

## EDITORIAL

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This is the decennial jubilee issue of ISLJ over the period 2002-2011. That means 258 articles, 55 conference papers, 148 opinions, 42 book reviews *et alia* (please, see also the Indexes (contents, authors, subjects) which are reproduced at the end of this issue. In the first years ISLJ appeared three times annually (about 30/40 pages per issue). As from 2004 it gradually grew from approximately 90 pages to 180 pages per double issue. Authors from almost all regions and continents of the world delivered their views in ISLJ. In this context it is striking to note that Africa and the Arab world are still nearly absent in sports law. A large contribution to ISLJ which is the official journal of the ASSER International Sports Law Centre (AISLC) in The Hague, the so-called "Legal Capital of the World", and now also of the Hague International Sports Law Academy (HISLAC or HISLA©) which was established last year at the international *Lex Sportiva* Conference in Djakarta (Indonesia) and of which the next Conference is planned to take place in New Delhi in cooperation with Sports Law India (Prof. Amaresh Kumar) on *Comparative Sports Law* (with an emphasis on the Asian region), was made by Prof. Ian Blackshaw who is now a honorary member of the Editorial Board. We are also in particular proud of the fact that the two "doyens" of International (global) and European Sports Law, Prof. Jim Nafziger (USA) and Prof. Steve Weatherill (United Kingdom) respectively regularly and spontaneously offered their valuable insights for publication in ISLJ. Over the years, ISLJ reported on the "deeds" of the AISLC with regard to its book publications series and in the form of pre-publications from book contributions many of which are compilations of Europe-wide and worldwide country studies on a particular topical subject of the undertaking of EU-commissioned applied-research studies and reports; and of the organization of seminars and conferences

at home and abroad and their results. In the field of education, the AISLC is now closely connected with the special Chair in International and European Sports Law at the School of Law of Erasmus University in Rotterdam, the Dutch "City of Sport". This bond is factually illustrated by the reproduction of a number of "lecture articles" on diverse subjects which were delivered by Robert Siekmann to this and the previous issue of ISLJ. He also presented this series of articles in a course at the School of Law of Shandong University of Finance and Economics (China) where sports law now is a new item of education and research, in November this year.

In ISLJ 2011/3-4, there is a number of articles on the theme of "What is Sports Law?", the international *Lex Sportiva* discussion which is a continuation of what was started last year in the Journal. The inaugural lecture that Robert Siekmann presented in June this year in Rotterdam is amongst them. In this context, he also contributed a research-based Opinion on the etymology (origin) of the technical terms *lex sportiva* and *lex ludica*. Amongst other valuable contributions, the publication of several expert comments on the CASs award in the *De Sanctis* case on professional football transfer "buy-outs" (*Webster/Matuzalem/De Sanctis*) should especially be mentioned.

Looking forward to the future, we very much welcome Karen Jones, a new member of the AISLC, who will be the managing editor of ISLJ as from 2012.

Finally, we thank all members of the Editorial and Advisory Boards of ISLJ as well as all authors and commentators for their effort in the past Decennium, thus helping forward the development and expansion of the Journal.

*The Editors*



## What is Sports Law? *Lex Sportiva* and *Lex Ludica*: a Reassessment of Content and Terminology\*

by Robert C.R. Siekmann\*\*



*Prof. Robert Siekmann presenting his inaugural lecture on "What is Sports Law?" at Erasmus University Rotterdam, 10 June 2011*

\* This is the full text of the inaugural lecture which was delivered in summarised form upon the acceptance of the appointment as Extraordinary Professor of International and European Sports Law at the School of Law of Erasmus University Rotterdam on Friday, 10 June 2011.

\*\* Director, ASSER International Sports Law Centre, The Hague, and Professor of International and European Sports Law, Erasmus University Rotterdam, The Netherlands. The author holds a Master's degree in Slavonic languages and general linguistics as well as public international law from the University of Leiden, and a doctorate in public international law from the University of Amsterdam.

## 1. Introduction

What is 'sports law'? This is a question often asked by students, academics, lawyers and lay persons. Anyone attempting to formulate an answer often searches in vain for a response that is compelling and demonstrates some modicum of understanding of what 'sports law' is. Perhaps the difficulty in articulating a response is, in part, a result of uncertainty related to what information is being sought. Is the question as to what 'sports law' is intended to focus attention on the content of the practice of 'sports law'? In other words, which substantive areas of practice fall under the rubric of 'sports law'? Or is more particularly the role of the sports lawyer intended as the principal focus? In this regard, perhaps what is sought is information concerning the services provided by a lawyer in this field. Finally, perhaps the inquirer seeks an answer to a more fundamental consideration: does such a thing as 'sports law' exist?<sup>1</sup>

In other words, can sports law be considered as an independent substantive area of the law, does it enjoy recognition as such, and if so, why? This is actually the primary question that requires answering, because the answer to this question is not unchallenged. The question of what sports law is can then be addressed. This address is structured as follows: 1) Does sports law, a sports law, sports law as an area of law exist?, 2) What does sports law consist of?, 3) a reassessment of content and terminology, and 4) what is the 'hard core' of sports law? The reassessment includes my own vision of the subject matter and issues that go to make up sports law, partly in the light of a presentation of existing, previous positions and views in this regard.

## 2. Does such a thing as 'sports law' exist?

Beloff says that the question of whether a 'lex sportiva' - which he apparently uses literally in the sense of 'sports law' here<sup>2</sup> - exists is a persistently recurring theme. Whether a cohesive set of rules exists or whether sports law is nothing more than a mosaic arbitrarily constructed from a diversity of generally accepted and separate areas of law - the law of obligations, torts, intellectual property, administrative law - is the subject of continuing debate. The issue is not purely academic, a qualification which cynics are inclined to use for an issue of no practical importance. Proponents of the first argument (sports law does exist) supposedly do so partly out of a wish to enhance the status of the subject<sup>3</sup>, which does not necessarily mean that advocates of the latter argument (sports law does not exist) can be said to be motivated in any way by a wish to belittle that status. Nonetheless, those who advocate the existence of 'sports law' clearly choose Latin terminology in order to lend the subject a semblance of classical antiquity, sometimes using the alternative term 'lex ludica'<sup>4</sup>, even though this is a rather unfortunate choice since it might come across as faintly ludicrous if incorrectly translated ('playful law'). The question of whether 'sports law' exists is not of enormous importance, but nor is unimportant according to Beloff.<sup>5</sup> Mitten and Opie remark that the academic study of the law regulating sport is relatively new. In effect, they say, there is no consensus amongst scholars and academics who regularly examine the rapidly growing body of rules and case law that governs the sports industry as to whether 'sports law' is an independent area of the law or merely the application of general legislation, which would better be labelled as 'sport and the law'. The debate revolves around the question of whether the area displays the unique and coherent characteristics of a separate collection of rules or whether principles from more established legal disciplines merely appear to be finding particular or special application.<sup>6</sup> Davis has out-

lined a possible assessment framework for answering this question in relation to the subject of 'sport and the law'. But before defining that framework, those criteria, he comments that there are, roughly speaking, three views or positions.

- the traditional view that 'sports law' does not exist: no separately identifiable body of law exists that can be designated as sports law and the possibility that such a corpus of law will ever develop is extremely remote; according to this interpretation, 'sports law' is nothing more and nothing other than an amalgamation of elements from different substantive areas of law that are relevant in the context of sport; the term 'sports law' is then incorrectly chosen since sport as an activity is governed by the legal system as a whole;<sup>7</sup>
- the moderate position contends that 'sports law' has the capacity to develop into an independent area of law; in 2001, when Davis' article is published, proponents of this view identify developments that would appear to point in that direction; they draw attention to the *de facto* unique character of certain issues in sport that require specialised analysis and the in some cases unique application of the law to sport; and:
- 'sports law' is a separate area of the law; supporters of this view highlight the increase in legislation and court case law specific to sport as a sign of this. Commentators argue that those who view sports law merely as an amalgamation of various other substantive areas of the law ignore the present-day reality that very few substantive areas of the law fit into separate categories that are distinct from and independent of other substantive areas of the law; overlaps exist not only within sports law, but within other areas of law as well; the inter-disciplinary nature of sports law has in any event not helped the case for establishing the existence of a separate legal discipline; the supporters of this view argue, additionally, that the unwillingness to recognise sports law as a specific body of law appears to reflect the inclination of some intellectuals not to take sport seriously. In this regard, they emphasise the tendency to marginalise the academic study of sports rather than treat it as any other form of business.

The debate on the existence of sports law as an independent field of law is not extraordinary given that questions about the legitimacy of new fields of law are not uncommon. Similar controversy accompanied the emergence of 'computer law', for example. Such diverse areas of the law as employment law, health law and environmental law ensured similar fates until they became generally recognised as specific fields of law. The process of recognising a new area of the law is slow-moving, because it is connected with a fundamental process of change in society. Inherent in this process of transformation is the development of new behavioural patterns and forms of cooperation that seek acceptance. Whether a particular field of law ought to be recognised as such is not an exact science. The process of identifying, designating and naming areas of the law is a complicated matter and is, to a certain extent, often arbitrary; there is no official recognition procedure. It is a process whereby legal practitioners and academics determine that the law is increasingly being applied to a new area of society. According to Davis<sup>8</sup>, at the end of the day, the answer to the question of whether sports law is recognised as an independent area of the law may depend on the perceptions of those practising, teaching and conducting academic research into that sports law.

### 2.1. Assessment framework

Which factors or criteria can be applied in order to determine whether an independent legal area exists?

Davis lists no fewer than eleven in his article. While these factors are a guide, their meticulous application need not necessarily provide a definitive answer to the question of whether an independent sports law discipline exists. The factors are:

- unique application by courts of law from other disciplines to a specific context;
- factual peculiarities within a specific context that produce problems, requiring specialised analysis;
- issues involving the proposed discipline's subject matter must arise in multiple, existing, common law or statutory areas;

1 Cf. Timothy Davis, 'What Is Sports Law?', in: *Marquette Sports Law Review*, Vol. 11, Spring 2001, p. 211.

2 See also below under 3.1. *Lex sportiva*.

3 By way of *oratio pro domo*.

4 Cf. also below under 3.4. *Lex ludica*.

5 Michael J. Beloff Q.C., 'Is there a *Lex Sportiva*?', *International Sports Law Review* (2005) p. 49.

6 Matthew J. Mitten, Hayden Opie, "'Sports Law': Implications For The Development Of International, Comparative, And National Law And Global Dispute Resolution', *Marquette*

*University Law School Legal Studies Research Paper Series*, Research Paper No. 10-31, June 2010, pp. 3-4 and n. 6, p. 4.

7 The classical representative of this position is the *eminence grise* of sports law in England, Edward Grayson: 'Sport and the Law', 2nd ed., London 1994, p. XXXVII. A recent publication in this tradition is, for example, Laura Donnellan, *Sport and the Law: A Concise Guide*, Dublin 2010.

8 Th. Davis, *op.cit. supra* n. 1, pp. 211-214.

4. within the proposed discipline, the elements of its subject matter must connect, interact or interrelate;
5. decisions within the proposed discipline conflict with decisions in other areas of the law and decisions regarding a matter within the proposed discipline impact another matter within the discipline;
6. the proposed discipline must significantly affect the nation's (or the world's) business, economy, culture or society;
7. the development of interventionist legislation to regulate specific relationships;
8. publication of legal casebooks that focus on the proposed discipline;
9. development of law journals and other publications specifically devoted to publishing writings that fall within the parameters of the proposed field;
10. acceptance of the proposed field by law schools; and:
11. recognition by legal associations, such as bar associations, of the proposed field as a separately identifiable substantive area of the law.

Davis himself has not applied this assessment framework explicitly and systematically to sport. If we nonetheless apply the above criteria, which are not always clearly formulated, to 'sport and the law' then there is no doubt that we can conclude in 2011 that an independent area of the law exists that is fully deserving of the name 'sports law'.

The above listed factors particularly concern the internal cohesion within the area concerned and its own, special, independent character which distinguishes the area from the legal environment. This is probably most systematically expressed in the term 'sport specificity' that has been developed in the context of European law. This term indicates the extent to which the European Court of Justice in particular has recognised exceptions to regular law, because in some cases the rules of organised sport cannot be dispensed without this rendering it impossible to complete sports competitions in a correct and proper fashion.<sup>9</sup> A now classic example, in consequence of the Lehtonen case<sup>10</sup>, is the recognition of only two periods during a competitive season within which professional footballers can move from one club to another (in the summer, after the end of the season, and during the so-called winter break).<sup>11</sup> As such, this rule is contrary to the freedom of movement of workers in the European Union, but without this rule there would be a risk of falsification of competition because, for example, a club that is in danger of relegation could suddenly and at the last moment be bolstered by an injection of funds by external backers which are not available to their competitors at that time. This would compromise the existence of a fair and even competition for all participants. It is clear that the particular characteristics of sports organisations deserve special attention, which can lead to exceptions if these exceptions are unavoidable.<sup>12</sup> Factors 1 and 2 are consequently met. Conflicts (see factor 5) are not always settled in favour of the sports rule, however. A good example is the 6+5 rule adopted by FIFA. The rule implies that only 5 foreign players may be selected per team in any match; the other players must be domestic players. This rule discriminates on the basis of nationality and can therefore not be applied within the European Union. Such a rule is not indispensable in order to guarantee a strong national team, for example. Talented young or experienced domestic players can also improve abroad. The Dutch national team is a good example of a team comprising many international players who ply their trade in the best

foreign leagues, thereby strongly benefiting the standard of the national team. The special nature of sport is also expressed through the application of factor 7. There are many countries in the world with a general, national Sports Act. Such countries are generally considered as belonging to the group of interventionists. The so-called Football Act (*Voetbalwet*) aimed at combating unwanted behaviour by supporters and other acts of vandalism is an example of special regulatory provisions in the Netherlands. The international community similarly makes its voice heard: anti-doping conventions have been accepted by the Council of Europe and UNESCO, for example.

There is also broad compliance with the other factors, which are partly of a practical rather than substantive legal nature, such as the publication of legal casebooks, specialised journals, academic teaching and research, as well as the existence of specialised associations, at many places around the world (see factors 8 to 11, inclusive).<sup>13</sup>

There is also sufficient institutional connection or interrelationship in organised sport (cf. factor 4). Around the world organised sport is structured pyramidically, with the universal organisations for each sport, such as FIFA for football and the IOC for Olympic sports, at the top. There is a 'world court' for sport, the Court of Arbitration for Sport (CAS) which is located in Switzerland, and a World Anti-Doping Agency (WADA), in which the international community is also officially a stakeholder. Which leaves factor 3, the second part of factor 5 and factor 6. Matters that are sport-related occur in many different fields of law. Sports law has an inter-disciplinary character, and according to this factor that would argue in favour of the existence of an independent field of law rather than against it (factor 3). It is evident that internal decisions of sports organisations sometimes impact on another matter within the field of law of which the rules of organised sport form an inextricable part. If, for example, FIFA were to repeal its agents' rules, that would automatically have repercussions for the rules relating to player transfers as a whole (factor 5.b). Finally, it goes without saying nowadays that sport, and hence sports law, are of considerable economic, cultural and social importance at a national as well as international level. In England, professional football is labelled an 'industry', reflecting the fact that football has become a marketable product and a business sector in its own right. Thanks to commercialisation and the sale of TV rights, huge sums of money now pass hands in professional sport.<sup>14</sup> Events such as the Olympic Games and the Football World Cup are watched by billions of people around the world (factor 6).

In summary, there is sufficient phenomenological and legal inter-relationship and external distinctness to designate 'sports law' an independent substantive area of the law.

### 3. What is 'sports law'?

That such a thing as 'sports law' exists in 2011 would therefore appear to be a wholly justifiable position to take, at least when one adheres to the assessment framework provided by Davis. The following question may now be asked: what is sports law, what are the elements of sports law, what can it be deemed to cover?

Firstly, however, an observation, in particular regarding the nature of sports law. Beloff says that a distinction can be made between 'horizontal law' - a body of rules which applies across the full range of relevant human activity - and 'vertical law', which is a body of rules driven by a single human activity. Torts or competition law fall into the first cate-

9 The concept of the "specificity of sport" has also become established beyond European Sports Law (see below under 3.6.) on a worldwide scale, for example in the FIFA player's status and transfer regulations, the rules of the FIFA Dispute Resolution Chamber (DRC) and pertinent CAS jurisprudence (cf., the Webster, Matuzalem and De Sanctis transfer "buy-out" awards of CAS).]

10 Case C-176/96.

11 So-called transfer windows.

12 Apart from that, in this author's opinion, the old-fashioned tradition of one transfer

window (between two full competitions at the start of the football season) would be sufficient and fair, since it prevents the composition of teams being changed during the winter break which unduly distorts the initial balance of strength between clubs during competition.]

13 Mitten and Opie (*op.cit. supra* n. 6, p. 3 enoot 3) comment that in spite of the fact that almost all areas of the law - individually and in combination - regulate competition (including broad and important areas such as competition law, the law of obligations, intellectual property law

and employment law), relatively few academics teach sports law or are scholars of sports law. According to the AALS (The Association of American Law Schools) Directory of Law Teachers 2009-2010, there are only 120 professors teaching sports law, while more than 340 are specialised in competition law, 1800 in constitutional law and 360 in employment law. These three fields of law are the main areas of public law regulating sport in the United States. So, there is scope for a greater focus on sport on these fields of law. See the website of the ASSER

International Sports Law Centre ([www.sportslaw.nl](http://www.sportslaw.nl), under 'The Centre') for a global listing of International and National Sports Law Associations, Sports Law Centres and Sports Law Journals.

14 Real Madrid, for example, tops the world ranking list of clubs in terms of annual turnover for 2010 with more than EUR 438 million. The total turnover of all professional clubs exceeded four billion euros for the first time last year (according to data from accountancy firm Deloitte, as published in *NRC Handelsblad* on 11 February 2011).

gory. Sports law, like aviation law and banking law, falls substantially into the latter.<sup>15</sup>

Focused literature research then reveals that the following distinctions are explicitly made or the following terminology is explicitly used to designate sports law, or sections of it: *lex sportiva*, global sports law, transnational sports law, *lex ludica*, public international sports law ('the law of nations of sport') and European sports law. These categories are discussed successively below. It is noticeable that the term '*lex sportiva*' repeatedly occurs in one meaning or another as if it were a benchmark in this regard. Incidentally, all the authors are, of course, adherents to the position that sports law does exist as an independent substantive area of the law.

### 3.1. *Lex sportiva*

Nafziger comments that the arbitral decisions and opinions of the CAS in practice provide guidance in later cases, strongly influence later awards and often function as precedent. By reinforcing and helping to elaborate established rules and principles of international sports law, the accretion of CAS awards is gradually forming a source of that body of law. This source is referred to as '*lex sportiva*'. He adds that the concept of a *lex sportiva* is normally limited to the case law of the CAS.<sup>16</sup> Foster points out that the CAS itself has recognised the existence of precedent effect in accord with its own earlier arbitral awards.<sup>17, 18</sup>

Casini says that the number of arbitral decisions made by the CAS has increased to the point that a set of principles and rules has developed relating in particular to sport: this 'judge-made law' has been given the name '*lex sportiva*'. This name, which calls to mind well-known designations such as '*lex mercatoria*' or '*lex electronica*', has been readily adopted and its meaning has been extended over time, effectively in order to refer more generally to the transnational law produced by sports organisations.<sup>19</sup>

Foster comments that in 2005 the CAS was not so sure whether a concept of '*lex sportiva*' exists at all. The CAS said that it was not prepared to take refuge in such uncertain concepts as that of a '*lex sportiva*', as had been advocated by various authors. The exact content and the boundaries of the concept were still far too vague and uncertain to enable it to be used to determine the specific rights and obligations of sports associations towards athletes<sup>20</sup>. Since this comment of the CAS there had been no further references to it in the published awards of the CAS until the recent arbitration of Anderson et al v IOC<sup>21</sup>, which appeared to signal the acceptance that such a concept exists.<sup>22</sup>

Erbsen comments that the CAS has developed a fascinating body of case law that unfortunately has acquired a misleading name that obscures its nuances. An increasingly popular interpretation of the history of the CAS in the first two decades of its existence suggested that the CAS had

created an entirely new body of international sports law called '*lex sportiva*'. Commentators do not agree on what '*lex sportiva*' means, but many share the belief that it exists. The term's inscrutability increases its allure, combining the legitimising cachet of Latin with the malleability of obscure concepts such as '*lex*' and '*sport*'. Erbsen goes on to say that the concept of a '*lex sportiva*' cannot meaningfully describe or explain the jurisprudence of the CAS. When it was first used, the term evoked visions of an emerging, new form of sports regulation that probably helped the CAS to gain recognition and establish itself as a respected and authoritative tribunal. The term has outlived its usefulness, however. *Lex sportiva* has become a collective name that encompasses many different types of lawmaking and unites a diverse collection of variables under an oversimplified motto. Descriptive and normative scholarship in relation to the CAS would benefit from a more subtle interpretation of how the CAS has adapted general legal principles to the circumstances of disputes involving athletes and sports officials. According to Erbsen, the idea that the resolution of international sports disputes through arbitration is creating a '*lex sportiva*' had gained increasing resonance over the previous decade. The term '*lex sportiva*', which was only thought up in 1990<sup>23</sup>, now appears in the CAS' official descriptions of itself, in the case law of the CAS, in articles by academic specialists in sports law and academics who study general international law, in textbooks, in lectures, speeches and presentations given by sports officials and informally at academic conferences and gatherings of experts in this field. There is nonetheless considerable disagreement about the sources of law and the forms of reasoning that are encompassed by '*lex sportiva*', with Erbsen referring in particular to Foster (see below) and Nafziger (see above). The increasing use of '*lex sportiva*' as an amorphous euphemism for legal innovations affecting international sport causes problems, he says.<sup>24</sup>

### 3.2. Global sports law

Foster wonders whether a definable concept called 'international sports law' exists and proposes that a distinction be made between 'international sports law' and 'global sports law'. International sports law can be applied by national courts. Global sports law, on the other hand, implies a claim of immunity from national law. Foster states that some authors have used the concept of '*lex sportiva*' in a superficial manner to describe what is happening with the globalisation of sports law. He argues that '*lex sportiva*' should be equated to global sports law. To define '*lex sportiva*' as global sports law is to express that '*lex sportiva*' is a label for permanent self-regulation by international sports federations. It is a claim for non-intervention by national legal systems as well as international sports law and thus opposes the regulation of international sport by public law. Foster further explains his position that it is necessary to distinguish between the concepts of international and global

15 Michael J. Beloff Q.C., *op.cit. supra* n. 5, p. 52. For example, in the context of the topical fight against sporting fraud, in particular match fixing in relation to legal or illegal sports betting within the framework of national or international organised crime, a distinction can be made between measures that are horizontally applicable (e.g. to episodes of corruption in the private sector, independently of the different business sectors concerned) and measures that have been specifically adopted to address sporting fraud and match fixing in particular ('vertical law'); cf., Negotiated procedure EAC/25/2011, Study on the legal framework applicable to sporting fraud, notably match-fixing, in the EU Member States, European Commission, Directorate-General for Education and Culture, Annex 1 - Terms of Reference, para. 3.2., p. 4.

16 James A.R. Nafziger, '*Lex Sportiva*', in: 1-2 *The International Sports Law Journal* (ISLJ) (2004) p. 3; also included under the title '*Lex Sportiva and CAS*' in: Ian S. Blackshaw, Robert C.R. Siekmann and

Janwillem Soek (eds), *The Court of Arbitration for Sport 1984-2004*. The Hague 2006, p. 409. See also: James A.R. Nafziger, *International Sports Law*, New York 2004, p. 48.

17 Devyatovski v IOC, 2009 A 1752.

18 Ken Foster, '*Lex Sportiva: Transnational Law in Action*', in: 3-4 *The International Sports Law Journal* (ISLJ) (2010), p. 20; paper presented during the *Lex Sportiva* Conference at Pelita Harapan Universitas (UPH), on 22 September 2010 in Jakarta, Indonesia, organised in collaboration with the Indonesia *Lex Sportiva* Institut and with the support of the Ministry of Foreign Affairs of Indonesia, the National Olympic Committee, the T.M.C. Asser Instituut and the Indonesian football league.

19 Lorenzo Casini, '*The Making of a Lex Sportiva: The Court of Arbitration for Sport Der Ernährer*', Draft paper for the Max Planck Institute International Conference on 'Beyond Dispute: International Judicial Institutions as Law-Makers', Heidelberg, June 14-15, 2010, p.

3 (the most recent version appeared as IILJ International Law and Justice Working Paper 2010/5 under the title '*The Making of a Lex Sportiva: The Court of Arbitration for Sport "The Provider"*', see: <http://www.iilj.org/publications/2010-5.Casini.asp>; the final version appeared under the title '*The Making of a Lex Sportiva* by the Court of Arbitration for Sport' in *German Law Journal* (GLJ) 2011 Vol. 12 No. 05, pp. 1317-1340.

20 FIFA v WADA, CAS 2005/C/976 and 986.

21 CAS 2008/A/1545.

22 Ken Foster, *op.cit. supra* n. 17, p. 20. However, see previously also, CAS/2004/A/704, suggesting that CAS decisions constitute a '*lex sportiva*' that subsequent CAS panels should consider.

23 MacLaren says that the term '*lex sportiva*' was coined by the acting Secretary General of the Court of Arbitration for Sport. Matthieu Reeb, at the time of the publication of the first Digest with awards of the CAS in the period 1986-1998

[Berne, 1998], in: Richard H. McLaren, '*The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*', *Valparaiso University Law Review* (2001) p. 379, footnote 11; in the introduction to the *Digest of CAS Awards II 1998-2000* [The Hague/London/New York, 2002], Reeb writes that the *Digest of CAS Awards 1986-1998* recorded the creation of a *lex sportiva* through the arbitral awards of the CAS (p. XXX). The term '*lex sportiva*' is not a pure Latinism, since the adjective '*sportiva*' is not Latin, the term '*lex sportiva*' obviously was created by analogy with *lex mercatoria*; see generally, Boris Kolev, '*Lex Sportiva and Lex Mercatoria*'. In: *The International Sports Law Journal* (ISLJ) 2008/1-2, pp. 57 and 60-62.

24 Allan Erbsen, '*The Substance and Illusion of Lex Sportiva*', in: Ian S. Blackshaw, Robert C.R. Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984-2004*, The Hague 2006, pp. 443, 443-444.

sports law as follows. International law deals with the relations between states. International sports law can therefore be described as the principles of international public law that are applicable to sport. Global sports law, by contrast, can be provisionally defined as a transnational autonomous legal order created by the global private institutions that govern international sport. Its main characteristics are, firstly, that it is a contractual legal order and, secondly, that this legal order is not governed by national legal systems. It could therefore be described as a legal order 'without a state'. It is a *sui generis* set of principles that have developed from transnational legal norms based on the rules of international sports federations and the interpretation of those rules. This is a separate legal order that, from a global perspective, is autonomous. It implies that international sports federations cannot be regulated by national courts and governments. They can only be regulated by their own internal institutions or by external institutions which they themselves have installed or mandated for that purpose. Foster considers the fundamental distinction between international and global sports law to be crucially important. He reports that various authors have recently argued for the distinctiveness of international sports law and in doing so have described it as 'lex sportiva'. This usage confuses and merges international sports law with global sports law, contrary to his own definitions.<sup>25</sup>

Foster comments further that one of the claims made for the work of the CAS is that it is developing a 'lex sportiva'. The jurisprudence of the CAS is an 'international sports law', it is argued. It involves more than the application of international law or of general legal principles to the resolution of sports disputes. A distinct jurisprudence is emerging, it is claimed: a unique set of universal legal principles that is used by the CAS in its adjudications. According to Foster, the concept 'lex sportiva' is an imprecise term covering several different concepts. It can be helpful to distinguish different uses. The 'lex sportiva' is little more than the proper interpretation and application of the regulations of sports organisations - a *lex specialis* that is applicable to the governance of international sport because its source exists in the constitutional order created by sports federations to administer sport. In a wider sense, the 'lex sportiva' can be extended to those general principles that can be derived from the diverse practice of sports federations and the rules and regulations by which they govern themselves. This is a restricted, but specific use of the concept of 'lex sportiva'. Foster says that it corresponds roughly to his own definition of a global sports law, which he equates with 'lex sportiva'. This concept has several important elements. It is essentially a transnational autonomous private legal order. This legal order is constituted by the regulatory and constitutional order established by international sports federations. It was created by and has its origin in the private global institutions that govern sport and consists of custom and practice of international sporting federations. Global sports law is a private system of governance with its own global forum, the CAS.<sup>26</sup>

Casini says that sport rules are genuine 'global law', because they are spread across the entire world, they encompass both international and national levels and they directly affect private actors. Hence the global dimension of sport is, in the first place, normative. A 'global sports law' has emerged, which consists of the whole body of norms and standards

that have been set and are implemented by sports organisations. Global sports law encompasses the rules that have been set by central sports institutions such as the IOC, the international sports federations and WADA, and by national sports associations such as national Olympic Committees and national anti-doping organisations. Global sports law, therefore, is highly heterogeneous. Casini uses the term 'lex sportiva' in the broad meaning of 'global sports law'. So the term 'global sports law' includes all the definitions that academics have so far provided to describe the principles and rules of sports organisations.<sup>27</sup>

### 3.3. Transnational sports law

Latty analyses the self-regulation of transnational sport taking the concept of 'transnational law' as the starting point: law made by private parties, without the intervention of states and across their borders, and intended to regulate activities in the community concerned. This analysis shows that the 'lex sportiva' is constructed from the legal systems of the international sports federations which are, to a certain extent, centralised by the legal order of the International Olympic Committee (IOC), assisted by the activities of the Court of Arbitration for Sport (CAS) and the World Anti-Doping Agency (WADA). The 'lex sportiva' is comparable to the 'lex mercatoria' and the canon law of the global Catholic Church. They constitute global, extra-nationally applicable rules. Latty evaluates the degree of autonomy of the 'lex sportiva'. Largely freed from national rules and only embodied in a decentralised international legal order, the 'lex sportiva' is nonetheless substantially restricted by European law.<sup>28</sup>

### 3.4. Lex ludica

According to Foster, the rules of the game ('sporting law') can be distinguished as an independent set of norms and standards, separate from the concept of 'lex sportiva'. He proposes to call these principles 'lex ludica'.<sup>29</sup> They encompass two types of rules that are unique because of the context of sport in which they occur and are applied. One type covers the actual rules of the game and their application, or enforcement, by referees and other match officials. The second type is what can be termed the 'sporting spirit' and covers the ethical standards that should be respected by sportsmen and women. So, the concept of 'lex ludica' includes both the official rules of the game and the principle of fair play in sport. They are principles of 'internal' sports law and governance.<sup>30</sup>

### 3.5. Public international sports law

Wax points out that public international sports law, a central component of international sports law, has so far received little attention. Defined in a positive manner, public international sports law can be considered as including all norms of international public law that are applicable to legal issues concerning sport and according to which the subjects of international public law allow themselves to be directly or indirectly governed. Defined in a negative manner, public international sports law includes all norms that are not connected with the rules and regulations of national and international sports organisations, EU sports law or national sports law. Public international sports law relates in particular to the following four areas: the struggle against apartheid and other forms of discrimination in sport, peacekeeping during the Olympic Games and preventing and combating violence in connection with sporting events (matches), the prevention of and fight against doping in sport and the question of recognising a 'right to sport' as a human right. These four areas can, in turn, be subdivided into two categories. The struggle against apartheid (against racism in general) and other forms of discrimination, the question of the recognition of a 'right to sport' as a human right as well as the prevention of and fight against doping in sport involving the actual practice of sport: in these cases, it is possible to refer to a public international sports law 'in the strict sense' of the term. Peacekeeping during the Olympic Games and preventing and combating violence in connection with sporting events (matches) by contrast do not pertain to the practice of sport as such, but are directly related to them (in a spatial sense). This category involves public international sports law 'in the broader sense'.

Public international sports law is a key component of international sports law. At a time when sport is becoming increasingly 'juridified',

25 Ken Foster, 'Is There a Global Sports Law?', in: Entertainment Law, Vol. 2, No. 1, Spring 2003, pp. 1-2, 8.

26 Ken Foster, 'Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence', in: Ian S. Blackshaw, Robert C.R. Siekmann and Janwillem Soek (eds), The Court of Arbitration for Sport 1984-2004, The Hague 2006, pp. 420-421.

27 Lorenzo Casini, *op.cit. supra* n. 18, pp. 2-4.

28 Franck Latty, 'Transnational Sports Law' (to appear in: 1-2 The International Sports Law Journal (ISLJ) (2011), paper presented during the Lex Sportiva Conference at Pelita Harapan Universitas (UPH), on 22 September 2010 in Jakarta,

Indonesia, organised in collaboration with the Indonesia Lex Sportiva Institututa and with the support of the Ministry of Foreign Affairs of Indonesia, the National Olympic Committee, the T.M.C. Asser Instituut and the Indonesian football league. See also: Franck Latty, *La lex sportiva - Recherche sur le droit transnational*, Études de Droit International Volume 3, Leiden-Boston 2007.

29 In the CAS award AEK Athens and SK Slavia Praha v UEFA, 'lex ludica' is described as a set of unwritten legal principles, a sort of *lex mercatoria* for sports (CAS 1998/200 at para. 156); see also, CAS 2009/A/1768 at para. 5.2, with reference to CAS 1998/200.]

30 Ken Foster, *op.cit. supra* n. 24, p. 421.

public international sports law is the appropriate means of correction for which the internationalisation of sport currently has a need. On the one hand the statutes and regulations of the international sports organisations find their 'doubles partner' in public international sports law for the regulation of international sport. On the other, public international sports law is the suitable instrument for regulating international sport in precisely these areas (and hence for achieving its goals) which depending on the nature of the issue manage to evade the powers of the sports organisations, argues Wax.<sup>31</sup>

### 3.6. European sports law

Does such a thing as European (EU) sports law exist? Weatherill says that the simple answer to this question is 'yes', but that simple answers tend to be misleading, and that this is the case here, too. There is such a thing as EU sports law in the sense that since the entry into force of the Lisbon Treaty on 1 December 2009, sport has been explicitly recognised as an area in which the European Union has authority to intervene. However, this observation can be misleading in two quite different senses. Firstly, it ignores the fact that while December 2009 was certainly a notable milestone in the shaping of EU sports law, the relevant newly introduced Treaty provisions are in fact cautiously drafted and limited in their scope. They emphatically do not elevate the EU to the position of 'sports regulator' in Europe. So one should not get too excited about these provisions. Secondly, a focus solely on the Treaty reforms of 2009 fails to recognise that for some 35 years the EU has already exerted an influence on sports governance in Europe. Beginning with its famous judgment in *Walrave and Koch* in 1974, the European Court of Justice has subjected sport to the requirements of what was then Community (EC) law and is now EU law, in so far as it constitutes an economic activity. So sport was not brought within the explicit scope of the EU Treaties until December 2009, but well before that date, sport, though unmentioned by the Treaty, was required to comply with its rules in so far as it constituted an economic activity. That meant, primarily, that sporting practices were to be tested against the prohibitions in the Treaty against practices which are contrary to fair competition, which obstruct inter-State trade or which discriminate on the basis of nationality. So an EU sports law (of sorts) has developed as a result of the steady accretion of case law where sporting rules exerted an economic effect and interfered with the fulfilment of the EU's mission. The EU did not stipulate how sport should be organised, but it did rule out choices that contravened the Treaty. The core of EU sports law is therefore an established pattern with sporting practices being checked to determine whether they comply with the commercial law of the EU, and most clearly in relation to freedom of movement and competition law. When making this assessment the special characteristics of sport have always been taken into account, and since 2009 that is explicitly recognised in the Lisbon Treaty. However, EU law is anything but broad in scope. There is very little legislation at EU level that pertains directly to sport, and its 'negative' effect - the Treaty prohibitions - is primarily focused on practices which are anti-competitive or which obstruct inter-State trade. The EU has little to do with determining property rights, contract law or crime. So there is such a thing as European, or EU, sports law; it is of practical and intellectual interest, but it is quite different from and far less systematic and comprehensive than one would expect of sports law at national level.<sup>32</sup>

<sup>31</sup> Andreas Wax, 'Public International Sports Law - A 'Forgotten' Discipline?', in: 3-4 *The International Sports Law Journal (ISLJ)* (2010), pp. 25, 28; paper presented during the Lex Sportiva Conference at Pelita Harapan Universitas (UPH), on 22 September 2010 in Jakarta, Indonesia, organised in collaboration with the Indonesia Lex Sportiva Institututa and with the support of the Ministry of Foreign Affairs of Indonesia, the National Olympic Committee, the T.M.C. Asser Instituut and the Indonesian football league. See also: Andreas Wax,

*Internationales Sportrecht - Unter besonderer Berücksichtigung des Sportvölkerrechts*, Tübinger Schriften zum internationalen und europäischen Recht Band 90, Berlin 2009.

<sup>32</sup> Stephen Weatherill, 'Is There Such a Thing as European Sports Law?', in: *Global Sports Law and Taxation Reports (GSLTR)* 2010/1; also in: *The International Sports Law Journal (ISLJ)* (2011) pp. 38-41. See also: Stephen Weatherill, *European Sports Law: Collected Papers*, The Hague 2007.

### 3.7. Summary

A further analysis of the above overview of the different views about what 'sports law' is, what forms part of it, reveals the following picture. The first thing to note is that the concept of a 'lex sportiva' evidently plays a crucial role. It is also the oldest term in the debate. However, different authors interpret it differently. Nafziger adheres to the 'classical' view that the concept of a 'lex sportiva' is restricted to the 'judge-made law' of the CAS. Erbsen, incidentally, is of the opinion that the term is an unfortunate choice. He also observes that different meanings are attached to 'lex sportiva', which does nothing to aid clarity in relation to it.

Foster has introduced the concept of a 'global sports law', suggesting that the concept of a 'lex sportiva' be equated with it. Latty talks of a 'transnational sports law' in this connection. Both essentially understand the same thing by it, namely the rules and institutions of the international sports organisations and the accompanying jurisprudence, or case law. Their interpretation of the concept 'lex sportiva' is therefore broader than that of Nafziger since it covers more than just the jurisprudence of the CAS. In addition, Foster uses the term 'lex ludica' to refer chiefly to the rules of the game themselves.

Wax has emphasised the importance of assigning public international sports law its own place within international sports law. Finally, European (EU) sports law can be distinguished as a regional public variant (Weatherill).

## 4. A reassessment of content and terminology

### 4.1. Content

It is evident from the above that the debate in literature concerning what 'sports law' is has so far taken place in a manner that is barely conducive to creating clarity. There is still no cohesive vision that systematically compares and assigns a place to all possible elements and aspects. The purpose of this contribution to the debate is therefore to introduce structure in terms of content and terminology so as to engender a reassessment of them which will dispel the existing lack of clarity regarding the subject matter.

First and foremost, it may therefore be assumed that 'sports law' (or 'a' or 'the' sports law, if one wishes) does exist as a separately identifiable field, and hence substantive area of, the law. The concept 'sports law' is nevertheless made up of the elements 'sport' and 'law'. It is 'the law of sport'. The first question is therefore: what do we understand by 'sport' in this connection? This is followed by the question of what we understand by 'law' in this context.

What is 'sport'? In order to answer this question there is no need here to further examine existing (abstract) definitions of the concept of 'sport' and the choice between them. We can limit ourselves in this connection to referring functionally to one of the factors in the assessment framework of whether sports law exists, namely: that the various aspects of the subject matter in question connect, interact or interrelate (factor 4). The existence of such a connection, interaction or inter-relationship is most clearly evident in the institutional structure of organised sport. Organised sport is transnational by nature. National associations for each sport are affiliated with regional, continental and international, global sports federations. This produces a pyramid, with, taking football as an example, in the Netherlands the Dutch football association, the KNVB, regionally UEFA and globally FIFA in charge. Organisationally and administratively, the sports world spans national borders. In addition to national championships, there are also European and world championships in each sport. Alongside this there exists an Olympic Movement and there are Olympic Games which unite all Olympic sports recognised as such, with the IOC at the head. Both nationally and internationally, organised sport constitutes an independent social sector. 'Sports law' therefore pertains above all to the law that applies to organised sport represented in the structure as outlined.

This can be both amateur and professional sport. It encompasses, at all levels of the pyramid, competitive sport in which championships can be contested and won. This means that recreational sports or leisure sports that are not practised competitively or in any organised sense, however important they may be from a social perspective, will not ini-

tially be studied in the context of sports law. That is not to rule out the study of this type of practice of sport, which may also include physical education at school, in advance, however. But there is little sense in conducting an academic debate about the precise definition of the concept of sport in this regard. The boundaries are fluid. There is also a grey area between what constitutes 'sport' and what is simply a 'game'. A response must naturally be formulated where an issue of law arises in relation to what constitutes a 'game' also. A person who goes out jogging on the road in an independent capacity only needs to observe the rules of the road and is not subject to any sporting rules. The essence of sport, and hence of sports law, is to be found however in the sport that is encompassed by the most suitable response to the question in factor 4 of the assessment framework.

That brings us to the question of what 'law' is in relation to 'sport'. In principle it can be stated that in the widest sense (*lato sensu*) all 'law' that pertains to 'sport', as the latter concept is explained further above, constitutes 'sports law', is 'sports law'. So this includes not just all the rules and regulations that have been drawn up by organised sport itself, but also all other law that has been accepted by national states and the international community in order to regulate 'sport'. This is supplemented by the combined jurisprudence of courts or other law-administering bodies of organised sport itself as well as that of 'ordinary' courts<sup>33</sup>, both national and international. If we label the law of sport itself as the 'private' part of sports law then it seems obvious to designate all other law as 'public'. Naturally, the private, or autonomous part, has a public base: it concerns the application of general public law, in particular in the context of the law of associations, to the specific social sector known as sport or it is law that has, at least by definition, been created in the public context. Sports organisations too cannot disengage themselves from the regular jurisdictions of which they are a part. If one were to bring together all existing law within a single framework containing the various areas of the law and then were to introduce sport into this framework, a picture (configuration) would emerge comprising a great many blank spots of varying severity. These are all those areas that are not covered by 'sports law' or where the law has not been applied to sport. The International Court of Justice and the International Criminal Court in The Hague, for example, have never yet had any involvement with sport, nor is it really conceivable that it should, although nothing should be ruled out in advance, of course.<sup>34</sup> Sports law therefore relates solely to a single, specific social sector.

Although the public part of sports law is of an incidental nature and the private part structural, we choose to begin with a further explanation of what can be considered as belonging to the public part because this relates to the environment of sport, how it is placed within a broader social framework, and is by definition of a higher legal order. The rules and regulations which sport has set itself are intended to legislate

the sector from within and therefore constitute the private core or essence of sports law. The public part can be divided into national and international sports law. The clearest example of national sports law in a public sense is the national Sports Act which exists in some fifty countries. There are also countries that have included a provision on sports law in their Constitution.<sup>35</sup> This is legislation of general application that is intended to define the position of sport in society and hence to regulate the relationship between government and sport ('sport governance'). It is customary to distinguish between interventionist and non-interventionist countries.<sup>36</sup> The Netherlands belongs to the latter group and therefore has no provision in its Constitution, let alone a Sports Law. Within Europe it is the southern countries such as France, Portugal, Italy and Spain where governments traditionally have more involvement with sport. Countries where sport is still in its infancy in terms of organisation and/or where sports law is still in the first stage of development attach great importance to having a Sports Law. Indonesia and China are random examples in this regard.<sup>37</sup> Apart from national, general Sports Laws there are also examples of special legislation aimed at a particular field. A well-known example is the Dutch law that specifically targets football hooliganism, also commonly referred to as the Football Act, and which has been drafted along the same lines as its English counterpart.<sup>38</sup> There are also special Anti-Doping Laws in Europe and elsewhere.<sup>39</sup> An example of national sports legislation that caused a lot of commotion at the time of the 2010 Football World Cup in South Africa is the criminalisation of participation in acts of ambush marketing (the 'Bavaria girls').

In addition to public national sports law, there also exists public international sports law. The revival of the *ekecheiria*, the longest lasting truce in history and hence international law from the earliest times (in the field of sport), has seen the United Nations engage in international peacekeeping during the Olympic Games of the modern era through a series of resolutions which since 1993 have consistently been passed with a view to preserving the 'Olympic Peace' at the forthcoming Olympic Games.<sup>40</sup> Between 1968 and 1993, standard resolutions against apartheid in sport were adopted by the General Assembly of the United Nations. 1977 saw the adoption in New York of the International Declaration against Apartheid in Sports, followed by a corresponding UN Convention in 1985. The UN Security Council imposed a sports boycott against South Africa due to apartheid. The global UNESCO Convention of 2005 aims to combat doping in sport. At a regional level, the Council of Europe adopted an anti-football hooliganism convention as early as 1985, followed by an anti-doping convention in 1989.<sup>41</sup> And the sports provision in article 165 of the Lisbon Treaty is another recent example of 'public regional sports law' which can, incidentally, be classified under European (EU) sports law.<sup>42</sup> At EU level also sports boycotts have been imposed in the past, an example being that against

33 Civil courts as well as criminal courts.

34 Cf. as an example of a 'casus belli' - in the new meaning of legal proceedings on war - an event such as the border conflict which El Salvador and Honduras waged with one another in the 1960s following a series of football matches which escalated out of control (*casus belli* in the traditional sense) (see: Richard Kapu ci ski, *The Soccer War (Wojna futbolowa)*, 1978.

35 See: Janwillem Soek, 'Sport in National Sports Laws and Constitutions: Definition, Ratio Legis and Objectives', in: *The International Sports Law Journal (ISLJ)* 2006/3-4, pp. 28-31 and 33-35.

36 André-Noël Chaker, *Good governance in sport - a European survey*, Council of Europe Publishing, Strasbourg 2004, pp. 9-11.

37 See: Law Number 3 Year 2006 of the Republic of Indonesia concerning National Sports System. In China, the 1995 Sports Law is currently being reviewed, see James A.R. Nafziger and Li Wei, 'China's Sports Law', in: *The*

*American Journal of Comparative Law*, Volume XLVI, Summer 1998, Number 3, pp. 453-483.

38 See: Peter T.M. Coenen, 'At Last, a Football Law in the Netherlands?', in: *The International Sports Law Journal (ISLJ)* 2009/3-4, pp. 59-61 and 64-65; Geoff Pearson and Mark James, 'The Legality and Effectiveness of Using Football Banning Orders in the Fight against Racism and Violence at Sports Events', in: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann (eds), *EU, Sport, Law and Policy: Regulation, Re-regulation and Representation*, The Hague 2009, pp. 535-554.

39 See: Hans-Georg Koch in: Klaus Vieweg and Robert Siekmann (eds.), *Legal Comparison and the Harmonisation of Doping Rules - Pilot Study for the European Commission*, Beiträge zum Sportrecht Band 27, Berlin 2007, pp. 95-158 (Part II.B: Public Law).

40 Andreas Wax, *op.cit. supra* n. 31, p. 26. Francis G. Jacobs, 'Tourism, sports and

other forms of leisure from the point of view of international law, General report on the twenty-fourth A.A.A. Congress', Nicosia, 22 to 27 May 1972, *Annuaire de l'A.A.A./Yearbook of the A.A.A.* 1972/73 Volume 42/43, La Haye/The Hague 1975, p. 52, says that the Games of Greek antiquity were an early example of the influence of sport on the development of international law and that these Games can therefore also be seen as one of the first steps towards the creation of true international law between ethnically related, but completely autonomous city states.

41 For the activities of the Council of Europe in the field of sport, see: Robert C.R. Siekmann and Janwillem Soek (eds), *The Council of Europe and Sport: Basic Documents*, The Hague 2007. Regarding the combating of football hooliganism in the European Union, see: 'Football Hooliganism with an EU Dimension: Towards an International Legal Framework', Final Report AGIS Programme 2003, T.M.C. Asser Instituut,

The Hague 2004; also: Hans Mojet and Robert Siekmann, 'Legal Aspects of Combating Football Hooliganism in Europe', in: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann (eds), *EU, Sport, Law and Policy: Regulation, Re-regulation and Representation*, The Hague 2009, pp. 499-533.

42 See: Robert Siekmann and Janwillem Soek (eds), *The European Union and Sport: Legal and Policy Documents*, The Hague 2005; see in particular regarding the 'sports article' in the Lisbon Treaty: 'Lisbon Treaty and EU Sports Policy', Study for the European Parliament, commissioned to the T.M.C. Asser Instituut and Edge Hill University and Loughborough Universities, September 2010. See also, Stephen Weatherill, 'Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?', in: *The International Sports Law Journal (ISLJ)* 2010/3-4, pp. 11 and 14-17. For a comparison of types of 'continental sports law' see:

Nigeria.<sup>43</sup> Finally, reference is made in this connection to the international Nairobi Treaty on the protection of the Olympic Symbol of the five rings (1981).

The rules and regulations which sport has set itself in a self-regulatory capacity (the private, autonomous, non-governmental part of sports law) can be divided firstly into Olympic law and the law of the national, regional and international organisations for each sport.<sup>44</sup> The law of the Olympic Movement (*Lex Olympica*) is laid down in the Olympic Charter and everything associated with it.<sup>45</sup> The law of the sports organisations can be divided into the rules of the game (in football: Laws of the Game), which are identically applicable around the world, on the one hand, and Constitutions, rules and regulations pertaining to administrative (institutional) and thematic aspects of the sport concerned, on the other. The competition regulations can also be included in this category.<sup>46</sup> Many rules have a transnational character, meaning that they are compulsorily applicable up to national level, or ought to be converted into a corresponding set of national rules and regulations. A good example in this regard, in the anti-doping field, is the WADA Code, which to a certain extent can also be characterised as 'semi-public' because national governments are officially involved in administering the WADA and the Code has effectively been legitimised by the UNESCO Convention against doping in sport.<sup>47</sup> The doping rules of the Netherlands Institute of Sports Judicial Administration (*Nederlandse Instituut Sportrechtspraak*) are an almost entirely faithful copy of the WADA Code, which must therefore be largely or fully complied with in its application. In the past each national sports association and international sports federation had its own doping rules, until, in 2004, harmonisation was achieved by means of the WADA Code.<sup>48</sup> Further well-known examples, in the field of football, are the rules regarding the status and transfer of professional footballers and regarding players' agents, which are about to be abolished as such.<sup>49</sup> At a regional level, reference can be made, for example, to the safety and security regulations of UEFA, the European football federation, which are of particular importance in combating football hooliganism.

In sport, the role fulfilled by criminal law and 'ordinary' courts in civil disputes in regular society is assigned to disciplinary bodies and forms of arbitration at the various geographical levels for each sport.<sup>50</sup> In this system, the Court of Arbitration for Sport performs the general function of 'International Court for Sports', while also acting as the appeal court in doping cases and ad hoc during Olympic Games.<sup>51</sup> Football has its own important international body for resolving disputes in transfer matters: FIFA's Dispute Resolution Chamber.<sup>52</sup>

#### 4.2. Terminology

'Sports law' can therefore be considered as consisting of public and private national, regional and international (in the sense of: universal, global) sports law. Strictly speaking, the term 'lex sportiva' could be used to cover the concept of sports law in its entirety, since 'lex sportiva' means literally 'sports law' and as such is a neutral designation. The 'exotic'

Latin nature of the name means it could also be deemed ideally suited to this designation, since this lends it a very clearly distinctive and exclusive character (cf. *lex mercatoria*). The term purportedly underlines that sports law is something distinct, a separately identifiable field, and hence substantive area of, the law. However, several objections may be raised against the use of 'lex sportiva' in this general, broad meaning. For example, that this innovation goes too far, leading as it does to further terminological confusion, and that is in no one's interest. From a purely academic perspective this may be correct: after all, every researcher is entitled to develop his own, new conceptual framework as well as what he considers to be appropriate terminology in that regard, provided he gives his reasons for doing so. In this case, however, it would not be very practical to act in this way. Firstly: sports law, or sections of it, is not taught at university level anywhere under the name 'lex sportiva'.<sup>53</sup> In literature, moreover, we find agreement on one thing at least, namely that 'lex sportiva', while it may not pertain exclusively to the jurisprudence of the highest judicial body in sport, the CAS (Nafziger), nonetheless in any event encompasses nothing more than the autonomous rules of organised sport itself and the associated jurisprudence (private sports law) (Foster, Latty). It is important not to disrupt a conceptual framework that has already developed and about which, as in this case, consensus exists to a certain extent, in advance with one's own brand of reasoning. A pragmatic approach is preferable here. In the private meaning, 'lex sportiva' is 'global sports law' (Foster), or even better 'transnational sports law' (Latt), which should then not be limited in its meaning to the global, or at least the international and regional level. *Lex sportiva* can - to continue the Latin terminological thread - indeed be said to consist of *lex sportiva internationalis* (universalis), regionalis and nationalis. Thanks to the transnational, cross-border, or even supranational character, if one will, of the private part of sports law, this part of sports law constitutes *de facto* a single, continuous body of law. Anyone referring in a general sense to international sports law is implicitly also referring to its national variant. Unlike international public law, private sports law knows no boundaries. There is nothing comparable to the sovereignty of national states in the sports world. While sport may be organised along national lines, the boundaries between the associations are in effect nothing more than dotted lines (by comparison, national boundaries rather are solid lines). The clearest example of this is provided by the rules of the game for each sport. The rules of football as adopted and expounded by FIFA are the same all over the world, making it unique.

As law consists not just of legislation, but also of jurisprudence, or case law ('judge-made law'), I prefer the meaning of the use of 'lex sportiva' in the broad sense rather than the use of the term in the strict sense (CAS). Law, however, is not just formal, written law, but also practice out of which customary law may have arisen. This is addressed rarely, if at all, in the 'sports law debate', however. But this source of law can also operate in the private sector. An interesting example of the question of whether customary law can be said to exist is provided by the

James A.R. Nafziger, 'A Comparison of the European and North American Models of Sports Organisation', in: 3-4 The International Sports Law Journal (ISLJ) (2008) pp. 100-108; see also: Stephen Weatherill, 'Resisting the Pressures of "Americanization": The Influence of European Community Law on the "European Sport Model"', in: S. Greenfield and G. Osborn (eds), *Law and Sport in Contemporary Society*, London 2000, p. 155 et seq.; also included in: Stephen Weatherill, *European Sports Law: Collected Papers*, The Hague 2007, pp. 155-176. See in general also, Robert C.R. Siekmann and Janwillem Soek, 'Towards a Typology of (International) Comparative Sports Law (Research)', in: The International Sports Law Journal (ISLJ) 2011/1-2, pp. 41-51 and 54.

43 See: R.C.R. Siekmann, 'The Sports Boycott of Nigeria: Sports, Politics and

Human Rights', in: The International Sports Law Journal (ISLJ) 2008/1-2 pp. 121-124.

44 A distinguishing feature of international sports federations (IFs) amongst (private) international organisations is their 'normative' functions, which possibly contributes one more, minor argument to consider 'sports law' as a separate area of law]

45 See: Alexandre Miguel Mestre, *The Law of the Olympic Games*, The Hague 2009.

46 See: Robert C.R. Siekmann and Janwillem Soek (eds), *Basic Documents of International Sports Organisations*, The Hague/Boston/London 1998.

47 See: Lorenzo Casini, 'Global Hybrid Public-Private Bodies: the World Anti-Doping Agency (WADA)', in: *International Organizations Law Review* 6 (2009) pp. 421-446; See also, Robert C.R. Siekmann, 'Anti-Doping Law in

Sport: The Hybrid Character of WADA and the Human Rights of Athletes in Doping Cases (Proportionality Principle)', in: The International Sports Law Journal (ISLJ), pp. 89-96. see in general: Paul David, *A Guide to the World Anti-Doping Code - A Fight for the Spirit of Sport*, Cambridge 2008.

48 Robert C.R. Siekmann, Janwillem Soek, Andrea Bellani (eds), *Doping Rules of International Sport Organisations*, The Hague 1999. See also: Janwillem Soek in: Klaus Vieweg and Robert Siekmann (eds), *Legal Comparison and the Harmonisation of Doping Rules - Pilot Study for the European Commission*, Beiträge zum Sportrecht Band 27, Berlin, pp. 159-561 (Part III: Sport Rules and Regulations).

49 See Robert C.R. Siekmann, Richard Parrish, Roberto Branco Martins, Janwillem Soek (eds), *Players' Agents Worldwide: Legal Aspects*, The Hague

2007; see also, Roberto Branco Martins and Gregor Reiter, 'Players' Agents: Past, Present ... Future?', in: The International Sports Law Journal (ISLJ) 2010/1-2, pp. 7-12. Roberto Branco Martins is initiator and director of the Dutch professional football players' agents association ProAgent and general manager of the European Federation of Football Agents (EFAA).

50 See: Robert C.R. Siekmann and Janwillem Soek, *Arbitral and Disciplinary Rules of International Sports Organisations*, The Hague 2001; see also: Ian S. Blackshaw, *Sport, Mediation and Arbitration*, The Hague 2009.

51 Ian S. Blackshaw, Robert C.R. Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984-2004*, The Hague 2006.

52 See: Frans de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber*, The Hague 2009.

rules of football. It is customary, it is seen as a moral duty (fair play), for a player possessing the ball to hit the ball out of the play if an opponent is lying injured on the ground and is unable to play on. It is then customary, the opponent has the sporting duty, not to give the ball to one of his own players from the throw-in, but to return it to the other team that had kicked the ball out of play. The party with the throw-in derives the right to throw-in the ball again from the fact that the other team had knocked the ball out of play, constituting an infringement: the ball should remain in play, otherwise it is not possible to play football. This unwritten rule may well be 'soft law' rather than customary duty and law, since the referee does not have the power to enforce this unwritten rule of fair play. Or can he claim this power by innovatively invoking the principle of 'unsporting behaviour' (formerly: ungentlemanly conduct) in disrespect for the game, which is explicitly provided for by the laws of the game (Law 12)? After all, the custom of giving the ball back is based on a gentlemen's agreement. But how then should the game be restarted? By having the throw-in taken by the other team? The laws of the game make no provision for this. By awarding a direct free kick to the other team? That is not possible, since the ball is not then validly returned into play. The player taking the throw-in could be given an official caution (yellow card), if one were to reason along these lines. Or is the offence deemed to have taken place at the moment the teammate receives the ball, so that a free kick would be possible? But who should then be shown a yellow card: the player taking the throw-in, or the player receiving the ball from the throw-in, or both? Very rarely is a throw-in taken 'mistakenly' or 'incorrectly' - even in professional football. When it does happen, it is greeted by loud disapproval from opponents and spectators alike.<sup>54</sup> The custom of hitting the ball out of play when an opponent is injured is under pressure nowadays, however, because it is increasingly assumed in professional football that it is the referee's duty to stop play. That is indeed true, but only in case of serious injuries. There is therefore a tendency to play on when an opponent is lying injured on the pitch. Might he just be feigning injury, for example, in order to break up the opponent's rhythm? Professional footballers do not throw the ball straight to an opposing player, anyway, but to a teammate who then kicks the ball as far as possible towards the opponent's goal or another safe area, so as not to incur any disadvantage from the custom. That teammate, of course clearly could be sanctioned by the referee for unsporting conduct in disrespect for the game.<sup>55</sup>

The rules, or laws, of the game are distinguished as a separately identifiable category of sports law (Foster). However, I consider 'lex ludica' - a similarly 'exotic' term, due to its evidently Latin roots - not as a type of sports law alongside 'lex sportiva', but rather as a part of it, a sub-species. The direct inter-relationship is best illustrated by the example of the footballer who is ordered to leave the field of play after being given a red card by the referee and who can subsequently be given a one or two match ban as a disciplinary measure. That rules of the game which are not as such assessed by any 'ordinary' court are most autonomous in practice may be a particular feature of those rules, but that does not justify them being considered as an entirely independent category, or

even being excluded from sports law. On the contrary, without the Laws of the Game sports would be non-existent and, as a consequence the same would apply to sports law! So, from this perspective *lex ludica* in fact might be considered as the hard core of sports law.

In my opinion, 'sports law' in the broader sense consists of more than 'lex sportiva' and the subspecies 'lex ludica'. It should also be seen as encompassing the public part (national, regional and international). There is no generally accepted, specific terminology in use for this part and its sub-parts. The German term *Sportvölkerrecht* (Wax) is so far the only suggestion, but when translated into the lingua franca of international sport, English, it is rendered quite unusable in a terminological sense: 'public international sports law', 'the law of nations of sport'? And we shouldn't forget the national variant also ('public national sports law' or 'national public sports law?'). On the other hand, 'European sports law' (Weatherill) has become a standard term. We know that this does not refer to the private regional variant of 'lex sportiva'.

In order nonetheless to produce a comprehensive nomenclature for the entire field of 'sports law', one might wish finally to consider the following solution, as an attempt to unravel the terminological knot. Admittedly, it is a theoretical, purely academic solution that runs contrary to what is generally understood by the terms 'lex sportiva' (the laws of sport) and 'lex ludica' (the rules, or laws, of the game). 'Lex sportiva' would then stand for public sports law (the 'law' that governments set on sport), which can be divided into 'lex sportiva nationalis' and 'lex sportiva internationalis' (or 'regionalis', such as European (EU) sports law), and 'lex ludica' which would then designate sporting rules and the rules, or laws, of the game (the 'law' that sport sets for itself), which might also be divided into 'lex ludica nationalis', 'internationalis' (or 'regionalis'), with the Laws of the Game belonging *qualitate qua* to the 'lex ludica internationalis'. This solution would be based on the idea that we only have two 'termini technici' available to us in sports law: 'lex sportiva' and 'lex ludica' (with additionally 'Lex Olympica', of course, as the designation for the law relating to an international series of competitive events). The advantage of using the neologisms 'lex sportiva' and 'lex ludica' in this sense would also be that they are commonly used international technical terms which, as Latinisms, do not require translation into various national languages. As such, they are even more suitable than the umbrella label 'sports law', which is derived from the lingua franca of sport, English. From this perspective, 'lex sportiva' might be distinguished in English with 'sporting law' and 'lex ludica' with 'sportive law' ('game-law') so that the triplet *sports law / sporting law / sportive law* would arise, in which case the oral pronunciation of each of these terms in practice must be very clear, of course! Finally: why use the term 'lex sportiva' for the public part and the term 'lex ludica' for the private part? Could they not just as easily be used differently, namely the other way round? The reason is that, in terms of their literal meanings, 'lex ludica' is closer to sport as a game (and that is, after all, the basis of sport as it is practised, see: the 'hard core' constituted by the rules, or laws, of the game) and 'lex sportiva' as a more general, more neutral term is, as it were, by definition further distanced from this designation and lends itself more readily to association with 'government'.

The sharp 'bright line' definition and designation of an area of the law could, incidentally, also be added as an additional (X) factor to Davis' assessment framework (no. 12). If this X factor is then applied to the present area, 'sports law', then the outcome is not entirely positive, as is evident from the above.

## 5. The hard core of sports law

In Davis' assessment framework, which I took as my reference point in order to determine whether such a thing as 'sports law' exists, to which the answer was 'yes', it is evidently factors 1, 2, 5 and 7 (unique application of law from other disciplines to sport; specific, and from a legal viewpoint problematical, context of sport; conflictual nature of the rules of sport with other areas of the law; interventionist legislation for sport, which would also therefore include conventions by way of international legislation) that chiefly determine the response to this question. They can be considered as the 'hard core' of the assessment framework. These are all factors or criteria that determine the distinctive nature of an area of law relative to the legal environment of other areas of the law. They

<sup>53</sup> Jakarta (Indonesia) is the only place to have a *Lex Sportiva Instituta*. It was founded several years ago by Dr Hincia Pandjaitan, a honorary member of the *Hague International Sports Law Academy* (HISLAC(a)) which was established in Djakarta in September 2010, and is the private initiative of a law firm that is not officially connected with any university.

<sup>54</sup> A famous example of the ball not being returned to the other team occurred on 13 February 1999 during the FA Cup tie between Arsenal and Sheffield United, when Nwankwo Kanu, making his debut for Arsenal, mistakenly took a ball from a teammate that was intended for the opponent and crossed it for Marc Overmars to score the winning goal. Arsenal manager Arsène Wenger subsequently offered to have the match re-played. This happened, and Arsenal won again 2-1.

<sup>55</sup> The in-depth study of the Laws of the Game of Association Football in a historical and comparative (in particular, team sports) perspective will be undertaken by this author in the coming years.

Especially, the Laws on the off-side rule and offences ('fouls and misconduct') are of critical importance, the latter for the benefit of their further improved application also to be examined from the perspective of generally recognised principles of criminal law (cf., the concepts of carelessness, recklessness and excessive force already having been introduced in Law 12). See, in this context, Sir Stanley Rous C.B.E. and Donald Ford M.A., *A History of the Laws of Association Football*, Published by E.I.F.A., Zurich, Switzerland, 1974.

are therefore not only relevant for determining whether sport and law make up 'sports law', in other words whether sports law exists, but it can also be argued that they determine where the 'hard core' of the content of sports law might be found (*stricto sensu*). The core of why sports law exists, sports law is *sui generis*, also constitutes the core of what sports law is, what makes it special. Of course, all sports law - as described above in 4.1. and furnished with its own terminology in 4.2. - is by definition special, since it pertains to all law that is related to sport. But that should not be a reason in itself to practice sports law as an intellectually interesting, academic discipline. I am not therefore concerned here with this sports law 'in the broader sense'. What interests me is the dynamism that occurs when sporting rules are tested against the general norms of regular society, and what the outcome then is or could/should be. How do the rules by which the subculture of organised sport regulates itself fit into the legal framework of the rest of society? From the perspective that has been outlined, the emphasis is therefore placed on the study of 'judge-made law'. As, globally, the Court of Arbitration for Sport (CAS) is both the ultimate and the key body in this regard, it is understandable that Nafziger is keen to use the term 'lex sportiva' solely for the jurisprudence of the CAS.

Sporting rules are applied and interpreted by the CAS - also including in the light of regular, general public legislation and regulations. The disputableness of some CAS awards, however can be illustrated by the following example. According to the disciplinary law of UEFA, the European football governing body, clubs are responsible for the conduct of their supporters. In the 'football hooliganism' case of Feyenoord Rotterdam versus UEFA<sup>56</sup>, the CAS confirmed this rule, even in those cases where the club is not to blame for the misconduct of its fans. UEFA's rule and the arbitral award of the CAS, which confirms the rule, are clearly incompatible with the fundamental principle under the rule of law and of criminal procedure of 'no punishment without guilt'. In his Rotterdam doctoral thesis on sports law<sup>57</sup>, Soek successfully defended the position that disciplinary procedural law in relation to doping offences must be considered as pseudo-criminal law and the *praesumptio innocentiae* set forth in Article 6 of the European Convention on Human Rights is applicable to doping-related disciplinary law and that consequently the application of the principle of 'strict liability', with its presumption of 'automatic' (risk) liability, is contrary to this.<sup>58</sup> In this case, the CAS upholds a sporting rule in spite of all the objections raised (the club had done everything possible and was simply not reasonably able to prevent this misconduct; the so-called supporters were not members of the club, or even of the official supporters club and, moreover, the European match at which they caused a disturbance took place abroad, in France). It is, however, uncertain whether this sporting rule would stand the test of criticism before a public court.

The CAS produces 'judge-made law' of private origin and thereby contributes to the development and refinement of sports law. The CAS is usually regarded as a sufficiently independent body, although in actual fact it is closely affiliated with international organised sport, and the IOC in particular. As far as I am aware, incidentally, the jurisprudence of the CAS has not yet resulted in the 'exportation' of specific legal doctrine or principles to other sectors and areas of the law in order to enrich them.

European sports law is largely based on the 'judge-made law' of the European Court of Justice. The jurisprudence of the European Court of Justice stretches from the 'landmark cases' Walrave via Bosman and

Meca-Medina<sup>59</sup> to the most recent Bernard (Olympique Lyonnais) case regarding compensation for clubs providing training to players in professional football.<sup>60</sup> This has led to the development of a body of case law based on the underlying principle of respect for the autonomy of the sports associations and their rules, provided that these rules and decisions are sustainable in the light of the particular characteristics of the sport, and hence granting exceptions to EU law is justifiable and proportional.<sup>61</sup> The question of so-called 'sport specificity' was also addressed in the Bernard case. The European Court of Justice accepted in principle, in this regard, that compensation for providing training to talented young footballers is necessary in order to keep the profession going, although such a mechanism actually conflicts with the freedom of movement of workers to change employer. Weatherill<sup>62</sup> questions the judgment. The prospect of receiving compensation for providing training might equally well encourage universities or supermarkets to recruit new talent and to train young employees. Why is football any different, and ought this really to be allowable in this sector?

The European Court of Justice does not always endorse the existing sporting rules and decisions. It sets out the limits of what is permissible and what is not permissible. The clearest example of a rejection of sporting rules was, of course, the well-known Bosman case which led to the abolition of the transfer system and the nationality clauses in professional football in Europe. This ruling caused nothing short of a revolution in professional football since it meant that footballers were henceforth free to move on after the expiry of their contract without their 'new' club being entitled to any fee from their 'former' club and regardless of their nationality in so far as they moved as an EU citizen within the EU. Many open questions have been clarified by the jurisprudence of the European Court of Justice, due to a sporting rule being held up to the light. The European Commission also has made a contribution in this regard in its decision-making, particularly with regard to the collective selling of TV rights in relation to competition law. Nevertheless, numerous questions remain open as to whether a particular sporting rule is indeed compatible with EU law. A recent example may serve to illustrate this. In recent years, the European Commission has received a raft of complaints from individual sportsmen and women about discrimination on the basis of nationality when competing in individual events in another EU Member State. The question of whether one may take part in national championships in other EU countries is, of course, highly explosive in this context. Is the scope of the ban on discrimination so wide that it also allows one to 'hack into' sporting events that were traditionally reserved for subjects, 'nationals' of the country in question? It is a question that has disturbed the peace of mind of the sporting world, although there are countries (Scandinavia) where this is already possible in specific sports disciplines. Anyone required to answer these types of question finds themselves also having to respond to the preliminary, non-legal demand for the facts. A sports lawyer must know a lot about how sport is structured, how it works, including in practice. Although he need not have smelled for himself the proverbial odour of the locker room that is nonetheless considered an advantage also when applying for a job within the sector. Aspects that are evidently relevant in this case are, for example, the question of the relationship between the national championships in question and qualification for European and World Championships and the Olympic Games. This is important since in order to be allowed to compete at this level, the sportsman or woman must hold a national passport of the country he or she

56 CAS 2007/A/1217.

57 Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, The Hague 2006.

58 For a detailed elaboration of this issue in relation to the Feyenoord/UEFA case, see: Hans Mojet and Robert Siekmann, *Legal Aspects of Combating Transnational Football Hooliganism in Europe*, in: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann (eds), *EU, Sport, Law and Policy*, The Hague, pp. 530-531.

59 Case C-36/74, Case C-176/96 and Case C-519/04, respectively.

60 Case C-325/08.

61 See: Richard Parrish and Samuli Miettinen, *The Sporting Exception in European Union Law*, The Hague 2008. In the jurisprudence of the European Court of Justice regarding 'sports betting' (nine cases from Zenatti (1999) to Carmen Media (2010)) it is not 'sport specificity' (rules and regulations of sports organisations), but rather national lottery legislation and policy that is tested against EU

law. The subject of sports betting as part of European Sports Law (ESL) is sports-related, but not 'sports-rule' related and as such it looks like to belong to the marginal topics of ESL. See also: Robert C.R. Siekmann, 'Sports Betting in the Jurisprudence of the European Court of Justice: A Study into the Application of the *Stare Decisis* Principle, or: the Application of the 'Reversal Method' of Content Analysis and the Essence of the ECJ Case Law on Sports Betting', in: *The International Sports Law Journal* (ISLJ)

2011/1-2, pp. 97-99, 102-117 and 120-121, and also in: Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek (eds), *Sports Betting: Law and Policy* (due to appear in October 2011 from T.M.C. Asser Press, The Hague).

62 Stephen Weatherill, 'The *Olivier Bernard* Case: How, if at All, to Fix Compensation for Training Young Players?', in: *The International Sports Law Journal* (ISLJ) 2010/1-2 pp. 3-6.

is representing. If a sportsman from another country then blocks his or her progress during the national championships that also grant direct international qualification in the particular sport in question, this would constitute a falsification of competition. This can occur if a fellow countryman has not met a better foreign competitor and he thereby wins the national championships, for example. Swimming is a non-contact sport, so there will not be any problems there. You swim to register your own time in your own lane. Or might there be psychological (warfare) problems as in any sporting match? Judo and fencing, however, are non-timed 'combat sports' in which participants eliminate each other in a series of knock-out rounds. If you find yourself in the half of the draw with the better foreign competitor then you will not reach the final. Tennis and badminton are also examples of sports, although of a non-contact character, with eliminating or knock-out rounds, as is boxing, of course. The conclusion must be that it is easier to justify a ban on participation in 'qualifying' national championships by non-national competitors in such sports, thereby possibly enabling an exception to be made to EU law.<sup>63</sup>

## 6. Conclusion

In summary, it can be concluded that: 1) *sports law* exists, 2) according to the 'sources theory' which in fact is presented in this address, it comprises a public and a private part, 3) it is proposed to name the public part 'lex

*sportiva*' (*sporting law*) and the private part 'lex *ludica*' (*sportive law*), and 4) the 'hard core' of sports law is chiefly 'judge-made law': of the European Court of Justice (now: Court of Justice of the EU) as the public judge - at least from a European (EU) perspective, or court (regional), and of the Court of Arbitration for Sport as the private court (global).

Additionally, and from a different perspective, it can be argued that the Laws of the Game (the term is here used in a generic sense) are in fact the 'hard' core of sports law. They then are surrounded by the regulations of the sport governing bodies at the national, regional, and global levels. Together they form the *lex ludica* (*sportive law*). In this circular model, the *lex ludica* is surrounded by the *lex sportiva* at the various levels.

*Ipse dixi.*

The International Sports Law Journal

## Postscript

*'But I forget myself and run beyond my bounds. Though yet, if I shall seem to have spoken anything more boldly or impertinently than I ought, be pleased to consider that not only Folly but a woman said it; remembering in the meantime that Greek proverb, "Sometimes a fool may speak a word in season," unless perhaps you expect an epilogue, but give me leave to tell you you are mistaken if you think I remember anything of what I have said, having foolishly bolted out such a hodgepodge of words. 'Tis an old proverb, "I hate one that remembers what's done over the cup." This is a new one of my own making: I hate a man that remembers what he hears. Wherefore farewell, clap your hands, live and drink lustily, my most excellent disciples of Folly.'*

Erasmus of Rotterdam, *The Praise of Folly*, 1509; translated by John Wilson, 1668

<sup>63</sup> See: Study on the equal treatment of non-nationals in individual sports competitions, Commissioned by the European Commission to the T.M.C. Asser Instituut and Edge Hill and Leiden Universities, December 2010. See for the

Study's Introduction, Analysis, Conclusion and Recommendations, and Executive Summary, *The International Sports Law Journal (ISLJ)* 2011/1-2, pp. 152-172.



From 31 October till 11 November 2012, Prof. Robert Siekmann, School of Law, Erasmus University Rotterdam and Director of the ASSER International Sports Law Centre (AISLC) in The Hague, the Netherlands, was invited to deliver an intensive course on "International and European Sports law: Capita Selecta" at the School of

## Prof. Robert Siekmann Lecturing in China

Law of Shandong University of Finance and Economics in Jinan (China). In the two-weeks course the following topics inter alia were dealt

with: What is Sports Law?; (international) comparative sports law (research); "sport specificity" in European Union Law; EU competition law and sport; sports betting; Social Dialogue in sport in Europe; Sport and nationality; the law on association football transfers; anti-doping law; football hooliganism.

# Defining the Scope and Structure of International Sports Law: Four Conceptual Issues

by James A.R. Nafziger\*

## I. The Problem

There is general agreement that the term “international sports law” refers to a process involving a distinctive body of rules, principles, procedures, and practice to govern important consequences of sports activity that transcends national boundaries. Beyond this broad definition, however, the scope and structure of international sports law is uncertain, thereby limiting its authority and legitimacy. What this means at the international level of authority is that we do not always know what is law and what is not, or at least we may find it difficult to distinguish law, with all of its rigor, from non-legal norms, best practices, ethics, and simple rules of sports etiquette, with all of their flexibility. This kind of problem besets most if not all young regimes, not just international sports law, but the sports law community would be remiss if it failed to address the underlying issues.

It might seem that we could overcome this problem by defining and labeling the pertinent law and legal institutions more precisely. To do so, our collective wisdom would be essential. After all, our ability to accurately describe our observations, whether of concrete objects or social phenomena such as legal norms, often depends on more than individual impressions. One is reminded of the story about a group of blind persons who are finding it difficult to identify an elephant merely by touching it, each of them describing a different part of the animal.

A lack of agreement on definitions and labeling does not seem to be the real problem, however. To be sure, we need to distinguish what is so-called hard law, such as prohibitions on match-fixing, and what is soft law, such as the ethics of good sportsmanship and the principle of international cooperation. But simply defining the terms “hard law” and “soft law” more precisely would not seem to be very helpful. Similarly, we cannot resolve the tensions between international and national authority over sports merely by refining the terminology and rules that express their complicated relationship. After all, international sports law is an authoritative process, not a taxonomy of rules.

Trying to reach a more functional consensus on the scope and structure of international sports law therefore raises deep and rather difficult issues - not just nominal or verbal ones, but conceptual ones.<sup>1</sup> Four of these conceptual issues are particularly troublesome: professional orientations among sports lawyers toward either international or domestic law, but not always both; the public-private law distinction; the jurisprudential scope of a *lex sportiva*; and the applicability of a core principle of fairness.

There is a fifth set of important conceptual issues that this commentary will not discuss in detail, namely, those related to the European Union's complex relationships with national authorities, international sports bodies, and, ultimately, athletes and other individual stakeholders in sports. Although the EU is certainly a source of important developments in international sports law - indeed, some of the most important developments - it nevertheless remains only a regional rather than

global mechanism. As such, EU law has its own internal conceptual issues that, we must remember, are not necessarily experienced elsewhere. Perhaps the most obvious of these issues is how, precisely, to define the specificity of sport - the so-called sporting exception - which within the EU is framed in terms of the distinctive exigencies of economic integration. We might even speak of EU-type specificity. Elsewhere, however, sports law typically is not as driven by economic requirements as on the continent of *Walrave, Bosman*, and *Meca-Medina*.<sup>2</sup> This means that at the global level the scope of the concept of specificity may be quite different from the sense of the term within the EU.<sup>3</sup> Moreover, the meaning of EU-type specificity is still evolving. Thus, although the term clearly raises conceptual issues of great interest, they are ones that as yet cannot be resolved at the global level, given the continuing evolution of the concept within the EU and, ultimately, its mandatory economic requirements. It seems advisable, then, to avoid this kind of confusion in a study of conceptual issues that are not simply regional and are susceptible to actual resolution at the global level.

The present commentary seeks mostly to identify and discuss the four conceptual issues without attempting to resolve them definitively. That should be the next step in seeking to achieve a consensus on the scope and structure of international sports law. Nevertheless, this commentary will offer several observations that may help us take this next step.

## II. The Conceptual Issues

Perhaps the best place to begin is by clarifying what should no longer be a conceptual issue - namely, whether the term “law and sports” or simply “sports law” best describes our common inquiry.<sup>4</sup> It should be clear that the more ambitious term “sports law” is entirely justified. The regime governing international competition has certainly evolved well beyond the “law and sports” stage when the applicable law was merely or mostly external. Today, the acceptance of a limited specificity of sport and the emergence of distinctive rules, institutions, and processes clearly confirm that sports law - indeed, the process of international sports law - is a discipline unto its own. Although it is still young, the discipline is surprisingly mature, with both primary and secondary rules. We shall return later to these points as we examine each of the four conceptual issues.

### A. Professional Orientations Toward Either International or Domestic Law

It is obvious that international sports law straddles both international law and topics of national or domestic law such as antitrust or competition law, employment law, labor law, tort law, criminal law, and civil rights law. As a result, some sports lawyers and scholars are more grounded in international law and others in domestic law. Consequently, individual orientations toward either international or domestic law con-

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1 The issues are fundamentally ones of “conceptual semantics - the language of thought - [as] distinct from language itself.” Steven Pinker, *The Stuff of Thought* 4 (2007). “The theory of conceptual semantics [proposes] that word senses are mentally represented as expressions in a richer and more abstract language of thought.” *Id.* at 150.

2 *Walrave v. Association Union Cycliste Internationale*, Case 36/74, [1974] E.C.R. 1405, *Union Royale Belge des Sociétés de Football Association v. Bosman*, Case C-415/93, [1995] E.C.R. I-4921, and *Meca-Medina & Majcen v. Comm'n*, Case C-519/04, [2006] E.C.R. I-6991, formed the foundation of a line of European Court of Justice opinions that have confirmed the EU's regulatory power over sport and have thereby attempted to define the bounds of sports specificity. See generally Richard Parrish & Samuli Miettinen, *The Sporting Exception in European Union Law* (2008).

3 See, e.g., Richard H. McLaren, *Is Sport Losing Its Integrity?*, 21 *Marq. Sports L. Rev.* 551, 558 n.22 (2011) (calling into question the global relevance of economic considerations in the context of cheating by athletes, citing *Meca-Medina & Majcen*, supra note 2, and quoting Richard Pound, former Vice-President of the International Olympic Committee and first President of the World Anti-Doping Agency, to the effect that a right to work as a professional athlete does not entail a right to cheat by the use of performance-enhancing agents).

4 For a concise summary of the debate just as “[t]he case for the recognition of a field

of ‘sports law’ [was] beginning to gain empirical credibility,” and as theoretical analysis was developing in the literature, see Richard Parrish, *The Birth of European Union Sports Law*, 2 *Ent. L., Summer* 2003, at 20, 21-23. See also Simon Gardiner et al., *Sports Law* 97, 99 (2d ed. 2001) (concluding that the notion that a separate discipline of sports law does not exist “is symptomatic of a narrow outlook.” *Id.* at 99). See also text at notes 30-32.

tribute to the confusion about the scope and structure of the discipline. It then becomes essentially a problem of legal ordering between the two spheres of authority.

Although this distinction can be exaggerated, professional orientations can make a difference in defining the proper legal ordering. For example, international lawyers are more apt to assume that international rules, standards, and procedures, often established by custom or general practice, should always be supreme. This is, of course, highly questionable as a general rule, at least in many domestic legal systems. International lawyers may also discount the actual impact that international sports law has on national regulation of employment relations, broadcasting rights, intellectual property rights, doping, and so on. Moreover, they may be impatient about or even overlook important variations in national constitutional protections and mandatory laws and procedures that may call into question the uniformity of such rules of international sports law as strict liability in doping cases. Sometimes the wish for greater uniformity of rules and authority around the world may be the parent of the thought that such uniformity actually exists in practice.

On the other hand, domestic lawyers tend to think of international law mostly, if not entirely, in simplistic terms of relations between nation-states. They may therefore fail to understand the breadth of international legal personality and consequently fail to appreciate the unusual and powerful status of the Olympic Movement, led by the International Olympic Committee (IOC), as an unusual nongovernmental arrangement with limited legal personality,<sup>5</sup> much like the International Committee of the Red Cross in that respect. It should be clear that the constituent and affiliated organizations of the Olympic Movement - particularly the IOC, international sports federations, the World Anti-Doping Agency (WADA), and the Court of Arbitration for Sport (CAS) - are not just loosely associated with each other under private agreements. Instead, these organizations, even though they are essentially nongovernmental, form an integrated subject of public international law that is recognized as such by nation-states.

This point is crucial to an understanding of the scope and structure of international sports law. Thus, for example, “[t]he IOC increasingly acts [as] a global legislator in international sport, setting common standards.”<sup>6</sup> In the words of a national court:

[A] court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement - the Olympic Charter. We are extremely hesitant to undertake the appli-

cation of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.<sup>7</sup>

Also, CAS awards have been repeatedly recognized and enforced by states, not only under the New York Convention on the Recognition and Enforcement of Arbitral Awards,<sup>8</sup> but also by virtue of the status of CAS itself as a legal actor within the framework of international sports law.<sup>9</sup> We should recall, too, that the World Anti-Doping Agency (WADA) was established by a mix of nongovernmental organizations *and* - it is too often forgotten - national governments. Moreover, UNESCO’s International Convention Against Doping in Sport,<sup>10</sup> with over 150 States Parties, establishes WADA as an advisory organization<sup>11</sup> and obligate the parties to adopt appropriate measures consistent with the principles of WADA’s World Anti-Doping Code.<sup>12</sup> As a hybrid of governmental and nongovernmental commitments, WADA therefore should not be classified as a strictly private organization. Unfortunately, the reality that the core nongovernmental organizations within the world of sports form a subject of public international law with limited international legal personality is too often obscured by the obvious (but misleading) fact that these organizations are, after all, nongovernmental. Too often, form thereby triumphs over function.

## B. The Public-Private Law Distinction

A second conceptual source of confusion is the public-private law distinction - so essential in the civil code tradition of law but so incidental or even blurred in the common law tradition. Unlike the civil code tradition, with its elaborate organization of substantive law, the common law tradition is fundamentally process-oriented, not substance-oriented. Of course, such contrasts between the two western legal traditions are not as important as they used to be. Today the two traditions are gradually converging in numerous respects. Even so, it is still easier for common lawyers to understand that everyday practices and dispute resolution that we may call “private” can easily ripen into public law without any legislative or executive intervention. For example, the concept of *stare decisis* ensures that court decisions in civil cases will shape future decisions in the public sector.

When Philip Jessup, over a half-century ago, coined the term “transnational law” to describe a normative process of decision-making that blends private and public elements, it soon became essentially another name for public international law in the United States, although a formal distinction between “international” and “transnational” law is certainly understood. Here again, the public-private distinction seems rather fuzzy in a common law system. Moreover, in the context of sport, even civil code systems have “undergone extremely interesting developments in recent decades”<sup>13</sup> that have blurred the sharp dichotomy between public and private law.

If, however, we maintain the public-private distinction so as to envisage two separate legal orders in international sports, the question becomes, how do the two orders relate to each other exactly? At this point, we must confront such rubrics as “global sports law,” “private international sports law,” “private international law of sports,” and “legal pluralism in sports” - each of which is used to describe a different range of private legal ordering. It is all very confusing - and unnecessarily so. We should readily reject two of these rubrics - “private international sports law” and “private international law of sports” - neither of which seems to be limited to the issues of jurisdiction, choice of law, and enforcement of foreign judgments that define private international law in the normal sense of the term. That is a simple semantic solution to terminological confusion. But the remaining rubrics - “global sports law” and “legal pluralism in sports” - do not suffer from the same sort of nominal confusion and therefore should not be rejected as semantically mistaken. Instead, these two rubrics exemplify the conceptual issues concerning the relationship between the kinds of legal ordering that the rubrics imply and the established framework of international sports law.

Here is one possible resolution of the conceptual issue: If some sort of private legal order in international sports is to be maintained, rather than conceptualizing it vaguely as autonomous as if it were beyond legal review, we simply need to integrate it effectively into the established process of international sport law, with all of its safeguards for the speci-

5 See, e.g., Michael Beloff, Tim Kerr, and Marie Demetriou, *Sports Law* 5, 257 (1999). Accord, Ken Foster, *Is There a Global Sports Law?*, 2 *Ent. L.*, Spring 2003, at 1, 13 (“The classic definition of international legal personality has been the capacity to enter into legal obligations at the international level and to enter into relations with other international persons such as nation states.”); David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 *Pace Yrbk. Int’l L.* 97, 109 (1992) (“it is clear the IOC has international legal status and acts as an international person”). See also Christoph Vedder, *The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law*, 27 *German Yrbk Int’l L.* 233, 257-58 (1984) (questioning whether the IOC has international legal personality but, even as early as 1984, noting that “public international law has become more decentralized” so that “the recognition of the IOC [by states] could be understood as an implied delegation.”)

6 Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in Ian S. Blackshaw, Robert C.R. Siekmann & Jan Willem

Soek, *The Court of Arbitration for Sport 1984-2004*, at 420, 438 (2006).

7 *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 677 (9th Cir. 1984).

8 *Done June 10, 1958*, 21 U.S.T. 2517, 330 U.N.T.S. 3.

9 See, e.g., E.T. Gilson, *Exploring the CAS*, 98 *Law Libr. J.* 503, 504 (2006). Also, the legal personality of CAS has been recognized, for example, by the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, *Europ. T.S. No. 124* (1986).

10 Paris, October 19, 2005.

11 *Id.* art. 29.

12 *Id.* arts. 3, 4. Article 4(3) provides that the Code, which appears as Appendix 1 to the Convention, is an “integral part of this Convention.”

13 Andreas Wax, *Public International Sports Law: A “Forgotten” Discipline?*, *Int’l Sports L.J.* 2010/3-4, at 25 (defining a limited scope of public international sports law). For an expansive commentary by the same author on international sports law, see Andreas Wax, *Internationales Sportrecht Unter Besonderer Berücksichtigung Des Sport Völkerrechts* (2009).



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ficity of sport; the authority and legitimacy of sports organizations; and the recognition of the rules of the game, ethical norms of sport and decisions in the field of play that constitute the *lex ludica*.<sup>14</sup> In philosophical terms, it may be time to make use of Occam's razor of simplicity by cutting out the unnecessary complexity of different legal orders. What seems to make good sense is a blend of so-called private and public authority that clearly articulates their symbiotic relationship, more or less in line with Philip Jessup's concept of transnational law.<sup>15</sup>

Taking into account these first two conceptual issues, an interesting question is the status of the Olympic Charter and the law generated by Olympic practice under it - the so-called *lex olympica*.<sup>16</sup> Once again, professional orientations and the distinction between public and private law seem to be important. As we have seen, international lawyers (and common lawyers in the United States but perhaps not as much in the British Commonwealth countries) generally conclude that the *lex olympica* is paramount in defining the process of international sports law itself whereas domestic lawyers (and civil code lawyers but perhaps not as much in Greece) may be inclined to view the concept as a description of an essentially autonomous body of private law.

### C. The Definition of the *Lex Sportiva*

A third conceptual issue involves the crucial but elusive term *lex sportiva*. There is general agreement that it refers to an emerging body of law which transcends the rules of the game, the ethical norms of sport, and decisions in the field of play, otherwise known collectively as the *lex ludica*. Indeed, international sports law, as articulated primarily by the awards of CAS and other arbitral tribunals, supplies a noninterference rule to help protect the *lex ludica*.

But what exactly is the scope of the *lex sportiva*? Even CAS awards are ambiguous on that point. There is some agreement, however, that the term refers to a body of sports law that is roughly analogous to the *lex mercatoria* or law merchant in international commercial practice and commercial arbitration.<sup>17</sup> These two bodies of law have numerous similarities of origin in customary practices and of development by arbitral tribunals. To be sure, they also have numerous differences, insofar as the *lex sportiva* is the product of arbitral awards and, by now, a distinctive development.<sup>18</sup>

The scope of the *lex sportiva* has been variously defined, sometimes expansively to embrace most if not all of international sports law and sometimes narrowly to describe a contractually based, private legal order based on the so-called autonomy of sports federations from national legal systems.<sup>19</sup> Ordinarily, however, the term is limited to its original definition as a body of rules and principles derived from awards made by CAS, primarily, and other recognized tribunals. These include, for

example, principles derived from rulings by the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center on the domain names of sports teams.<sup>20</sup> Although such awards and other pronouncements do not constitute precedent in the sense of the common law - they are, after all, *lex specialis* - they do provide guidance for future cases<sup>21</sup> under national and international law and gain additional traction in national legal systems whenever they become final and binding decisions under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>22</sup> In these ways, such tribunals and CAS generate the *lex sportiva* that helps shape international sports law.

The emerging *lex sportiva* does not address all issues presented for arbitration, however. For example, issues of *lex ludica* involving rules of the game, ethical norms and field-of-play decisions are not susceptible to formal arbitration under international sports law. The *lex sportiva* also does not address such other issues as the arbitrability of a dispute, the validity of an arbitration agreement, and judicial relief from arbitral awards. Instead, these issues are subject to the applicable rules of a particular arbitral tribunal and the positive law - in the instance of CAS, the *lex arbitrii* of Swiss law. 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 national constitutions, mandatory domestic law, or public policy (*ordre public*).<sup>23</sup>

But even if we can agree on the jurisprudential sources of the *lex sportiva* - largely CAS - we may still ask, so what? Is the term significant or is it only specious? If it is significant, what kinds of questions does it help answer? Two thoughtful but divergent commentaries on the *lex sportiva* raised these questions. One of the commentaries equated the *lex sportiva* with "global sports law,"<sup>24</sup> which it defined as a "transnational autonomous private order . . . constituted by the legislative and constitutional order created by international sporting federations."<sup>25</sup> The other commentary defined the *lex sportiva* as a "novel body of international sports law"<sup>26</sup> created by CAS, but then observed that it is little more than "an umbrella label that encompasses several discrete methodologies of lawmaking distilling a medley of variables into an oversimplified motto."<sup>27</sup>

What is most interesting and important about these two very different commentaries is that they both approached the conceptual issue of determining the nature of the *lex sportiva* by deconstructing CAS jurisprudence. Then, after exposing the diverse roles of CAS, both commentaries concluded that if we carefully identify the multiplicity of distinct tasks and functions that CAS performs, the law that it generates may take on real meaning and distinction. Thus, according to the first

14 In Ken Foster's definition: A further set of principles and rules . . . 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 mater officials. The approach here by the Court of Arbitration for Sport 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 specialized forum or system of arbitration by experts. Foster, supra note 6, at 421.

15 See McLaren, supra note 3, at 553 ("The coming challenge is to knit the approach

of both sets of authority together without taking away the control of sport by sport officials and their accompanying federations.").

16 See generally Alexandre Miguel Mestre, *The Law of the Olympic Games* (2009).

17 The text that follows draws on the author's earlier commentary. See James A.R. Nafziger, *The Principle of Fairness in the Lex Sportiva of CAS Awards and Beyond*, Int'l Sports L.J., 2010/3-4, at 3.

18 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 transna-

tional juridical order). One CAS award confusingly associated the *lex mercatoria* with the *lex ludica* rather than the *lex sportiva*. AEK Athens & SK Slavia Prague v. Union of European Football Associations (UEFA), CAS 98/200, at 158.

19 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); Dimitrios Panagiotopoulos, *Theoretical Foundation of Sports Law, in Sports Law (Lex Sportiva) in the World* 19, 22, 39 (2004); Dimitrios Panagiotopoulos, *Lex Sportiva: Sport Institutions and Rules of Law, in Sports Law: Implementation and the Olympic Games* 33 (2005); James Nafziger, *Lex Sportiva*, Int'l Sports L.J., 2004/1-2, at 3.

20 See, e.g., *Major League Baseball Properties, Inc. v. Lee*, WIPO Arbitration and Mediation Center, Case No. D2007-0896 (2007).

21 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 panels must try to come to the same conclusion on matters of law as previous panels).

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

23 On the inherent tension in resolving sports-related disputes between internationalism and nationalism and the need for "final and binding decisions having global recognition and effect," see Matthew J. Mitten & Hayden Opie, "Sports Law": Implications for the Development of International, Comparative Law and Global Dispute Resolution, 85 Tul. L. Rev. 269, 284-85 (2010).

24 Foster, supra note 6, at 421. In an earlier commentary, however, Professor Foster warned that the *lex sportiva* was "a dangerous smoke screen justifying self-regulation by international sporting federations and the danger is that their customs and practices will be accepted as legitimate." Foster, supra note 5, at 17.

25 Id.

26 Allen Erbsen, *The Substance and Illusion of Lex Sportiva*, in Blackshaw et al., supra note 6, at 441.

27 Id.

of the commentaries,<sup>28</sup> CAS may operate variously to preserve the autonomy of private sports bodies and thereby defer to the *lex ludica*, to serve as an ombudsman, to conduct a final review of a dispute, to act as a supreme court within the Olympic Movement, or simply to arbitrate a dispute on the basis of fairness and justice. The other commentary<sup>29</sup> similarly focused on four modes of legal analysis reflected in CAS awards, depending on the nature of a particular issue of interpreting language in an authoritative text.

CAS, then, is indeed capable of creating “a unique body of law known as *lex sportiva*,”<sup>30</sup> not merely a contextually specific application of general law although the application by CAS of general law is essential, too. Claiming that the *lex sportiva* is distinctive and functional is really not at all like claiming, for example, that any commercial and tort law applied to potato merchants forms a *lex tuber*.<sup>31</sup> Instead, the *lex sportiva* is distinctive - for example, its strict liability rules in doping cases, its deference to the *lex ludica* and the specificity of sport, its application of the Olympic Charter and practice, its provision for party autonomy to select mediation procedures, its acknowledgement of sport-specific definitions of nationality, its metaphor of fair play drawn from the *lex ludica*, and so on. Although much of the emerging law is still *lex ferenda* - that is, law still in the process of formation and acceptance - it is evolving steadily, as is the larger process of international sports law itself.<sup>32</sup>

#### D. The Applicability of Fairness as a Core Principle

##### 1. The Definitional Issue

A core principle, perhaps *the* core principle, to inform the *lex sportiva* and the larger body of international sports law is *fairness*. But what exactly is “fairness”? That question highlights our fourth and final conceptual issue - essentially a jurisprudential issue - about the scope of international sports law. We can all agree on an essential principle of the *lex ludica*: that “fair play” in competition requires athletes, coaches, and referees to comply fully with the rules of the game and ethical norms on the playing field. Beyond that, however, definitions of the principle of fairness as applied to sports have been disappointing. For example, the federal, provincial and territorial sports ministers of Canada issued a lengthy and elaborate declaration entitled “Expectations for Fairness in Sport” that is essentially meaningless because of its failure to come to grips with the term “fairness.”<sup>33</sup> The declaration’s inability to do so may have been simply an oversight or perhaps a semantic problem within the single legal system of Canada, but, as we shall see at the international level, the principle raises serious conceptual issues.

On a purely semantic level, if we attempt to develop a meaningful principle of fairness as a core principle of the *lex sportiva* and international sports law as a whole, we can generally rely on standard definitions. According to a leading legal dictionary, the word “fair” has “the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest; just; equitable; even-handed; and equal, as between conflicting interests.”<sup>34</sup> We might 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.<sup>35</sup> This distinction between substantive and procedural fairness is important. Turning first to *procedural* fairness, a CAS award made it clear that “the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations.”<sup>36</sup> As a matter of due process or natural justice, we can identify two basic 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.<sup>37</sup>

Defining *substantive* fairness, in the sense of distributive justice, is more difficult. 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 within national legal systems.<sup>38</sup> But at the international level, at least, the exact meaning of substantive “fairness” is unclear.

The applicability of substantive fairness is, however, an important issue, and it is ultimately a conceptual issue. For example, should athletes with disabilities be allowed to use prosthetic devices and other equipment to equalize their opportunities in international competition besides the Paralympics and such special competition? Should equal opportunities for women athletes trump religious barriers to such equality in the Middle East and elsewhere? In exceptional circumstances, should domestic courts adjudicate the fairness of actions against athletes as a matter of equity to soften the rigidity of legal prescriptions such as strict liability for doping? Should CAS make decisions on the basis of substantive fairness? The answers to these important questions are not simply semantic; that is, the answers to the questions cannot be resolved simply by terminological refinement and consensus. Instead, they raise fundamental conceptual - often cultural and jurisprudential - issues of discrimination, the role of national courts, the role of arbitral tribunals, and so on.

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 order to address such issues, given the primitive status of thinking about questions of substantive fairness in international sports law, we shall have to rely primarily on the better-developed elements that have been employed mostly to ensure procedural fairness, such as impartiality, equity, good faith, and coherence in the sense of consistency and uniformity.

##### 2. The Analysis of Fairness in Three Contexts

Despite the obvious indeterminacy of the principle 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.<sup>39</sup>

Sometimes a determination of the appropriate context for applying the principle of fairness will in itself be significant. For example, the

28 Foster, *supra* note 6, at 440.

29 Erbsen, *supra* note 26, at 442.

30 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).

31 Erbsen, *supra* note 26, at 445 (making that comparison, albeit facetiously).

32 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 Blackshaw et al., *supra* note 6. The ensuing discussion about the fourth conceptual issue, involving the core principle of fairness, is drawn but modified from Nafziger, *supra* note 17.

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

34 Black’s Law Dictionary 633 (8th ed. 2004). For an excellent commentary on the concept of fairness, particularly in its relation-

ship to field-of-play decisions, see Klaus Vieweg, Fairness und Sportregeln - Zur Problematik sog. Tatsachenentscheidungen im Sport, in G. Crezelius, H. Hirte, & K. Vieweg (Hrsg.), Festschrift für Volker Röhrich zum 65 Geburtstag: Gesellschaftsrecht, Rechnungslegung, Sportrecht 1255-75 (2005), translated and reprinted as Klaus Vieweg, Fairness and Sports Rules [and] Regulations - A Contribution to the Problem of “Field of Play” Decisions, in Sports Law Implementation and the Olympic Games 207 (Dimitrios P. Panagiotopoulos ed. 2005) (noting that “the ‘fairness’ argument has become one of the most popular,

most decisive forms of argumentation,” *id.* at 215, and that “[t]he volume of sports law literature on fairness and fair play is immense.” *Id.* at 217.).

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

36 AEK Athens, *supra* note 18, at ¶ 158.

37 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.

38 See, e.g., Gardiner, *supra* note 4, at 580.

39 For examples and a discussion of these three contexts, see Nafziger, *supra* note 17, at 5.

Lisbon Treaty of 2009<sup>40</sup> 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”<sup>41</sup> 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 might suggest. If so, then the EU mandate of fairness would largely lie beyond the competence of courts and other legal authority except to review issues involving governmental enforcement of the mandate. Or does the mandate apply more broadly to matters beyond the 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?<sup>42</sup> 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 agree on its scope. That, however, will require considerable deliberation and consensus about the relationships between the Lisbon Treaty and the specificity of sport, just as the specificity of sport has already been addressed by the European Court of Justice in the context of economic integration.

### 3. CAS Jurisprudence

The gold standard in resolving sports-related disputes on the basis of fairness has been established by CAS. Indeed, the greatest value of the tribunal so far has been one of ensuring fairness, at least in the more or less procedural sense of even-handedness, impartiality, acting in good faith, and coherence in the sense of consistency and uniformity.

In promoting procedural fairness, CAS awards have scrutinized procedures of internal appeals bodies within international sports federations.<sup>43</sup> CAS panels have criticized media interviews by such bodies<sup>44</sup> and have insisted that international sports federations provide for an appeals jury or some equivalent to review decisions involving issues of compliance with their rules.<sup>45</sup> One award emphasized the importance of *de novo* review by CAS so as to give an athlete a full hearing and supersede any previous procedural defects in the tribunal of a sports organization. Such defects thereby “fade to the periphery”<sup>46</sup> of a CAS proceeding. CAS has taken pains to avoid bias in dispute resolution. For example, in remitting issues for further fact-finding and other determinations by sports bodies, CAS has insisted that the required process must be undertaken by new decision-making panels and tribunals.<sup>47</sup> CAS panels have also demonstrated their commitment 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.<sup>48</sup>

In blending procedural and substantive fairness, CAS has relied not only on black-letter rules, but also on equitable principles such as the *lex mitior*. Accordingly, 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.<sup>49</sup>

In the interest of fairness and in its role as a sort of supreme arbitral tribunal within the Olympic Movement,<sup>50</sup> CAS has disregarded the stature of particularly institutions, including the IOC. The *Anderson* case,<sup>51</sup> just noted, is one example. Another important example is *USOC v. IOC*.<sup>52</sup> At issue in that case was Rule 45 of the Olympic Charter. It prohibited athletes who had been suspended from sanctioned competition for more than six months because of an anti-doping violation from participating in the next Olympic Games following the expiration of their suspension. After Rule 45 came into effect in July 2008, it served to disqualify a number of top athletes from competing in the 2012 Olympics. On behalf of one of these athletes, the United States Olympic Committee challenged the new rule as invalid and unenforceable.

In *USOC v. IOC*, a CAS panel concluded that Rule 45 was a disciplinary sanction rather than a pure condition of eligibility to compete in the Olympic Games within the IOC’s competence to establish. As such, the new rule did not comply with the sanctions provided by the World Anti-Doping Code, which had been incorporated by Rule 44 into the Olympic Charter. Article 23.2.2 of the Code bars its signatories (including the IOC) from introducing additional provisions of their own that change the periods of eligibility as a result of the Code’s sanctions. Rule 45 was therefore invalid and unenforceable. Also, as the CAS panel carefully explained, if the IOC wishes to exclude athletes who have been sanctioned for doping from the Olympic Games, it could propose an amendment to the World Anti-Doping Code to that effect. Such an amendment would avoid a *ne bis in idem* issue (prohibition against double jeopardy), as the ineligibility would be part of a single, Code-based sanction subject to the principle of proportionality.

Perhaps the record of CAS for applying the core principle of fairness, at least in a procedural or mixed procedural substantive sense of the term, confirms the famous dictum of an English court that sports-oriented bodies, including CAS, are “far better fitted to judge than the courts”<sup>53</sup> and the observation of a French scholar that legal disputes in sports are best settled “within the family of sports.”<sup>54</sup> What remains to be done is for sports lawyers to work together and with others on the applicability of the core principle, particularly in its substantive sense.

Despite the growth of the *lex sportiva*, however, the gradual accretion of CAS awards does not ensure consistency, an essential element of fairness, within the larger framework of international sports law. An issue of fairness can sometimes remain even after a CAS award that is based

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

41 Id. art. 165 (emphasis added).

42 See Stephen Weatherill, *Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?* (paper on file with author); 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).

43 *DeBruin v. Federation Internationale de Natation (FINA)*, CAS 98/211.

44 Id. ¶ 11.

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

46 *DeBruin*, supra note 44, at ¶ 8.

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

48 See, e.g., *Anderson v. IOC*, CAS 2008/A/1545 (upholding an appeal against an annulment of the results of women’s relay teams in the 2000 Olympics. CAS ruled that the IOC’s decision did not follow precedent, especially *USOC v. IAAF & IOC*, CAS 2004/A/725. The IOC decision also failed to rely on any express IOC or IAAF rule that clearly allowed the IOC to annul the results of women’s relay teams if one team member was found to

have committed a doping offense). See also *IAAF v. USA Track & Field & Young*, CAS 2004/A/628 (“In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel”); cf. *Brunemann*, supra note 43 (comparing a swimmer’s negligent ingestion of a banned substance to the negligence of other athletes).

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 the *lex mitior*). The principle of the *lex mitior* is an interesting variation on the fairness principle, also observed by CAS awards, of *tempus regit actum*. According to that principle,

any determination of what constitutes a sanctionable rule violation and what sanctions may be imposed must be done in accordance with the law in effect at the time of the allegedly sanctionable conduct, and new rules and regulations do not apply retrospectively to facts that occurred before their entry into force. See *Anderson v. I.O.C.*, CAS 2008/A/1545, at ¶ 10.

50 See supra text accompanying note 28.

51 Supra note 48.

52 CAS 2011/0/2422.

53 [1978] 3 All E.R. 211.

54 B. Foucher, “La Conciliation comme Mode de Règlement des Conflits Sportifs en Droit Français,” paper presented at the Court of Arbitration for Sport Symposium on Mediation, Lausanne, Switzerland, Nov. 4, 2000. The author is indebted to Ian Blackshaw for this reference.

on the principle. For example, although CAS panels generally have 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 re-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 forfeited when she confessed to having been doped during her victorious race. The IOC's decision not to re-award the medal to Thanou was based on her own disqualification, not from the 2000 Games in Sydney but from the 2004 Games in Athens. This rationale did not follow the CAS precedent, as a matter of fairness, of denying the award of a forfeited medal to only those athletes who had also tested positive for doping in the *same* Games.<sup>55</sup>

<sup>55</sup> 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.

<sup>56</sup> For example, in his commentary on the

concept of fairness, particularly as it relates to field-of-play decisions, Klaus Vieweg notes its "conceptual lack of clarity." Vieweg, *supra* note 34 at 219 (English translation). He concludes his commentary by observing that, despite the "need for swift and final decisions" on the playing field, "[f]airness should be accorded precedence." *Id.* at 224.

### III. 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. It is small wonder that the development of international sports law has been handicapped by unresolved conceptual issues.

This study has focused on four conceptual issues: the professional orientation of sports lawyers toward either international or domestic law but not always both, the public-private law distinction, the definition of the *lex sportiva*, and the applicability of fairness as a core principle of the law. These issues demand thoughtful analysis and, eventually, as much global consensus on how to resolve them as our fragmented world will allow. Meanwhile, international sports law, still in its youth, is growing along discernible lines of authority and dispute resolution. Of particular importance is the emerging jurisprudence of institutions within the Olympic Movement, including that of international sports federations and the *lex sportiva* formed by the awards of CAS and other tribunals. A major challenge for everyone interested in the progressive development and eventual codification of international sports law is to address the conceptual issues<sup>56</sup> that inhibit its development.

# The Making of a *Lex Sportiva* by the Court of Arbitration for Sport\*

by Lorenzo Casini\*\*

## Introduction

"Sports law is not just international; it is non-governmental as well, and this differentiates it from all other forms of law"<sup>1</sup>. Sports rules are genuine "global law", because they are spread across the entire world, they involve both international and domestic levels, and they directly affect private actors: this happens, for instance, in the case of the Olympic Charter, a private act of a "constitutional nature" with which all States comply<sup>2</sup>; or in the case of the World Anti-Doping Code, a document that provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities<sup>3</sup>.

Therefore, the global dimension of sport is, in the first instance, normative. A "global sports law" has emerged, which embraces the whole complex of norms produced and implemented by regulatory sporting regimes<sup>4</sup>. It includes not only transnational norms set by the International Olympic Committee (IOC) and by International Federations (IFs) - i.e. "the principles that emerge from the rules and regulations of international sporting federations as a private contractu-

al order"<sup>5</sup> -, but also "hybrid" public-private norms approved by the World Anti-Doping Agency (WADA) and international law (such as the UNESCO Convention against doping in sport). Global sports law is made of norms provided by central sporting institutions (such as IOC, IFs and WADA) and by national sporting bodies (such as National Olympic Committees and National Anti-Doping Organizations).

Global sports law, therefore, is highly heterogeneous. It operates at different levels and it is produced by several law-makers. Amongst those, there is one very peculiar body, funded in the 1980s, which has become a key actor in the sport legal system: the Court of Arbitration for Sport (CAS)<sup>6</sup>. In the last two decades, the activity of this institution has become extraordinarily important. The number of decisions released by CAS has increased to the point that a set of principles and rules have been created specifically to address sport: this "judge-made sport law" has been called the *lex sportiva*<sup>7</sup>. This formula, which recalls well-known labels like *lex mercatoria* or *lex electronica*<sup>8</sup>, has been readily adopted and, indeed, its meaning has been extended over time: it can be used, in fact, to refer more generally to the transnational law produced by sporting

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<sup>1</sup> M. Beloff, T. Kerr & M. Demetriou, *Sports Law*, Hart, Oxford, 1999, p. 5. These authors also note that "the public's limitless enthusiasm for sport and its importance to our cultural heritage makes sports law more than mere private law"

(*ibidem*, p. 4 et seq.).

<sup>2</sup> See J.-L. Chappelet & B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The governance of sport*, Routledge, Abingdon, 2008, and A.M. Mestre, *The Law of the Olympic Games*, T.M.C. Asser, The Hague, 2009.

<sup>3</sup> P. David, *A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport*, Cambridge, Cambridge University Press, 2008.

<sup>4</sup> An overview is in F. Latty, *La lex sportiva. Recherche sur le droit transnational*, Brill, Leiden-Boston, 2007, and in L. Casini, *Il diritto globale dello sport*, Giuffrè, Milano, 2010.

<sup>5</sup> K. Foster, "Is There a Global Sports Law?", 2 *Entertainment Law*, vol. 2, n. 1, spring 2003, p. 1 et seq., at 4, who describes "global sports law" as a "transnational autonomous legal order created by the private global institutions that govern international sport", "a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federation" and not "governed by national legal systems" (*ibidem*, p. 2): put otherwise, this author considers "global sports law" a significant example of spontaneous global law without a State, according to the definition provided by Global Law Without a

State, ed. by G. Teubner, Aldershot, Dartmouth, 1997, and G. Teubner, "Un droit spontané dans la société mondiale", in *Le droit saisi par la mondialisation*, sous la direction de C.-A. Morand, Bruylant, Bruxelles, 2001, p. 197 ss.

<sup>6</sup> The Court of Arbitration for Sport 1984-2004, ed. by I.S. Blackshaw, R.C.R. Siekmann, J. Soek, T.M.C. Asser, The Hague, 2006, A. Rigozzi, *L'arbitrage international en matière de sport*, LGDJ/Bruylant, Bâle, 2005, p. 132 et seq., and A. Merone, *Il Tribunale arbitrale dello sport*, Giappichelli, Torino, 2009.

<sup>7</sup> J.A.R. Nafziger, "Lex Sportiva and CAS" (2004), in *The Court of Arbitration for*

institutions<sup>9</sup>. In spite of this success, the existence of a *lex sportiva* is not universally accepted: in 2001, for instance, the Frankfurt *Oberlandesgericht* stated that “[E]ine von jedem staatlichen Recht unabhängige *lex sportiva* gibt es nicht”<sup>10</sup>.

In this paper, the term *lex sportiva* is used in a broad sense as 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”<sup>11</sup>) in order to describe the principles and rules set by sporting institutions. This approach of course raises several problems concerning the very concept of such a kind of law and its binding force<sup>12</sup>; other problems include those connected to wider themes such as the emergence of a “global private law” and the formation of “global private regimes”<sup>13</sup>.

However, this analysis will not deal with those issues. Instead, it will focus on the actor that is probably most prominent in constructing global sports law: the Court of Arbitration for Sport (CAS).

The purpose of this paper is to examine the structure and functions of this institution, in order to highlight a number of problems concerning judicial activities at the global level more generally. Section 1 will outline CAS’ organization and functions, from its inception to the present date. In particular, this section will show how the history of the CAS is reminiscent of a famous German novel based on a biblical saga, “Joseph and his brothers” by Thomas Mann<sup>14</sup>. Put briefly, CAS was originally the “favourite son” of the Olympic movement’s founding fathers; it subsequently became the target of its envious “brothers” - i.e. the International Federations and other sporting arbitration institutions - which viewed CAS as a dangerous enemy; ultimately, CAS defeated its opponents, gained independence and brought normative harmonization, thereby becoming “the Nourisher” (*Der Ernährer*) of global sports law. Section 2 will focus on the role of CAS in making a *lex sportiva*, and

it will take into account three different functions: the development of common legal principles; the interpretation of global norms and the influence on sports law-making; and the harmonization of global sports law. Section 3 will consider the relationships between the CAS and public authorities (both public administrations and domestic courts), in order to verify the extent to which the CAS and its judicial system are self-contained and autonomous from States. Lastly, section 4 will address the importance of creating bodies like CAS in the global arena, and it will identify the main challenges raised by this form of transnational judicial activity. The analysis of CAS and its role as law-maker, in fact, allows us to shed light on broader global governance trends affecting areas such as the institutional design of global regimes, with specific regard to separation of powers and the emergence of judicial activities.

## 1. The Court of Arbitration for Sport (CAS): A Novel

The CAS plays a crucial role within the sport legal system<sup>15</sup>. It was created in 1983, thanks in large part to the will of Juan Antonio Samaranch, at that time President of the International Olympic Committee (IOC), who planned to build a centralized mechanism of international judicial review in sport: the idea was to introduce a sort of “supreme court for world sport”<sup>16</sup>. From this point view, Samaranch followed the path of the father of IOC, Pierre De Coubertin, who was the first to observe that a sporting institution should, first of all, “s’organiser judiciairement”, because it must be “à la fois un Conseil d’Etat, une Cour d’appel et un Tribunal des conflits”<sup>17</sup>.

Nevertheless, the childhood of CAS was not easy. This was mainly due to three reasons. Firstly, activity at the beginning was not intensive, partially because there were few cases at that time: doping scandals, for instance, were not a major issue until the later years of the 1980s. To give an idea, in the 1980s the CAS issued few decisions per year; during the

Sport 1984-2004, above, p. 409 et seq. A. Rigozzi, *L’arbitrage internationale en matière de sport*, above, p. 628 ss., and M. Coccia, “Fenomenologia della controversia sportiva e dei suoi modi di risoluzione”, in *Riv. dir. sport.*, 1997, p. 605 et seq., at p. 621, adopt instead a wider definition of the *lex sportiva*, i.e. the incredibly large amount of customary private norms “che si sono ormai formate in campo sportivo grazie all’interazione, concretizzantesi soprattutto negli arbitrati sportivi tra le norme degli ordinamenti sportivi e i principi generali dei diritti statali”. See also M. Beloff, “Is there a *lex sportiva*?”, *International Sports Law Review* (2005), 3, p. 49 ss., and D.P. Panagiotopoulos, *Sports Law (Lex sportiva) in the World. Regulations and Implementation*, Ant.N. Sakkoulas, Athens, 2004.

8 See S.M. Carbone, “Il contributo della *lex mercatoria* alla precisazione della *lex sportiva*”, in *Diritto internazionale dello sport*, a cura di E. Greppi e M. Vellano, Giappichelli, Torino, 2006, p. 227 et seq., A. Röthel, “*Lex mercatoria, lex sportiva, lex technica - Private rechtsetzung jenseits des Nationalstaats?*”, 62 *Juristen Zeitung* (2007), p. 755 et seq., and C.H. Witt et al. (eds.), *Die Privatisierung des Privatrechts - rechtliche Gestaltung ohne staatlichen Zwang*, Boorberg, Stuttgart, 2003, in particular essays by H.-P. Schroeder, “Die *lex mercatoria* - Rechtsordnungsqualität und demokratische Legitimation”, p. 57 et seq., and by J. Adolphsen, “Eine *lex sportiva* für den internationalen Sport?”, p. 281 et seq. See also, on *lex mercatoria*, B. Druzin, “Law Without The State: The Theory of High Engagement and The Emergence of Spontaneous Legal Order Within Commercial Systems”, 42 *Georgetown Journal of International Law*

(2010) (forthcoming), and, on *lex electronica*, P. Trudel, “La *lex electronica*”, in *Le droit saisi par la mondialisation*, above, p. 221 et seq.

9 F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 31 ss., links the concept of *lex sportiva* to “les règles transnationales opérant dans le domaine du sport” e alla “manière dont elles s’agencent les unes par rapport aux autres”, so that it reveals “la présence d’un ordre juridique transnational sportif unitaire” (p. 39). On sports law as “transnational law”, see also B. Simma, “The Court of Arbitration for Sport” (1988), in *The Court of Arbitration for Sport 1984-2004*, above, p. 21 et seq.

10 Frankfurt *Oberlandesgericht*, 18 April 2001, D. Baumann / D.L.V., *Sport und Recht*, 2001, p. 161; on these aspects see A. Wax, *Internationales Sportrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts*, above, p. 173 et seq., who deals with the concept of a *lex sportiva internationalis*.

11 According to J.A.R. Nafziger, *International Sports Law*, Transnational Publishers, New York, 2004, p. 1 et seq., “international sports law” means a process that includes “a more or less distinctive body of rules, principles, institutions and procedures to govern important consequences of transnational sports activity”. For K. Foster, *Is There a Global Sports Law?*, above, p. 4, international sports law embraces “general principles of law that are automatically applicable to sport”. According to O.O. Olatuwura, “Fundamental Doctrines of International Sport Law”, in *International Sports Journal*, 2008, n. 3-4, p. 130 ss., “international sport law” is “the specialized branch of transnational law that globally regulates private and public participants conduct

and claims in sport”. In French legal scholarship, see A. Borras, “Existe-il un droit international du sport?”, in *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Bruylant, Bruxelles, 1993, p. 187 ss., and J.-P. Karaquillo, *Droit international du sport*, in *Recueil des Cours - Collected courses of the Hague Academy of International Law 2004*, Tome 309, Brill, Leiden, 2006. In Germany, A. Wax, *Internationales Sportrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts*, Duncker & Humblot, Berlin, 2009. In Italy, *Diritto internazionale dello sport*, above; formerly, M.S. Giannini, *Ancora sugli ordinamenti giuridici sportivi* (1996), in Id., *Scritti. Volume Nono. 1991-1996*, Giuffrè, Milano, 2006, p. 441 ss., who wrote that in sport the term “international” refers to a “diritto superstatale”, so that it does not mean the “diritto proprio di un ordinamento giuridico a sé”, but “una normativa interstato e superstato” (p. 444).

12 These issues are widely analyzed by F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 416 et seq., and L. Casini, *Il diritto globale dello sport*, above, p. 226 et seq.

13 See G. Teubner, “Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?”, in *Public Governance of the Age of Globalization*, ed. by K.H. Ladeur, Aldershot, Ashgate, 2004, p. 71 et seq., and H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford and Portland, Hart, 2005.

14 T. Mann, *Joseph und seine brüder*, a four-part novel by Thomas Mann, written from 1926 to 1943: I. *Die Geschichten Jaakobs* (1926-1930); II. *Der junge Joseph* (1931-1932); III. *Joseph in Ägypten* (1932-

1936); IV. *Joseph der Ernährer* (1940-1943).

15 The history of CAS is illustrated by *The Court of Arbitration for Sport 1984-2004*, above, e and there especially in K. Mbaye, “Une nouvelle institution d’arbitrage: le Tribunal Arbitral du Sport (TAS)” (1984), p. 6 et seq., B. Simma, “The Court of Arbitration for Sport” (1988), p. 21 et seq., and M. Reeb, “The Role and Functions of the Court of Arbitration for Sport” (2002), p. 31 et seq.; see also D.H. Yi, “Turning Medals Into Medal: Evaluating The Court Of Arbitration of Sport As An International Tribunal”, 6 *Asper Review of International Trade & Business Law* (2006), p. 289 et seq., A. Rigozzi, *L’arbitrage international en matière de sport*, above, p. 132 et seq., and A. Wax, *Internationales Sportrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts*, above, p. 137 ss. 16 According to K. Mbaye, this formula comes directly from Juan Antonio Samaranch, and it is reported in the Swiss Federal Court decision A. et B. contre Comité International Olympique, *Fédération Internationale de Ski et Tribunal Arbitral du Sport*, 4P267/2002, 27 May 2003, in BGE 129 III 445 S. 462. That was the famous case *Lazutina/Danilova*, in which Swiss Court acknowledged that CAS has gained its own independence from IOC after the 1993-94 reform.

17 F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 65, citing F. Alaphilippe, “Légitimité et légalité des structures internationales du sport: une toile de fond”, in *Revue juridique et économique du sport*, 1993, n. 3, p. 15.

18 For these data, see <http://www.tas-cas.org/statistics>.

19 L. Tarasti, *Legal Solutions in the*

last decade, there have been over 800 rulings<sup>18</sup>. Secondly, in those years the International Federations used to ignore the CAS, and some of them had their own judicial body. The most significant example is the International Association of Athletics Federations (IAAF), which had its own Arbitration Panel during the 1980s and the 1990s and only in 2001 did it decide to disband it in favour of CAS' jurisdiction<sup>19</sup>.

Thirdly, according to its original institutional design the CAS was a sort of judicial branch within the IOC, with the latter maintaining political and financial control over the former.

After a decade, however, there was a turning point in the history of the CAS. In 1993, the Swiss Federal Court stated that the CAS did not meet all of the standards required for international arbitrations, namely the independence of the arbitral body<sup>20</sup>: this issue would have come to a head had the IOC been a party in a CAS arbitration, for instance<sup>21</sup>. The episode forced the IOC to reform the CAS, which was re-organized along the lines of the current model (with the so called 1994 Paris Agreement)<sup>22</sup>.

Nowadays the Court of Arbitration for Sport is a permanent arbitration structure, and its mission is to "settle sports-related disputes through arbitration and mediation"<sup>23</sup>.

It is made of two distinct bodies, both settled in Lausanne

(Switzerland): the International Council of Arbitration for Sport (ICAS) and the CAS<sup>24</sup>.

The former was created in 1994 in order to provide the CAS with genuine independence from the IOC. It is a foundation regulated by Swiss civil law; its board is made of twenty members chosen to represent the Olympic movement and to ensure its autonomy<sup>25</sup>. The task of the ICAS is to facilitate the settlement of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS<sup>26</sup>. Moreover, the ICAS appoints the personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from those lists<sup>27</sup>.

There are at least 150 arbitrators and at least 50 mediators: the former provide "the arbitral resolution of disputes arising within the field of sport through the intermediary of arbitration provided by Panels composed of one or three arbitrators"; the latter provide "the resolution of sports-related disputes through mediation"<sup>28</sup>.

The CAS carries out several different activities<sup>29</sup>. It provides mediation<sup>30</sup>, and it also can render non-binding advisory opinions upon request of the IOC, the IFs, the NOCs, WADA and the organizations recognized by the IOC and the OCOGs, about any legal issue with

International Doping Cases - Awards by the IAAF Arbitration Panel 1985-1999, Sep, Milano, 2000.

20 Swiss Federal Court, 15 March 1993, Gundel v. Fédération Equestre Internationale, in BGE 119 II S. 271 ss.

12 These issues are widely analyzed by F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 416 et seq., and L. Casini, *Il diritto globale dello sport*, above, p. 226 et seq.

13 See G. Teubner, "Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?", in *Public Governance of the Age of Globalization*, ed. by K.H. Ladeur, Aldershot, Ashgate, 2004, p. 71 et seq., and H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford and Portland, Hart, 2005.

14 T. Mann, *Joseph und seine Brüder*, a four-part novel by Thomas Mann, written from 1926 to 1943: I. Die Geschichten Jaakobs (1926-1930); II. Der junge Joseph (1931-1932); III. Joseph in Ägypten (1932-1936); IV. Joseph der Ernährer (1940-1943).

15 The history of CAS is illustrated by The Court of Arbitration for Sport 1984-2004, above, e and there especially in K. Mbaye, "Une nouvelle institution d'arbitrage: le Tribunal Arbitral du Sport (TAS)" (1984), p. 6 et seq., B. Simma, "The Court of Arbitration for Sport" (1988), p. 21 et seq., and M. Reeb, "The Role and Functions of the Court of Arbitration for Sport" (2002), p. 31 et seq.; see also D.H. Yi, "Turning Medals Into Medal: Evaluating The Court Of Arbitration of Sport As An International Tribunal", 6 *Asper Review of International Trade & Business Law* (2006), p. 289 et seq., A. Rigozzi, *L'arbitrage international en matière de sport*, above, p. 132 et seq., and A. Wax, *Internationales Sportrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts*, above, p. 137 ss.

16 According to K. Mbaye, this formula comes directly from Juan Antonio Samaranch, and it is reported in the Swiss Federal Court decision A. et B. contre Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport, 4P.267/2002,

27 May 2003, in BGE 129 III 445 S. 462. That was the famous case Lazutina/Danilova, in which Swiss Court acknowledged that CAS has gained its own independence from IOC after the 1993-94 reform.

17 F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 65, citing F. Alaphilippe, "Légitimité et légalité des structures internationales du sport: une toile de fond", in *Revue juridique et économique du sport*, 1993, n. 3, p. 15.

18 For these data, see <http://www.tas-cas.org/statistics>.

19 L. Tarasti, *Legal Solutions in the International Doping Cases - Awards by the IAAF Arbitration Panel 1985-1999*, Sep, Milano, 2000.

20 Swiss Federal Court, 15 March 1993, Gundel v. Fédération Equestre Internationale, in BGE 119 II S. 271 ss.

21 The Court in fact observed that the IOC "est compétent pour modifier le Statut du TAS; il supporte en outre les frais de fonctionnement de ce tribunal et joue un rôle considérable dans la désignation de ses membres. Il reste que, étant donné, d'une part, la possibilité qui subsiste d'assurer, par la voie de la récusation, l'indépendance de la Formation appelée à connaître d'une cause déterminée, et, d'autre part, la déclaration solennelle d'indépendance souscrite par chaque membre du TAS avant son entrée en fonction, de telles objections ne permettent pas à elles seules de dénier au TAS la qualité de véritable tribunal arbitral [...], quand bien même il serait souhaitable que l'on assurât une indépendance accrue du TAS à l'égard du CIO" (BGE 119 II S. 280).

22 See D. Kane, "Twenty Years On: An Evaluation of the Court of Arbitration for Sport" (2003), in *The Court of Arbitration for Sport 1984-2004*, above, p. 455 et seq., especially p. 458 ss.

23 Articolo 5, Statutes of the Bodies Working for the Settlement of Sports-related Disputes. Therefore CAS can be likened to institutions such as the International Court of Arbitration (ICC), the International Centre for the Settlement of the Investment Disputes (ICSID) or, for the USA, the American Association of Arbitration (AAA).

24 There are also two field offices, one in

New York and the other in Sydney.

25 See article S.4, Statutes of the Bodies Working for the Settlement of Sports-related Disputes: The ICAS is composed of twenty members, namely high-level jurists appointed in the following manner: a. four members are appointed by the International Sports Federations (the "IFs"), viz. three by the Summer Olympic IFs ("ASOIF") and one by the Winter Olympic IFs ("AIWF"), chosen from within or from outside their membership; b. four members are appointed by the Association of the National Olympic Committees ("ANOC"), chosen from within or from outside its membership; c. four members are appointed by the International Olympic Committee ("IOC"), chosen from within or from outside its membership; d. four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; e. four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS. Some say, however, that these mechanisms would give to the Olympic movement even more influence on CAS than before: on these aspects, D.H. Yi, "Turning Medals Into Medal: Evaluating The Court Of Arbitration of Sport As An International Tribunal", above, p. 316 ss.

26 According to the article S6, Statutes of the Bodies Working for the Settlement of Sports-related Disputes, ICAS adopts and amends its Statute and the Statute of CAS; it looks after the financing of the CAS; it supervises the activities of the CAS Court Office; if it deems such action appropriate, it sets up regional or local, permanent or ad hoc arbitration structures; it may create a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means; it may take any other action which it deems likely to protect the rights of the parties and, in particular, to best guarantee the total independence of the arbitrators and to promote the settlement of sports-related disputes through arbitration.

27 Before the 1994 reform, the list included only 60 personalities. The personalities

designated by the ICAS appear on the CAS list for a renewable period of four years. The ICAS reviews the complete list every four years; the new list enters into force on 1 January of the following year. In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. In addition, the ICAS shall respect, in principle, the following distribution: 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside; 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside; 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside; 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article. In appointing the personalities who appear on the list of arbitrators, the ICAS shall, wherever possible, ensure fair representation of the continents and of the different juridical cultures. (Articles S13 et seq., Statutes of the Bodies Working for the Settlement of Sports-related Disputes). In 2009, the list of arbitrators included around 300 personalities; some of them appeared also in a special list regarding soccer [www.tas-cas.org/arbitrators-genlist](http://www.tas-cas.org/arbitrators-genlist)).

28 Article S3, Statutes of the Bodies Working for the Settlement of Sports-related Disputes.

29 The CAS includes a Court Office composed of a Secretary General and one or more Counsel, who replace the Secretary General when required (article S22, Statutes of the Bodies Working for the Settlement of Sports-related Disputes). The activities of the CAS Court Office are supervised by the ICAS, which appoint the CAS Secretary general.

respect to the practice or development of sport or any activity related to sport.

Its main task, however, is to settle disputes. To this end, the CAS is composed of two divisions, the *Ordinary Arbitration Division* and the *Appeals Arbitration Division*<sup>31</sup>.

The Ordinary Arbitration Division constitutes Panels, whose task is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or his deputy, all other functions in relation to the smooth running of the proceedings conferred upon it by the CAS Procedural Rules<sup>32</sup>. The Appeals Arbitration Division constitutes Panels, whose task is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide<sup>33</sup>.

Arbitration proceedings submitted to the CAS are assigned by the CAS Court Office to one of these two divisions according to their nature<sup>34</sup>. In addition to these two divisions, there are *ad hoc* chambers created for the Olympic Games (from 1996) and for other sports events such as the FIFA World Cup<sup>35</sup>.

This variety of tasks thus produce different models of judicial activities within the CAS. It resembles a civil law court when it deals with commercial law cases (such as players transfers), an administrative law court when it has to decide claims against sporting institutions' decisions, a criminal law court when it has to balance evidences in doping violations, and even a constitutional court when it must resolve conflicts between different institutions of the Olympic movement<sup>36</sup>. As a matter of fact, the coexistence of different jurisdictional models is common in international courts or tribunals: take, for instance, the WTO Dispute Settlement Body (DSB), in which there are both constitutional features (concerning the interpretation of Treaties or the protection of fundamental rights) and administrative law and civil law ones (relating to the review exercised by DSB over decisions and proceedings)<sup>37</sup>.

Lastly, the activities of CAS have increasingly expanded in the last fifteen years, so that the growing number of its decisions has led to the formation and the consolidation of a set of principles and rules<sup>38</sup>. This complex of norms stems from both the interpretation of sports law and the creation of new principles specific to sport (such as principle of "fair play", or that of "strict liability" in doping cases). This set of principles and rules has been labelled *lex sportiva*, and it is often relied upon by CAS panels as well as by other institutions: even the World Anti-Doping Code refers to CAS awards.

This result is mainly due to the necessity of harmonizing sports regulations (especially anti-doping rules, which were particularly different from each other before the adoption of the World Anti-Doping Code) and to the need for protecting fundamental rights of the athletes within the sport legal system (so that they do not have to file a case before domestic courts). In order to ensure CAS' supremacy, all of the basic legal documents of the sports system set out *ad hoc* clauses. The Olympic Charter has established CAS jurisdiction over IOC decisions and regarding any disputes arising during - and in connection with - the Olympic Games<sup>39</sup>. IFs Statutes and Regulations have introduced specific clauses in which they devolve disputes to the CAS<sup>40</sup>. The World Anti-Doping Code points the CAS as a judge of last instance in doping cases<sup>41</sup>.

The CAS Novel thus comes to a happy end. Born as the favourite son of the IOC, after an initial period of difficulty, it has constantly widened its jurisdiction, and has finally come to be viewed as a supreme court for sport by all sporting institutions: IOC, WADA, and even IFs. Through its decisions, CAS has made a crucial contribution to the emergence of global sports law. It develops common legal principles among sporting bodies; it interprets and harmonizes sports law; it reviews sporting institutions' decisions; it helps affirm the separation of powers within the sport legal system. The CAS is no longer a child sitting there by the well ("an der Tiefe"): it has become "the Nourisher" (Der Ernährer) of global sports law<sup>42</sup>.

## 2. The role of the CAS in making a *lex sportiva*

Among the different activities carried out by the CAS, some are especially relevant to the formation of the global sports law. In particular, we can distinguish at least three different functions. First, the CAS has been applying general principles of law to sporting institutions, and it has been also creating specific "principia sportiva".

Secondly, the CAS plays a significant role in interpreting sports law, thus influencing and conditioning rulemaking activity by sporting institutions. Thirdly, the CAS greatly contributes to the harmonization of global sports law, also because it represents a supreme court, the apex of a complex set of review mechanisms spread across the world: for instance, doping case decisions issued by national anti-doping panels can be appealed to the CAS.

### 2.1. Development of common legal principles

The first issue relates to the adoption of legal principles by the CAS. From this perspective, one can consider, on the one hand, when awards apply or refer to general principles of law, and, on the other, when awards develop new principles specifically conceived for sport.

As to the first hypothesis, it is worth noting that CAS often refers to public international law principles. In the *Dodó case*, for instance, the Brazilian national soccer federation (*Confederação Brasileira de Futebol*) was held responsible for decisions issued by the *Superior Tribunal de Justiça Desportiva do Futebol* (STJD), a body partially independent from the national federation, because of the principle which states that "States are internationally liable for judgments rendered by their courts, even if under their constitutional law the judiciary is wholly independent of the executive branch"<sup>43</sup>. An other example comes directly from the Arbitration rules for the Olympic Games, which establish that the CAS "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"<sup>44</sup>.

Furthermore, the CAS largely adopts public law principles, such as due process, fairness, duty to give reasons. Therefore, a relevant difference emerges between other forms of global law or transnational law, such as the *lex mercatoria*, and the *lex sportiva*: while the former adopt principles that are mostly - if not exclusively - based on private law, *lex sportiva*, and in particular CAS awards, have mostly developed using and in accordance with public law principles, particularly those drawn from criminal law and administrative law<sup>45</sup>.

The CAS itself, in fact, highlighted that there is "an evident analogy

30 See I.S. Blackshaw, *Mediating Sports Disputes: National and International Perspectives*, T.M.C. Asser, The Hague, 2009.

31 Article S20, Statutes of the Bodies Working for the Settlement of Sports-related Disputes. Articles R27-R37 of the CAS Procedural Rules establish provisions as to Application of Rules, Seat, Language, Representation and Assistance, Notifications and Communications, Time limits, Independence and Qualifications of Arbitrators, Challenge, Removal, Replacement, Provisional and Conservatory Measures.

32 See articles R27-R37 and R38-46, CAS Procedural Rules.

33 See articles R27-R37 and R47-59, CAS Procedural Rules.

34 Such assignment may not be contested by the parties or raised by them as a cause of irregularity. See *The Proceedings before the Court of Arbitration for Sport, CAS & FSA/SAV Conference Lausanne 2006*, ed. by A. Rigozzi and M. Bernasconi, Weblaw, Berne, 2007, and A. Merone, *Il Tribunale arbitrale dello sport*, above, p. 105 et seq.

35 The early experiences of the CAS Olympic games Ad Hoc division are analyzed by G. Kaufmann-Kohler, *Arbitration at the Olympics - Issues of fast-track dispute resolution and sports law*, Springer, The Hague-London-New

York, 2001.

36 F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 296.

37 B. Marchetti, "Il sistema di risoluzione delle dispute del WTO: amministrazione, corte o tertium genus?", in *Riv. trim. dir. pubbl.*, 2008, p. 933 et seq.

38 J.A.R. Nafziger, *Lex Sportiva and CAS* (2004), above, p. 409 et seq.

39 See articles 15.4, 45.6 e 59 of the Olympic Charter.

40 See, for instance, articles 62 et seq. of FIFA Statutes, article 36 of FIBA General Statutes or articles 74 et seq. of UCI Constitution.

41 See, for instance, article 13 of the World Anti-Doping Code.

42 Both expressions are from T. Mann, Joseph and his brothers, above.

43 CAS 2007/A/1370, *FIFA v/Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodó*, CAS 2007/A/1376, *WADA v/Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodó*, para. 88.

44 See [http://www.tascas.org/dzwfiles/document/422/5048/0/rules%20English%20\(2008.07.04\).pdf](http://www.tascas.org/dzwfiles/document/422/5048/0/rules%20English%20(2008.07.04).pdf).

45 See F. Latty, *La lex sportiva. Recherche sur le droit transnational*, above, p. 320 s. In CAS-JO[-TUR] 06/008, *Isabella Dal Balcon v. Comitato Olimpico Nazionale*

between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities<sup>46</sup>. This is why the CAS often reviews sporting institutions' action by comparing them to public administration: in the *Pistorius v. IAAF* case, for instance, the CAS evaluated the decision making process followed by the IAAF in order to verify whether the decision challenged by the athlete was "procedurally unsound"<sup>47</sup>.

The most important example of such principles is probably the principle of due process. In this regard, the CAS has issued several decisions that have allowed this principle to be introduced as a fundamental right in global sports law.

In 1995, for instance, the CAS stated that "The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion"<sup>48</sup>. Some years later, the CAS observed that it "has always considered the right to be heard as a general legal principle which has to be respected also during internal proceedings of the federations [...] Federations have the obligation to respect the right to be heard as one of the fundamental principles of due process"<sup>49</sup>. In 2004, the CAS stated that it "will always have jurisdiction to overrule the Rules of any sport federation if its decision making bodies conduct themselves with a lack of good faith or not in accordance with due process"<sup>50</sup>.

The importance of this jurisprudence is crucial if we consider that the World Anti-Doping Code - which recognizes the right of athletes to a fair hearing in anti-doping proceedings - entered into force only in 2003<sup>51</sup>. From this perspective, CAS acted as a law-maker, in so far as it brought in the sports legal system the principle of (procedural) due process<sup>52</sup>. The CAS, in fact, has always affirmed its role in "curing" procedural defects: meaning that such defects can be cured before the CAS, without necessarily upheld sporting institutions' decisions<sup>53</sup>. However, it is worth noting that the only case - to date - in which a CAS award has been successfully challenged before the Swiss Federal Court was because of a due process violation<sup>54</sup>.

A different hypothesis is when CAS does not apply a principle of general law, but creates a "new" principle. This happens, for instance, when-

ever 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<sup>55</sup>. This example provides us with an interesting case of judge-made law at the international level and highlights some relevant trends in global regimes. In particular, the emergence of global regulatory regimes and global courts leads to the constitution of autonomous sets of norms, principles and procedures. In this process, two distinct phenomena take place: first, these regimes imitate the machinery of the State, selecting principles and mechanisms that can be adapted to their own contexts; and second, they try to develop their own legal principles, which are binding within the regime that created them. The first phenomenon contributes to the development of principles of public law and administrative law at the global level, through a mimetic process. The second is an attempt to build autonomous and complete legal orders. This phenomenon, however, encounters many obstacles; mainly because these regimes often remain in some ways connected to the State (e.g. the Swiss Federal Court can review CAS awards according to the 1958 New York Convention<sup>56</sup>).

## 2.2. Interpreting sports law and influencing rulemaking

The second function carried out by the CAS in making a *lex sportiva* is the influence it has on sporting institutions' regulatory activities. This function is connected with the role played by the CAS in interpreting sports law and it leads directly to one key question: what is the weight of CAS jurisprudence? Is there any rule of binding precedent?

Formally, there is no rule of this kind for CAS awards, meaning that no panel is bound by preceding decisions issued by other panels. However, while reading through all the awards, panels demonstrate a consistent deference to CAS jurisprudence, which is often referred to by arbitrators. There is an analogy here between the CAS and other international courts or tribunals, such as the WTO Dispute Settlement Body: although there is no formal principle of *stare decisis* in the decisions of the WTO Appellate Body, it does tend to follow its own "jurisprudence"<sup>57</sup>.

Thanks to this informal but consistent rule of precedent, the CAS exercises a strong influence on sports law-making. The clearest example comes from anti-doping rules. In this case, during the formation process of the World Anti-Doping Code (both the first and the revised versions), CAS decisions were taken in due account; and the Code itself,

Italiano (CONI) & Federazione Italian National Skiing Federation, which have excluded an athlete from the Olympic team, was judged "arbitrary" and "unfair".

46 CAS 98/2000, AEK Atene & S.K. Slavia Praga v. UEFA, award of 20 August 1999, para. 58.

47 CAS 2008/A/1480, especially para. 56 ss.

48 CAS 94/129 USA Shooting & Q. / Union Internationale de Tir (UIT), 23 May 1995, para. 34. See also, ex plurimis, CAS ad hoc Division (O.G. Atlanta) 96/005 A., W. and L. v. NOC Cape Verde (NOC CV), 1 August 1996: "Any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it, in accordance with the elementary rules of natural justice and due process".

49 CAS 2001/A/317 A. / Fédération Internationale de Lutttes Associées (FILA), 9 July 2001, citing CAS 91/53 G. v/ FEI, award of January 15, 1992, Digest, p. 79, 86 f.

50 CAS OG 04/009, H.O.C. & N. Kakkamanakis / I.S.A.F., 24 August 2004.

51 On these aspects, M.S. Straubel, "Doping Due Process: A Critique of the Doping Control Process in International Sport", 106 Dickinson Law Review (2002) p. 523 et seq., and D. Panagiotopoulos, "International Sports Rules' Implementation-Decisions' Executability:

The Bliamou Case", 15 Marquette Sports Law Review (2004) p. 1 et seq.

52 See J. Lever, "Why Procedure Is More Important than Substantive Law", 48 International and Comparative Law Quarterly (1999), p. 285 et seq., and J.L. Mashaw, Due Process in the Administrative State, Yale University Press, New Haven, 1986. On substantive due process, C.R. Sunstein, "Due Process Traditionalism", 106 Michigan Law Review (2008), p. 1543 et seq.

53 "According to the constant jurisprudence of the CAS, a procedural violation is not enough in and by itself to set aside an appealed decision (see CAS 2001/A/345, in Digest of CAS Awards III, 240 and the references quoted therein); it must be ascertained that the procedural violation had a bearing on the outcome of the case. Whenever a procedural defect or unfairness in the internal procedure of a sporting body could be cured through the due process accorded by the CAS, and the appealed decision's ruling on the merits was the correct one, CAS panels had no hesitation in confirming the appealed decision" (CAS 2004/A/777 ARcycling AG v. Union Cycliste Internationale (UCI), 31 January 2005, para. 56). See also CAS 2006/A/1175, D. v. International Dance Sport Federation, award of 26 June 2007, para. 18: "the virtue of an appeal system which allows for a full rehearing

before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "fade to the periphery" (CAS 98/211, B. v/ Fédération Internationale de Natation, CAS Digest II, p. 255 at 264, citing Swiss doctrine and case law)". See articles R44.2 and R57, CAS Procedural Rules, which establish provisions regarding Hearing.

54 Arrêt of 22 March 2007, that annulled CAS 2005/A/951 Cañas v/ATP, award of 23 May, because "le droit d'être entendu du recourant a été méconnu par le TAS. Etant donné la nature formelle de ce droit [...], la sentence attaquée doit être annulée, sans égard au sort qui sera réservé aux arguments subsidiaires avancés par le recourant". Following this decision, CAS has anyhow confirmed its precedent award: CAS 2005/A/951 Cañas v/ATP, 23 May 2007, Revised award).

55 "Principles of sports law" or "Principia sportiva" are often referred to by the CAS (see, ex plurimis, CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), above, para. 158). The most famous ones are probably the "fairness and integrity of international competitions" and the "fair play". On the "strict liability" principle, see J. Soek, The Strict Liability Principle and The Human Rights of Athletes in Doping Cases, T.M.C. Asser, The Hague, 2007. A complete list of such principles is

in F. Latty, La lex sportiva. Recherche sur le droit transnational, above, p. 305 et seq.; see also E. Loquin, "L'utilisation par les arbitres du TAS des principes généraux du droit et le développement d'une Lex sportiva", in The Proceedings before the Court of Arbitration for Sport, above, p. 85 et seq., at p. 101 et seq., and A. Merone, Il Tribunale arbitrale dello sport, above, p. 233 et seq.

56 See L. Fumagalli, "La circolazione internazionale dei lodi sportivi: il caso del Tribunale arbitrale dello sport", in Riv. dir. sport., 1994, p. 364 et seq., and F. Oschütz, Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen und deutschen Schiedsverfahrensrecht, Duncker & Humblot, Berlin, 2005.

57 On these aspects, see the trilogy written by R. Bhalu: "The Myth about Stare Decisis and International Trade Law", 14 Am. U. International L. Rev. (1999), p. 845 et seq., "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication", 9 J. Transnational L. & Policy (1999), p. 1 et seq., and "Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication", 33 George Washington International L. Rev. (2001), p. 873 et seq. See also I. Venzke's Paper, p. 32 et seq., and more generally Mark Jacob's Paper.

in comments pertaining to specific articles refers to the CAS jurisprudence<sup>58</sup>.

Finally, another activity which illustrates the law-making role played by the CAS is the production of advisory opinions in response to requests from IOC, IFs, WADA or other sporting institutions. Although these opinions are not binding, they have the power of moral suasion and can influence the choices of sporting entities. In this case, the CAS acts like the French *Conseil d'État* or the Italian *Consiglio di Stato*, which do not operate only as judges, but are also called to advise the legislature. This is a fundamental function of such tribunals, which to date remains underdeveloped within sporting institutions.

### 2.3. Harmonizing global norms through the appeals procedure

Lastly, the third function of the CAS to be considered is that of normative harmonization. This kind of "law-making" is effected through the appeals procedure. CAS, in fact, represents the apex of a very complex judicial system, made up of two or even three levels. At the first two levels there are either national sporting tribunals or international sporting federation tribunals or both; while at the top level, as the court of last instance, there is the CAS. This kind of system creates a centralized mechanism of review that seems to be very effective: it has been working very well, for instance, in doping matters, where CAS can now intervene after the other two bodies have already reached a decision concerning a particular case. Thanks to the appeals procedure, therefore, CAS - that acts like a supreme court - plays a significant role in harmonizing global sports law.

In any event, an appeal against the decision<sup>59</sup> of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body<sup>60</sup>.

The need for an arbitration agreement represents the legal basis for a CAS intervention, which is legitimated through mutual agreements, i.e. the same kind of legitimacy of the entire sports legal system and of private law more generally (although it can be argued that professional athletes are free to decide about this once they are affiliated to a sport federation)<sup>61</sup>.

The CAS has "full power to review the facts and the law"<sup>62</sup>, so that it "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"<sup>63</sup>: the CAS, therefore, can be either an appeal judge or a "Cour de Cassation". The appeals procedure - based on a review of a decision issued by a sporting body - is another peculiarity of the CAS, in comparison with other forms of international arbitrations, where contracts

are usually at stake<sup>64</sup>. Within the sports legal system, this kind of procedure is essential for ensuring the equal treatment of athletes and for avoiding excessive influence of national sporting institutions over cases regarding domestic athletes<sup>65</sup>. Moreover, the appeals procedure may be the first time that a case is brought before a truly impartial body<sup>66</sup>, because it often happens that sporting tribunals are not completely separated from their own federations<sup>67</sup>.

In any event, the appeals procedure is an arbitration. It implies 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 which has issued the challenged decision 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"<sup>68</sup>. Moreover, the parties have to accept CAS jurisdiction, that is why sporting institutions' statutes and regulations establish an *ad hoc* clause<sup>69</sup>. This confirms that the most significant form of legitimacy of sport judicial activity is based upon consensus.

Through the appeals procedure, the CAS connects and harmonizes both transnational and national sports law. This function is thus closely connected to the development of common legal principles<sup>70</sup>, such as legality, fairness and good faith<sup>71</sup>, as well as "general principles of law drawn from a comparative or common denominator

reading of various domestic legal systems and, in particular, the prohibition of arbitrary r unreasonable rules and measures"<sup>72</sup>. Therefore, the CAS, like an international or "mercatique" judge, is "amené à déduire d'une comparaison des différent systèmes juridiques nationaux l'existence de règles de droit positif applicables à l'activité dont il est le juge"<sup>73</sup>.

### 3. The relationships between the CAS and public authorities

The CAS is an example of a centralized review mechanism over sporting institutions' activities. It is one of the most experienced among international tribunals, which are continually growing in numbers<sup>74</sup>. The creation of the CAS is also attributable to the necessity of limiting the intervention of domestic courts in sporting matters, of which there have been increasing instances since the end of the 1980s (largely due to the rise in doping cases and to the commercialization of sports, such as in the well-known cases of Reynolds and Krabbe<sup>75</sup>). National courts' intervention was perceived as posing a threat to the autonomy of sporting institutions<sup>76</sup>. As a consequence, in order to strengthen the role of CAS, most of IFs have dismissed their own arbitrations bodies (e.g. the IAAF), although some of them have retained jurisdiction over specific matters (for instance, FIFA has not devolved to CAS disputes concerning violations of the rules of the game of football<sup>77</sup>). The role of domestic courts within the sports system, however, brings to the fore another crucial issue: the relationships between the CAS and public authorities.

58 See Comments to articles 3.1 (Burdens and Standards of Proofs), 3.2.4 (as to drawing an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation), and 4.2.2 (Specific substances).

59 See CAS 2004/A/748: "in order to determine whether there exists a decision or not, the form of a communication has no relevance. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal. What is decisive is whether there is a ruling - or, in the case of a denial of justice, an absence of ruling where there should have been a ruling - in the communication".

60 R47, Cas Procedural Rules. See, ex multis, CAS 2008/A/1583, Sporting Lisboa e Benfica Futebol SAD v/ UEFA, & FC Porto Futebol SAD; CAS 2008/A/1584, Vitória Sport Clube de Guimarães v/ UEFA, & FC Porto Futebol SAD, award of 15 September 2008, para. 5.1: "there must be a "decision" of a federation, association or another sports-related body;

"the (internal) legal remedies available" must have been exhausted prior to appealing to the CAS; the parties must have agreed to the competence of the CAS"; on these aspects, M. Bernasconi, "When is a "decision" an appealable decision?", in The Proceedings before the Court of Arbitration for Sport, above, p. 261 et seq.

61 Here there is a different international judiciary legitimacy compared with those addressed in A. von Bogdandy and I. Venzke Paper. This is due to the peculiar nature of the CAS, that is neither a Court or a pure Arbitration body.

62 J.-P. Karaquillo, "Le rôle du Tribunal du sport en tant qu'instance d'appel externe aux fédérations sportives", in The Proceedings before the Court of Arbitration for Sport, above, p. 33 et seq.

63 R57, Cas Procedural Rules. An in-depth analysis of these issues is in A. Rigozzi, L'arbitrage international en matière de sport, above, p. 552 et seq.

64 See R.H. McLaren, "Sports Law Arbitration by CAS: is it the Same as International Arbitration?", 29

Pepperdine L. Rev. (2001) p. 101 et seq.

65 See CAS 96/156, F. v. FINA, award of 10 November 1997, in which the need of ensuring an international review of national federations' decisions is underlined.

66 This point is raised by A. Rigozzi, L'arbitrage international en matière de sport, above, p. 552 et seq., who observed that CAS appeal procedure is not a "procédure appellatoire à proprement parler".

67 CAS 2007/A/1370, FIFA v/Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodô, CAS 2007/A/1376, WADA v/Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodô, para. 71 ss.

68 R58, CAS Procedural Rules.

69 And this is what almost all federations did. An exception is in CAS 2006/A/1190, WADA v/ Pakistan Cricket Board & Akhtar & Asif, award of 28 June 2006, regarding cricket.

70 Above section 2.1.

71 Several cases are reported by A. Rigozzi, L'arbitrage international en matière de sport, above, p. 644 ss.

72 CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), above.

73 F. Latty, La lex sportiva. Recherche sur le droit transnational, above, p. 308.

74 See K.J. Alter, "Delegating to International Courts: Self-Binding vs. Other-Binding Delegation", 71 Law & Contemporary Problems (2008), p. 37 et seq; for some data, see the Project on International Courts and Tribunals (<http://www.pict-cti.org/>). See also B. Kingsbury's Paper.

75 P. David, A Guide to the World Anti-Doping Code. A Fight for the Spirit of Sport, above, p. 36 et seq.

76 J. Anderson, "Taking Sports Out Of The Courts": Alternative Dispute Resolution and the International Court of Arbitration for Sport", 10 Journal of Legal Aspects of Sport (2000), p. 123 et seq.

77 See article 63 FIFA Statutes, which estab-

It may happen that some of the domestic decisions appealed to the CAS were taken by public bodies, or even domestic courts. In these cases, CAS can be called upon to judge the decisions of public authorities.

Sometimes States themselves leave the last word to the CAS: in Italy, for instance, a specific provision establishes that doping sanctions issued by the national anti-doping tribunal (a public body) can be appealed to the CAS. In other circumstances, the CAS itself has resolved the matter, by simply ignoring the domestic decision<sup>78</sup>. In particular, the CAS stated that “the coexistence of national and international authority [...] is a familiar feature, and it is well established that the national regime does not neutralise the international regime”<sup>79</sup>. Therefore, national sovereignty - i.e. in this case the power to sanction athletes - “n’a, en principe, vocation à s’appliquer que sur le seul territoire national” and “la décision nationale peut toutefois être remplacé par une décision de l’autorité internationale - le TAS - pour que soit assurée la nécessaire uniformité du droit”<sup>80</sup>. In conclusion, it would be possible in theory that one State impose its own decisions, during sports events held in its own territory, against the will of the “autorité internationale”, such as IFs or the CAS; however, were this to happen, that State would not be allowed to host any international sport competition<sup>81</sup>.

It is worth noting, however, that domestic courts have intervened mostly in doping cases. From this perspective, the creation of the World Anti-Doping Agency (WADA) and the formation of a public-private anti-doping regime, followed by the adoption of the World Anti-Doping Code and the signature of the UNESCO Convention against doping in sport, have minimized the risk of actions being brought before national judges<sup>82</sup>. Furthermore, while looking at the process of “nationalization” that accompanied the formation of the anti-doping regime, some scholars have found a relationship of “international delegation” between States and the CAS<sup>83</sup>. This would offer a further explanation of the high effectiveness of CAS procedures, which during the Olympic games are also extremely fast (cases are solved within 24 hours)<sup>84</sup>. Lastly, CAS decisions - such as disqualifying an athlete or changing a result - are often very easily executed<sup>85</sup>.

Thus conflicts between public authorities and CAS are not frequent. Evidence of this can be found in the low number of claims against CAS awards before the Swiss Federal Court<sup>86</sup>. In 25 years, with around 1000 awards decided, only 30 such claims<sup>87</sup> were made against CAS awards, and of those, only one resulted in annulment of the award in question<sup>88</sup>. From this point of view, the Swiss Federal Court is the “closing gate” of the whole system, and it may be called upon to decide on an award issued in any part of the world<sup>89</sup>, according to the Swiss Federal Act on Private International Law<sup>90</sup>.

In conclusion, the case of sport shows some divergences in comparison with the general trends of international law. Some scholars observe that globalization and the rise of international institutions and their activities produce reactions from national courts. The latter, due to a lack of review mechanisms at the global level, have begun to act like review bodies over international organizations<sup>91</sup>. The sport legal system does not fit this paradigm, but, in a certain way, it confirms the hypothesis. In the past, in fact, national judges sought to fill the gaps in global sports law, particularly in doping matters. Once both a global anti-doping regime and a complex judicial system had been created, the role of domestic courts diminishes. Yet there are still dark zones in the sports judicial system. It has reached a high level of maturity in doping cases, but not in other fields: such as for instance the selection process for the Olympic games or the review over IOC decisions more generally<sup>92</sup>. In addition, in some States, particularly developing countries, national judicial bodies might be influenced by the most powerful IFs<sup>93</sup>.

In any event, the sports legal system is equipped with judicial machinery that is more advanced than in any other private regime, including that of the internet<sup>94</sup>. Yet this system is even more effective than other public international law mechanisms (and the CAS has been likened to the ECJ)<sup>95</sup>, because States do not easily accept the delegation of powers to an international court<sup>96</sup>: no such risk exists in sport, however, given that States are not parties to the disputes<sup>97</sup>.

lish that disputes regarding the following do not fall under CAS jurisdiction: “a) violations of the Laws of the Game; b) suspensions of up to four matches or up to three months (with the exception of doping decisions); c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made”.

78 CAS/A/1149 e CAS/A/1211, World Anti-Doping Agency (WADA) v. Federación Mexicana de Fútbol (FMF) and Mr. José Salvador-Carmona Alvarez, award of 16 May 2007, citing CAS 96/156, F. v. FINA, award of 10 November 1997, TAS 98/214, B. / Fédération Internationale de Judo (FIJ), sentence du 17 mars 1999, CAS 2005/A/872, UCI v. Muñoz and Federación Colombiana de Ciclismo, TAS 2006/A/1119, Union Cycliste Internationale (UCI) c. L. & Real Federación Española de Ciclismo (RFEC), sentence du 19 décembre 2006, e TAS 2006/A/1120, Union Cycliste Internationale (UCI) c. G. & Real Federación Española de Ciclismo (RFEC), sentence du 19 décembre 2006.

79 CAS/A/1149 e CAS/A/1211, World Anti-Doping Agency (WADA) vs. Federación Mexicana de Fútbol (FMF) and Mr. José Salvador-Carmona Alvarez, cit., para. 26.

80 TAS 2006/A/1119, Union Cycliste Internationale (UCI) c. L. & Real Federación Española de Ciclismo (RFEC), sentence du 19 décembre 2006, para. 30: “l’autorité des États et l’autorité sportive internationale ne sont pas en concurrence; au contraire, leurs rôles sont complémentaires” (par. 29).

81 TAS 2006/A/1119, Union Cycliste Internationale (UCI) c. L. & Real Federación Española de Ciclismo (RFEC), sentence du 19 décembre 2006, par. 30, cited by CAS/A/1149 and CAS/A/1211, World Anti-Doping Agency (WADA) vs. Federación Mexicana de Fútbol (FMF) and Mr. José Salvador-Carmona Alvarez, award of 16 May 2007.

82 L. Casini, “Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)”, in 6 International Organizations Law Review (2009), p. 411 et seq.

83 See A. Ravjani, “The Court of Arbitration for Sport: A Subtle Form of International Delegation”, 2 J. Int’l Media & Entertainment Law (2002), p. 241 et seq. On the notion of “international delegation”, see 71 Law & Contemporary Problems (2008), n. 1, and there C.A. Bradley and J.G. Kelley, “The Concept of International Delegation”, p. 1 et seq.

84 Article 18, Arbitration rules for the Olympic Games.

85 Whilst the effects of such decisions might be particularly devastating in terms of money and reputation. See G. Mannucci, “La natura dei lodi del Tribunale arbitrale dello sport tra fenomenologia sportiva e ordinamento generale”, Dir. amm. (2010), p. 229 et seq.

86 See M.J. Mitten, “Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations”, 9 Pepperdine Dispute Resolution L. J. (2009), and A. Rigozzi, L’arbitrage international en matière de sport, above, p. 655 et seq. As to the USA, M.A. Weston, “Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration

for Sport”, 38 Georgia Journal of International & Comparative Law (2009), p. 99 et seq.

87 M.J. Mitten, Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations, above, p. 5.

88 Decision of 22 March 2007, Cañas v. ATP Tour, above.

89 This is why the New South Wales Court of Appeal, Raguz v Sullivan [2000] NSWCA 240, dismissed an appeal filed against a CAS award issued in Sydney, observing that this CAS arbitration rules are “transnational, universal, global”, and their application “is not dependent on a territorial nexus, nor is restricted territorially”, so that “this global substantive law is matched by a uniform procedural law thanks to the choice of a sole seat for all CAS arbitrations” (see D. Sturzaker and K. Godhard, “The Olympic Legal Legacy”, 2 Melbourne Journal of International Law (2001).

90 Article 190, ann. 2, Loi fédérale du 18 décembre 1987 sur le droit international privé. See A. Rigozzi, L’arbitrage international en matière de sport, above, p. 684 et seq., and A. Merone, Il Tribunale arbitrale dello sport, above, p. 155 et seq.

91 See E. Benvenisti and G. Downs, “National Courts, Domestic Democracy, and the Evolution of International Law”, 20 European Journal of International Law (2009), p. 59 et seq., and B. Kingsbury, “Weighing Global Regulatory Decisions in National Courts”, in Acta Juridica (2009). More generally, as to the relationships between courts, R.B. Ahdieh, “Between Dialogue and Decree: International Review of National Courts”,

79 N.Y.U. L. Rev. (2004), p. 2029 et seq., Y. Shany, The competing jurisdictions of international courts and tribunals, Oxford University Press, Oxford, 2003, and Regulating jurisdictional relations between national and international courts, Oxford University Press, Oxford, 2007, and S. Casese, I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale, Donzelli, Roma, 2009.

92 Lastly, see the 2009 decisions issued in Canada, by the Supreme Court of British Columbia and the British Columbia Court of Appeal, regarding the Vancouver Organizing Committee.

93 See V. M. Akech, “The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations”, in Entertainment and Sports Law Journal, January 2008, (<http://go.warwick.ac.uk/eslj/issues/volume6/number2/akech>).

94 The Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by ICANN, for instance, refers to different arbitration body, such as the WIPO Arbitration and Mediation Center), but does not exclude the right to bring the dispute “to a court of competent jurisdiction for independent resolution” (article 4, lett. k, UDRP); see D. Lindsay, International Domain Name Law. ICANN and the UDRP, Hart, Oxford and Portland, p. 95 et seq.

95 F. Latty, La lex sportiva. Recherche sur le droit transnational, above, p. 308.

96 K.J. Alter, “Delegating to International Courts: Self-Binding vs. Other-Binding Delegation”, above, p. 38, Y. Shany, “No Longer a Weak Department of Power? Reflections on the Emergence of a New

#### 4. Towards a sporting "judicial branch"?

Judicial activity plays a crucial role in sport and exhibits peculiar features in this field, as can be seen from the formation of the complex system governed by the CAS.

Firstly, this system has both review and dispute settlement functions, which can be carried out by the same institution (i.e. the CAS). Secondly, the high degree of effectiveness of CAS proceedings and decisions confirms the importance of granting independence to tribunals and courts as well as the usefulness of creating a multi-level judicial systems. Thirdly, the sport judicial system illustrates the integration between supranational and national levels, often realized by involving public administrations instead of domestic courts. This blurs the dividing line between the judiciary and the administration; similarly, the adoption of arbitration proceedings by public bodies blurs the distinctions between public law and private law<sup>98</sup>. Fourthly, the formation of a sports "judicial branch" provides evidence of the strategic role played by courts and tribunals in global law-making<sup>99</sup>.

The case of CAS and its system, therefore, allows us to draw some comparisons

between sport and other international regimes.

A first analogy concerns the functions carried out by these kinds of bodies. In the sports system, as in other international contexts, courts are created both to settle disputes and to review and control the exercise of powers by international organizations<sup>100</sup>: this happens in traditional treaty-based institutions (e.g. the ILO<sup>101</sup>) and in private regimes (e.g. the internet<sup>102</sup>). At the same time there is an increasing need to ensure the observance of minimum standards and to protect fundamental rights (such as in the anti-doping regime)<sup>103</sup>. A second analogy comes

from the strategic role played by courts at the global level. In many regulatory regimes, judges, panels or tribunals contribute, as does the CAS, to the development of common rules and principles: take, for instance, the case of WTO Dispute Settlement Body, which has been conceived of by some scholars as an example of global "constitutionalism"<sup>104</sup>. Furthermore, international courts and tribunals increase connections between regimes<sup>105</sup>. From this perspective, CAS has certainly developed many links between different sports regimes (such as the Olympic, the Anti-Doping regimes, and those of the several International Federations), although - at least to date - it does not "dialogue" very much with other international courts and tribunals<sup>106</sup>.

Global sports law shows that the effectiveness of an international judicial system also depends on the variety of judicial models that it adopts and the variety of remedies that it can offer. However, decisions issued by international courts or tribunals are often to be executed or might be reviewed by domestic courts: this happens with the CAS, whose awards can be challenged before the Swiss Federal Court. Nevertheless, once the sports legal system has developed a complex and formalized global judiciary, independent from the executive, it has reduced the number of cases reviewed by domestic courts. In other words, the more global regulatory regimes imitate State systems, the less they will require States' intervention. A peculiarity of global sports law emerges here, in comparison with other private or hybrid regimes: sports judicial mechanisms display many more similarities with public international law regimes than with private ones. This is a further confirmation of the theory that the more complex private regimes become, the more they will come to resemble public law regimes<sup>107</sup>.

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International Judiciary", 20 *European Journal of International Law* (2009) p. 73 et seq., and C. Brown, *A Common Law of International Adjudication*, Oxford University Press, Oxford, 2007.

97 A. Ravjani, "The Court of Arbitration for Sport: A Subtle Form of International Delegation", above, p. 244 et seq., who refers to a "low visibility delegation" made by States.

98 This point emerges in several CAS decisions, and it is more generally discussed by G. Van

Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims Against the State", 56 *International Comparative Law Quarterly* (2007), p. 371 et seq.

99 See S. Cassese, "La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale", in *Il diritto globale*, Einaudi, Torino, p. 137 et seq.

100 In this way, a universal value of "judicial review" emerges: see J. Jowell, "The Universality of Administrative Justice?", in *The Transformation of Administrative Law in Europe / La mutation du droit administratif en Europe*, ed. by M. Ruffert, European Law Publisher, Munich, 2007, p. 55 et seq., at p. 62 et seq.; and E. García de Enterría, *Democracia, Jueces y Control de la Administración*, Madrid, 2000.

101 ILO Constitution, articles 26, 27, 28 e 33. See S. Charnovitz, "The International Labour Organization in its Second Century", in *Max Planck UNYB* 4 (2000), p. 147 ss., at p. 175 ss.

102 I can Bylaws, Article IV, on "Accountability and Review".

103 See M. Cappelletti, *Dimensioni della giustizia nelle società contemporanee: studi di diritto giudiziario comparato*, il Mulino, Bologna, 1994, p. 39 et seq., who observed an extraordinary expansion

of constitutional and transnational justice, due to the need for controlling political power and for protecting fundamental rights.

104 D.Z. Cass, "The 'constitutionalization' of international trade law: judicial norm-generation as the engine of constitutional development in international trade", 12 *European Journal of International Law* (2001), p. 39 et seq.; more recently J.L. Goldstein and R.H. Steinberg, "Regulatory Shift: The Rise of Judicial Liberalization at the WTO", in *The Politics of Global Regulation*, ed. by W. Mattli e N. Woods, Princeton University Press, Princeton, 2009, p. 211 et seq., who refers to the "emergence of Judicial Lawmaking" (p. 227 et seq.). See also R.B. Stewart's Paper.

105 S. Cassese, *La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale*, above.

106 This is mostly due to the "specificity" of sport. However, it is most likely that there will be soon a more intensive dialogue between the CAS and other courts, such as the European Court of Justice or the European Court for Human Rights: sports cases that may affect antitrust regulation or fundamental rights of the athletes, in fact, have been increasing their numbers.

107 A. Riles, "The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State", 56 *Am. J. Comp. L.* (2008), p. 605 et seq., at p. 629, and E. Meidinger, "Competitive Supragovernmental Regulation: How Could It Be Democratic?", 8 *Chicago Journal of International Law* (2008), p. 513 et seq., at p. 516 et seq.



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# Does the Outsourcing of a Sports League Affect Its Evaluation under EU Competition Law?

by Olli Norros\*

*In Europe national sports leagues are usually organized to be overseen by a national federation of each sport. However, it is quite common that a national federation does not itself organize the league but assigns the organizing task to a separate legal entity, usually controlled by the teams that play in the league. The league corporation may be formed for example as a non-profit association, as a limited-liability company, or as a cooperative society. Professional sports leagues are a sensitive branch of business from a competition law perspective. The aim of this paper is to discover whether the outsourcing of sports league functions affects their evaluation from the point of view of EU competition law. The current prevailing view seems to be that the outsourcing of league functions could well be significant for different aspects of competition law. However, this paper argues that the outsourcing actually seems to be a neutral measure in light of competition law.*

## 1. Introduction

### 1.1 The aim of the Paper

The aim of this paper is to answer the following two-pronged question: is the evaluation of a sports league under EU competition law altered according to whether a national sports federation 1) organizes the league itself or 2) assigns the organizing functions to a separate legal entity such as a company owned by the league teams. As is described in more detail later, the current prevailing view seems to be that the outsourcing of league functions could well be significant for different aspects of competition law. However, this paper questions the prevailing view arguing that the outsourcing actually seems to be a neutral measure in light of competition law. Before defining the subject more precisely we must take a look on the two backgrounds of the theme, first outsourcing of league functions generally and then the application of competition law to league sports.

### 1.2 General Remarks on the Outsourcing of League Functions

Sports leagues are an important form of competition both in amateur and professional sports. However, an unambiguous definition of a sports league is difficult to determine. Usually a sports league is understood to be a series of matches involving team ball play, in which each team plays a predetermined number of matches against the other teams in the same league and receives points depending on the end result of each game.

The champion of the league may be decided directly according to which team has achieved the most points, as has traditionally been the case in soccer leagues in most countries, or the competition may continue after the prescheduled matches as an elimination tournament as happens for instance in the North American National Hockey League (NHL).

In Europe national sports leagues are usually organized to be overseen by a national federation of each sport. For example, in the UEFA Statutes a league is defined as “a combination of clubs within the territory of a Member Association and which is subordinate to and under the authority of that Member Association”.<sup>1</sup> However, it is quite common that a national federation does not itself organize the league but assigns the organizing task to a separate legal entity, usually controlled by the teams that play in the league. I refer to this kind of assignment hereafter as the *outsourcing of league functions*.

The initiative to outsource league functions usually comes from the league teams themselves, when they wish to increase their influence in the administration and commercial exploitation of the league.<sup>2</sup> The league teams' confidence in the national federation's abilities to administer the league may be reduced by the fact that the league clubs usually constitute only a small minority of all clubs that belong to the federation. This prevents the league clubs from exercising too much voting power in the federation even when the league clubs are unanimous in certain question.

For these reasons, *inter alia*, league functions have in many countries and in many sports been outsourced from national federation to a separate legal entity. The league corporation may be formed as 1) a non-profit association, like Finnish soccer league *Veikkausliiga* and many other soccer leagues in Europe, 2) as a limited-liability company, like the Finnish ice hockey league, English soccer Premier League or Major League Soccer (MLS) of North America, 3) or as a cooperative society, which, although not in use currently, would seem to be rather attractive alternative at least from the viewpoint of Finnish law.<sup>3</sup> It is not even necessary to form the league into a legal entity at all; the “big four” of North American professional leagues, Major League Baseball (MLB), National Basketball Association (NBA), National Football League (NFL) and National Hockey League (NHL) are all only joint ventures arranged by multilateral contracts.<sup>4</sup>

Outsourcing may reduce the internal tension in the federation between league clubs and other clubs, but there often emerges at least some kind of tension between the federation and the league corporation. And it is this tension that makes the relationship interesting in a juridical sense. The relationship can be one of partnership or membership, for example if the federation is a shareholder in the league company or if the league corporation is a member of the federation. The English Football Association is a “special shareholder” in the Premier League Ltd.,<sup>5</sup> and the Finnish Floorball Federation owns all of the shares in a league company.<sup>6</sup> But in many cases there is only a contractual relationship between a federation and a league, like for instance in Finland in ice hockey and soccer.

It must be pointed out that outsourcing of league functions differs in many ways from what outsourcing is normally understood to be in business. Usually outsourcing means that a firm stops performing some part of its manufacturing process in order to assign the task to some other firm that performs the task in a more cost-efficient way. When a national sports federation outsources league functions, the purpose is usually not to save costs by increasing efficiency. The case is usually that 1) a federation grants its official championship status to a league organized by a separate entity and 2) gets in return a boost in the league's professionalism and the sport's national standing generally. In addition, if there are monetary transactions between a national federation and a

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1 UEFA Statutes, Edition 2010, I. Definition of Terms, 4. “League”, available at [www.uefa.org](http://www.uefa.org) (accessed 4th July 2011).

2 Müller raises these two points when he discusses how the German soccer *Bundesliga* was made into an entity separate from the national federation. J. Christian Müller: ‘Club Licensing as a Means to Control Costs and to Safeguard the Integrity of the Game - the Example of the Bundesliga’, in *Idrottsjuridisk*

*skriftserie* (hereafter “*IS*”) 2004 pp. 277-299, pp. 281-282.

3 On the suitability of a non-profit association, limited-liability company and a cooperative society for organizing a sports league, see Norros 2011 pp. 195-264.

4 See generally Gregor Lentze: ‘The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective’, in 6 *Marquette Sports Law Journal* (hereafter “*Marq. Sports L. J.*”) 1995-1996 pp. 65-94, pp. 68-69; and Paul D. Abbott: ‘Antitrust and Sports - Why Major League Soccer Succeeds Where Other Sports Leagues Have Failed’, in 8 *Sports Lawyers Journal* (hereafter “*Sports Law. J.*”) 2001 pp. 1-20, p. 3.

5 [www.premierleague.com](http://www.premierleague.com) -> Premier League -> About Us (accessed June 17th 2011).

6 <http://salibandyliiga.fi/salibandyliiga/yhteystiedot> (accessed June 17th 2011).

league corporation, the net payer is not usually the federation, which would be the case in outsourcing normally, but rather the league corporation, which may be obliged to pass some part of its profit to the federation to support grassroots activities.

### 1.3 Sports Leagues and Competition Law

Professional sports leagues are a sensitive branch of business from a competition law perspective in a number of respects. One has to take into account both the prohibition of agreements and other concerted actions that are restrictive of competition (Article 101 TFEU) as well as the prohibition not to abuse dominant position (Article 102 TFEU). Article 101 may be relevant especially in situations where league teams agree to some uniform behaviour, for example the collective sale of broadcasting rights.<sup>7</sup> However, the outsourcing of league functions should be at least in most cases insignificant with respect to the applicability of Article 101 because the core of the article is the co-operation itself that restricts competition and not according to which juridical act or form this purpose was carried out.

By contrast to Article 101, which applies to a collusion between two or more undertakings, Article 102 TFEU focuses on the market power of a single undertaking - or in some cases group of undertakings (collective or joint dominance) - and the way in which this power is exploited. If an undertaking is in a dominant position, some measures it engages in may restrict competition even though the same measures would not have the restrictive effect if performed by an undertaking not in a dominant position.<sup>8</sup> In other words - the issue of which undertaking performs the measures under consideration is crucial when the applicability of Article 102 is being weighed up.

This raises the question of whether the outsourcing of league functions affects their evaluation in the light of the prohibition of abuse of dominant position. The problem is approached from three distinct viewpoints. Firstly, there is a need to assess whether outsourcing affects the applicability of EU competition law in general, since the national sports federation is in practice always a non-profit association, whereas the league corporation is usually a limited-liability company or some other commercial corporation. Secondly, can the competition law control of a league moderate if all or some part of the profit it produces is directed towards grassroots sports, which is usually the case when a league is administered by a national sports federation but rarely when this is done by a separate corporation. Thirdly, there is a need to analyse whether competition law control can be mitigated if outsourcing leads to a situation where the regulatory power over the sport is held by a different entity (the federation) than that with the right to exploit the sport commercially (the league corporation).

As a starting point for the assessment of whether outsourcing of league functions affects their evaluation in the light of prohibition of abuse of dominance we should determine conditions under which Article 102 TFEU can generally be applicable in sports league activities. The first prerequisite for applicability of EU competition law is that there is an *undertaking* engaged in economic activity. In TFEU there is no definition of undertaking but it has taken form in the praxis of the ECJ. The most influential decision seems to be the *Höfner* case in which the ECJ held that “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.<sup>9</sup> Sports leagues conducted at the highest national level usually meet this condition without dispute. As stated by the ECJ in its *MOTOE* decision,

a legal person whose activities consist in organising sports competitions and in entering, in that connection, into sponsorship, advertising and insurance contracts designed to exploit those competitions commercially, and constitute for that entity a source of income, must be classified as an undertaking for the purposes of Community competition law.<sup>10</sup>

Another general condition for the applicability of EU competition law is that the anti-competitive practices at issue affect trade between member states. An established view is that this condition is usually fulfilled in the context of sports leagues, at least when the sport concerned is played in another member state.<sup>11</sup>

Finally, the applicability of Article 102 TFEU provides that there is an undertaking in a dominant position. When examining league activities, several different markets can be recognized between 1) the league and teams willing to participate;<sup>12</sup> 2) the league and broadcasting companies;<sup>13</sup> and 3) the league and potential spectators.<sup>14</sup> It should be evaluated *in casu* whether a league - or more precisely, the undertaking organizing the league - holds a dominant position in one of these aforementioned markets. However, it is often stated that a national league normally holds in its territory a dominant position in relation to the teams willing to participate it.<sup>15</sup> A league can also hold a dominant position as to the sale of broadcasting rights, depending which particular sport is concerned.<sup>16</sup>

Holding a dominant position is not prohibited as such, but abusing it is. In case law and in the legal literature several occasions have been recognized where actions relating to a league may breach Article 102 TFEU, for example when: 1) setting unreasonable or discriminating prerequisites for granting a league licence;<sup>17</sup> 2) performing other disproportionate administrative measures<sup>18</sup> or 3) imposing unreasonable conditions on the sale of broadcasting rights.<sup>19</sup>

7 On applying Article 101 TFEU to collective selling of broadcasting rights see for example Stephen Weatherill: ‘The Sale of Rights to Broadcast Sporting Events under EC Law’, in *ISLJ* 2006/3-4 pp. 3-27, pp. 17-18; Adam Lewis and Brian Kennelly in Adam Lewis - Jonathan Taylor: *Sport: Law and Practice*, Second Edition, Tottel Publishing, West Sussex 2008 pp. 452-453; and Richard Parrish - Samuli Miettinen: *The Sporting Exception in European Union*, TMC Asser Press, The Hague 2008 pp. 149-151.

8 Ivo Van Bael - Jean-François Bellis: *Competition Law of the European Community*, Fifth Edition, Wolters Kluwer, The Netherlands 2010 p. 800.

9 Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, [1991] ECR I-01979, paragraph 21. Generally on concept of undertaking see for instance Richard Whish: *Competition Law*, Sixth Edition, Oxford University Press, Oxford 2009 pp. 82-91.

10 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio* [2008] ECR I-04863, summary, paragraph 1. See accordingly

also Commission Decision 92/521/EEC of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 - Distribution of package tours during the 1990 World Cup), paragraph 52-53; Commission Decision 2003/778/EC of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League), paragraph 106; and SEC (2007) 935, Commission Staff Working Document, The EU and Sport, Background and Context, Accompanying document to the White Paper on Sport, section 2.1.3.

11 See for instance Norros 2011 pp. 100-102; and Adam Lewis and Brian Kennelly in Lewis - Taylor 2008 p. 410.

12 For instance Norros 2011 p. 108.

13 See generally with case examples Olli Rauste: *Urheiluoikeus* [Sports Law], Kauppakaari Oy, Helsinki, 1997 pp. 643-645; and Franklin M. Fisher - Christopher Maxwell - Evan Sue Schouten: ‘The Economics of Sports Leagues and the

Relocation of Teams: the Case of the ST. Louis Rams’, in 10 *Marq. Sports L. J.* 1999-2000 pp. 193-218, pp. 204-205.

14 Fisher - Maxwell - Schouten 10 *Marq. Sports L. J.* 1999-2000, p. 204; and Helmut Dietl - Tobias Duschl - Egon Franck - Markus Lang: ‘A Contest Model of a Professional Sports League with Two-Sided Markets’, November 2009, International Association of Sports Economists, Working Paper Series, Paper No. 09-12, p. 3, available at <http://college.holycross.edu/RePEc/spe/DietlataTwoSidedMarkets.pdf> (accessed 11th January 2011).

15 Rauste 1997 p. 217; Katarina Pijetlovic: *Treatment of Breakaway Structures in Football under the EC Treaty Competition Provisions*, Unpublished licentiate thesis dated 20th March 2009 in Faculty of Law at the University of Helsinki, pp. 83-85; Markku Pohjonen: ‘Urheilusarjaan hyväksyminen ja kilpailuoikeus’, in *Urheilu ja oikeus* (hereafter “UO”) 2007 pp. 59-60; Miika Suves: *Jalkapalloilijan vapauttaminen maajoukkueehtäviin arvioituna EY:n kilpailuoikeuden näkökulmasta*, Turun yliopiston oikeusti-

eteellisen tiedekunnan julkaisu, Turku 2007, pp. 37-38; and Stephen Hornsby: “Closed Leagues”: A Prime Candidate for the “Sporting Exception” in European Competition Law? In *International Sports Law Review* (hereafter “ISLR”) 2001 pp. 161-167, p. 165.

16 Rauste 1997 pp. 643-644; and Antti Aine: ‘Competition Law and Sport’, in “Nordiskt seminarium i idrottsjuridik 2006” (ed. Heikki Halila) pp. 79-95, Urheiluoikeuden Yhdistys, Helsinki 2007, p. 91 with references.

17 For example Rauste 1997 p. 211-212; Kirsi Kunnas: *Suljettu sarja jääkiekossa*, Opetusministeriö, Kulttuuripolitiikan osaston julkaisusarja nro 4/1999, Helsinki 1999, p. 66-68; Aine 2007 p. 92-93; Parrish - Miettinen 2008 p. 218; and Heikki Halila: ‘Liigalisenssin hyväksyminen ja epäminen joukkueurheilussa’, in *UO* 2008 pp. 9-41, pp. 14-15 and 36.

18 Lars Halgreen: *Sportsret, EU-recht og kontraktmessige aspekter ved sportssudøvelse i Danmark*, Thomson, København 2000 p. 192.

19 Rauste 1997 p. 650-651; and Steven Stewart: ‘The Development of Sports Law

## 2. Significance of the Corporate Form

National sport federations are usually organized as non-profit associations. In most cases it would be theoretically possible to establish a federation for example as a limited-liability company, but there would hardly be any reasons for this.<sup>20</sup> On the other hand, league corporations are often limited-liability companies, as mentioned above. One might speculate whether this difference is of significance from the viewpoint of competition law. The answer is unambiguous at least when considering the applicability of EU competition law in general. The ECJ stated in its often cited decision *Klaus Höfner and Fritz Elser v. Macrotron GmbH* that the concept of ‘undertaking’ covers “every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed”.<sup>21</sup>

Regardless of whether EU competition law applies generally to business run by a non-profit association, it might be questioned whether the corporation form may be attributed any significance as a point of reference in a borderline case when considering if a corporation should be classified as an undertaking.<sup>22</sup> Even this question must be answered in the negative. The *Höfner* case is interpreted in the legal literature such that legal form is simply irrelevant when considering whether a certain corporation is an undertaking.<sup>23</sup> Thus we arrive at a simple conclusion: outsourcing of league activities does not affect evaluation under EU competition law, at least not because of the difference between the legal form of a federation and a league corporation.

## 3. Solidarity Defence

### 3.1 Introduction

A crucial economic difference between a national sports federation and a league corporation is that the league functions form usually only a minor part of all the federation’s activities whereas a league company often has no other functions. It has been occasionally proposed in different contexts that activities of sports federations should be immune from competition law intervention because federations share with grassroots sports the income they get from commercial activity. To be brief, this argument is hereafter called *the solidarity defence*.

The solidarity of sports organizations is divided in the legal literature into a) *horizontal* and b) *vertical* solidarity. Horizontal solidarity refers to mutual solidarity of league teams, for example when they divide more or less equally income from the collective sale of broadcasting rights.<sup>24</sup> Vertical solidarity is understood to be the solidarity of league teams in relation to lower divisions as well as amateur and junior sport.<sup>25</sup> In the context of this paper, vertical solidarity seems most relevant because outsourcing of league functions usually breaks, or at least weakens, the connection between league sports and lower levels of sport.<sup>26</sup>

Vertical solidarity of a federation structure - the so-called *pyramid model* - is highlighted in the IESR 2006 report<sup>27</sup> on several occasions as an argument against applying EU competition law to the activity of federations. First, vertical solidarity is used in defending the exclusivity of the federation structure and one of its manifestations, the prohibition of competing activity.<sup>28</sup> Vertical solidarity is accordingly used to justify federations’ right to the commercial exploitation of sport whilst using strong administrative power.<sup>29</sup> The solidarity defence is also raised against the applicability of Article 101 TFEU on the collective selling of broadcasting rights.<sup>30</sup> In this context solidarity defence is also referred by commissioner *Monti* in his speech<sup>31</sup> and by the Commission in the Helsinki Report on Sport<sup>32</sup> and in the White Paper on Sport.<sup>33</sup> Furthermore, *Halgreen* discusses in general the abuse of dominant position by sports federations and states that vertical solidarity is definitely one of the best reasons - but not without its problems - presented for upholding the present federation structure.<sup>34</sup>

The IESR 2006 report does not explain the exact normative grounds for the solidarity defence.<sup>35</sup> However, three potential ways of legal influence of solidarity defence may be raised in closer examination:

1. Does vertical solidarity affect classification as an undertaking when organizing a sports league?
2. May vertical solidarity be a mitigating circumstance when considering whether certain actions can be regarded as abuse?
3. May grassroots sports be regarded as “services of general economic interest” in the meaning of Article 106(2) TFEU with the result that the provision of these services is exempt from EU competition law?

### 3.2 Effect of Vertical Solidarity on the Concept of Undertaking

The first of the aforementioned questions seems relatively clear: the vertical solidarity of a federation structure cannot determine whether an administrator of a league is regarded as an undertaking from the viewpoint of EU competition law. The reason for this is that classification of an actor as an undertaking depends on the activity itself and its economic nature, not on how the actor disburses the profits made.<sup>36</sup> The Finnish Competition Authority referred to the ineffectiveness of the solidarity defence in its case concerning the Finnish basketball league. The authority stated that economic activity in the context of sports may differ from ordinary business in that the profit made is used in non-profit activity. This, however, has no bearing on the applicability of competition law.<sup>37</sup>

### 3.3 Effect of Solidarity Defence on Criteria of Abuse

The formulation of Article 102 TFEU does not indicate that abusive conduct could be justified according to any counterarguments such as features that might enhance the efficiency of the conduct. This kind of

in the European Union, Its Globalisation, and the Competition Law Aspects of European Sports Broadcasting Rights’, in 16 *Sports Law J.* 2009 p. 183-229, p. 203.

<sup>20</sup> See more extensively Norros 2011 p. 68-69.

<sup>21</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] ECR. I-01979, summary, paragraph 1.

<sup>22</sup> *Halila* touches on this question when he briefly contemplates whether competition law restricts the possibilities of a national sports federation or a league corporation to interfere in the incorporation of league teams. *Halila* remarks that the form of association and the concept of *association autonomy* protect non-profit activity against intervention of competition law to a certain degree. He concludes that when competition activity is organized by a limited-liability company or a cooperative society it cannot appeal in the same way as an association to the fact that the measures performed are part of its non-profit activity. Heikki Halila: *Oikeudellistuva urheilu* [Juridification of Sport], Talentum, Helsinki 2006 p. 353.

<sup>23</sup> Whish 2009 p. 85; and Alexander Egger -

Christine Stix-Hackl: ‘Sports and Competition Law: A Never-ending Story?’ In *European Competition Law Review* (hereafter “*ECLR*”) 2002/2 pp. 81-91, p. 84. Whish states: “An entity can be found to be acting as an undertaking only as a result of the activity it is engaged in; its legal form is irrelevant.”

<sup>24</sup> See for example Lars Halgreen: *European Sports Law, A Comparative Analysis of the European and American Models of Sport*, Forlaget Thomson, København 2004 p. 70; Stephen Weatherill: ‘The Sale of Rights to Broadcast Sporting Events under EC Law’, in *ISLJ* 2006/3-4 pp. 3-27, p. 19; Parrish - Miettinen 2008 p. 3; and Norros 2011 pp. 39-41.

<sup>25</sup> Weatherill *ISLJ* 2006/3-4 p. 19.

<sup>26</sup> For a more detailed account, see Norros 2011 p. 134.

<sup>27</sup> *Independent European Sport Review 2006*, Final Version, October 2006, Report by: José Luis Arnaut.

<sup>28</sup> *IESR* 2006 p. 37.

<sup>29</sup> *IESR* 2006 pp. 70-71.

<sup>30</sup> *IESR* 2006 p. 51.

<sup>31</sup> Mario Monti’s speech “Competition and

Sport - the Rules of the game”, given in Brussels, February 26th 2001 in the “Conference on “Governance in Sport” - European Olympic Committee - FIA - Fédération Internationale de l’Automobile”: “Whether collective selling agreements fall within Article 81(1), we have to see whether they can be exempted under Article 81(3). In this context, factors such as the possible link between the collective selling of rights and financial solidarity between clubs or between professional and amateur sport, as long as they are quantifiable and objectively defined, could be taken into consideration with all other relevant factors.”

<sup>32</sup> Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - The Helsinki Report on Sport, COM(1999) 644 final, p. 9.

<sup>33</sup> White Paper on Sport, COM(2007) 391 final, p. 17.

<sup>34</sup> Halgreen 2004 pp. 155-156.

<sup>35</sup> The report has been generally criticized

for emphasizing the peculiar nature of sport and its independence from legal norms without always presenting appropriate legal or economic grounds for these viewpoints. Samuli Miettinen: ‘The “Independent European Sport Review”: A Critical Overview’, in *ISLJ* 2006/3-4 pp. 57-62, p. 60; Stephen Weatherill: ‘Article 82 EC and Sporting “Conflict of Interest”: the Judgment in *Motoe*’, in *ISLJ* 2009/1-2 pp. 3-7, p. 6; and Heikki Halila: ‘Eurooppalaista urheiluoikeutta’, in *UO* 2006 pp. 9-16, pp. 14-15.

<sup>36</sup> See Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] ECR. I-01979, summary, paragraph 1: “[the] classification [of an undertaking] applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed” (additions by the author).

<sup>37</sup> Decision of the Finnish Competition Authority, September 5th 1995, record 511/61/94, p. 19 [available in Finnish only].

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*efficiency defence* is enacted in Article 101 concerning the prohibition of agreements restricting competition (101(3)). However, a well-established view holds that there are certain counterarguments that may justify conduct which would as such infringe Article 102.<sup>38</sup> It has been understood that in a systematic sense this justification is not a separate legal exemption such as Article 101(3), but rather that the presence of a justification should be acknowledged when determining whether some particular conduct constitutes an abuse at all.<sup>39</sup>

Can the vertical solidarity of a federation structure then be regarded as a valid objective justification? When approaching this question it is useful to get acquainted with discussion concerning admissibility of solidarity defence in the context of Article 101 TFEU. Firstly, it seems reasonable to ask whether vertical solidarity could be regarded as an *objective justification* that might be significant when considering the applicability of Article 101(1) and whether there exists any agreement that restricts competition. The ECJ has indicated in certain cases that this kind of effect would be possible in addition to the statutory efficiency defence enacted in Article 101(3).<sup>40</sup>

In *Wouters*<sup>41</sup> a regulation was given by the Bar of Netherlands that prohibited multi-disciplinary partnerships between members of the Bar and accountants. The ECJ held that the regulation *did* restrict competition, but that it still did not infringe Article 85(1) of the EC Treaty (now Article 101(1) TFEU). The reason was that the objective of the regulation was to guarantee the independence and loyalty to the client of members of the Bar, and the consequential effects restrictive of competition were inherent in the pursuit of those objectives.<sup>42</sup> In *Meca-Medina*<sup>43</sup> two swimmers claimed that the international anti-doping code infringed EU competition law. The ECJ dismissed the action referring to *Wouters* and noted that even if anti-doping rules were to be regarded as restricting competition, they did not necessarily constitute a restriction of competition incompatible with Article 81 EC (now Article 101 TFEU), inasmuch as they are justified by a legitimate objective.<sup>44</sup>

However, it seems obvious that the vertical solidarity of a federation structure cannot usually be regarded as an “objective justification” as referred in *Wouters* and *Meca-Medina*. The ECJ emphasized in both cases that an objective justification may exempt restrictions of competition only if the restrictions are *inherent* consequences in the pursuit of those objectives. However important an objective the financing of grassroots sports might be, the pursuit of this objective can hardly restrict competition in a way that could be regarded inherent in the meaning of *Wouters* and *Meca-Medina*.

A further question is whether the solidarity defence may be regarded as the efficiency defence in the meaning of Article 101(3) TFEU.<sup>45</sup> The answer appears to be no. The essential elements of the efficiency defence are defined in quite some detail in Article 101(3) TFEU. According to the established view, the article should be interpreted strictly rather than widely.<sup>46</sup> *Weatherill* considers that vertical solidarity does not appear to be a circumstance that could be regarded as contributing “to improving the production or distribution of goods or to promoting technical or economic progress” in the meaning of Article 101(3). He points out that vertical solidarity is a matter of the internal resource allo-

cation of a federation structure and its costs should not be channelled through restrictions of competition to be borne by third parties, such as purchasers of broadcasting rights.<sup>47</sup>

The solidarity defence thus seems to be ineffective under Article 101. However, the same cannot be said with respect to Article 102, because the scope of exemptions under Article 102 is understood to be slightly broader than under Article 101. The discussion paper of the Commission states that a conduct that would otherwise be abusive may be justified if the undertaking in question is able to show that the conduct is actually necessary on the basis of objective factors external to the parties involved and, in particular, external to the dominant company.<sup>48</sup> The legal literature also argues that social and policy factors should be taken into account.<sup>49</sup>

But for all that, the solidarity defence still does not seem to fulfil the criteria of valid objective justification. The discussion paper emphasizes that the exemption covers only indispensable restrictions of competition, and the condition of indispensability is applied strictly.<sup>50</sup> The paper refers to the *Hilti* case as an example.<sup>51</sup> In *Hilti* the CFI held that an undertaking was not allowed to attempt to exclude its competitors from the market on the grounds that the competitors’ products allegedly caused danger in use. It was the authorities’ task to oversee product safety in the market.<sup>52</sup> It seems evident that the need to finance grassroots sports cannot indispensably require that a federation would be allowed to boost its profits with conduct that would otherwise be abusive. Moreover, the solidarity defence obviously fails to fulfil the condition of externality of the objective factor. Once again, as *Weatherill* points out, vertical solidarity is a matter of the internal resource allocation of a federation structure.<sup>53</sup>

For these reasons it appears that the solidarity defence cannot affect the way in which the criteria of abuse are applied under Article 102.<sup>54</sup>

### 3.4 Effect of the Solidarity Defence on “Services of General Economic Interest”

The third possible legal background for the solidarity defence is provided by Article 106(2) TFEU. This article may be roughly explained as follows: TFEU is not applied to undertakings entrusted with the operation of services of general economic interest in so far as a) the application of TFEU would obstruct the performing of those services and b) the non-applicability of TFEU would not be contrary to the interests of the EU.<sup>55</sup> The concept of “services of general economic interest” has been characterized as rather unclear, partly due to certain political tensions that lie behind the article.<sup>56</sup> Anyhow, in the IESR 2006 report and in the legal literature it is observed that some public service obligations could probably be identified in sport, for example obligations related to training, education or to the promotion of public health.<sup>57</sup> The applicability of Article 106(2) provides also that the services in question are *entrusted* to the provider by the relevant member state. This assignment does not necessarily have to be made through legal provision. However, it is unclear whether assignment through an ordinary private law contract may be considered sufficient (entrusting) in the meaning of Article 106(2).<sup>58</sup>

38 See for instance ‘Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’, 2009/C 45/02, paragraph 28 and Whish 2009 pp. 206-207. A parallel view is also presented in a case concerning the licensing system of players’ agents: case T-193/02 *Laurent Piau v. Commission of the European Communities* [2005] ECR II-00209, paragraph 119.

39 Opinion of Mr Advocate General Jacobs in case C-53/03 *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfai) and Others v. Glaxosmithkline AVEE* [2005] ECR I-4609, paragraph 72; Paul-John Loewenthal: ‘The Defence of

“Objective Justification” in the Application of Article 82 EC’, in 28 *World Competition* 2005 pp. 455-477, pp. 459-460; and Whish 2009 p. 206.

40 The normative grounds for this objective justification defence are unclear. See, for example, Whish 2009 pp. 126-131; Van Bael - Bellis 2010 pp. 66-68; and Paul Craig - Gráinne de Búrca: *EU Law, Text, Cases and Materials*, Fourth Edition, Oxford University Press, Oxford 2008 pp. 980-981.

41 Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten and Raad van de Balies van de Europese Gemeenschap* [2002] ECR I-0577.

42 Case C-309/99, paragraph 3 of the summary.

43 Case C-519/04 *P. David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2006] ECR I-06991.

44 Case C-519/04, paragraph 3 of the summary.

45 Husa seems to support this interpretation. Antti Husa: ‘Jalkapallon talouskriisi ja eurooppalaisen urheilumallin tulevaisuus’, in *UO* 2010 pp. 50-71, p. 63.

46 Whish 2009 pp. 155-156; Ali Nikpay and Jonathan Faull in “*Faull & Nikpay: The EC Law of Competition*”, Eds. Jonathan Faull and Ali Nikpay, Second Edition, Oxford University Press, Oxford 2007, pp. 294-295; and Craig - de Búrca 2008

pp. 981-982. The two former refer *inter alia* to the Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, 2004/C 101/08 (see especially paragraph 42 of the Communication).

47 *Weatherill ISLJ* 2006/3-4 p. 20. Accordingly, Stewart 16 *Sports Law J.* 2009 p. 210 and from a more general perspective Whish 2009 pp. 154-156 with also references to cases concerning sports federations (p. 154). On the applicability of Article 101(3) TFEU on sports generally see Parrish - Miettinen 2008 pp. 124-125.

48 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, paragraph 78.

How does Article 106(2) TFEU relate to professional leagues, since it seems clear that they cannot be considered as providing a service of general economic interest? The ECJ indicated in *Corbeau*<sup>59</sup> that if an undertaking which provides both a) services meant in Article 106(2) and b) other services, a restriction of competition which relates to some “ordinary” service may be allowed if it is indispensable for financing services meant in Article 106(2).<sup>60</sup> In other words, if the grassroots activities of a sports federation, or even some part of them, are regarded as services meant in Article 106(2), and financing these activities would indispensably require the admissibility of some restrictions of competition in the activity where the profit is made - in the league - then EU competition law would not prohibit the restrictions.

Once again the solidarity defence comes within the condition of indispensability. It is undoubtedly easier for a sports federation to finance grassroots activities if it is allowed to collect some extra profit by abusive conduct, but it is equally obvious that this cannot be a crucial condition for grassroots activity to get by.<sup>61</sup> Another matter is that typically federations are not even willing to depend on Article 106(2), because then they would have to allow the state to impose legal obligations on them to perform defined services. This type of intervention would be contradictory to federations’ pleas for greater autonomy and self-regulation.<sup>62</sup>

#### 4. Conflict of Interest between Regulation and Commercial Exploitation of Sport

##### 4.1 General Remarks

In earlier sections we have discussed whether it might be beneficial, from the viewpoint of competition law, to preserve league functions within the single entity of a federation. No benefits have been discovered. In this section we consider whether the risks of competition law intervention might be reduced by separating the regulatory power over sport from commercial exploitation of sport, so that they are performed by different legal entities, the federation and the league corporation, respectively.

This problem has been approached in the international debate on the subject by assessing whether there is a *conflict of interest* between regulation and commercial exploitation of the sport within a sports federation. In other words, it is contemplated whether commercial interests are able to attract the federation to use its regulatory power in ways which cannot be justified by referring to the common good of the sport or citing any other admissible reasons. It must be noted that the aforementioned concept of *conflict of interest* differs from the way in which it is usually understood in modern company law, where it can be defined as a conflict between separate parties such as directors and shareholders of the company.<sup>63</sup>

The ECJ touched on the question of conflict of interest in *MOTOE*.<sup>64</sup> The background of the case was that, according to the Greek Road Traffic Code, permission to arrange a motorcycling competition requires approval of the national federation, *Elliniki Leskhi Afokinitou kai Perigiaseon* (hereafter “ELPA”).<sup>65</sup> The approval of ELPA was condition-

al on an arranger committing to the competition rules of the federation.<sup>66</sup> The possibilities for the arranger to conclude sponsorship contracts were restricted in the competition rules *inter alia* by providing that: 1) competitions cannot be named after a sponsor without the consent of the federation and 2) the arranger has to comply with sponsorship contracts concluded by the federation.<sup>67</sup> The ECJ had to determine whether the Greek Road Traffic Code and the competition rules of ELPA infringed the prohibition to abuse dominant market position (Article 82 EC, nowadays Article 102 TFEU) and Article 86(1) EC (nowadays Article 106(1) TFEU), which prohibits the state from restricting competition through public undertakings.

The ECJ stated that ELPA was an undertaking in the business of organizing the motorcycling competition because it arranged competitions itself and exploited them commercially.<sup>68</sup> The ECJ considered that ELPA had an obvious advantage over its competitors when it could ultimately deny other operators access to the relevant market. The ECJ stated that it was contrary to Articles 82 (now Article 102 TFEU) and 86 (now 106 TFEU) EC that national legislation confers that kind of position upon a single undertaking without that power being made subject to restrictions, obligations and review.<sup>69</sup> Advocate General *Julianne Kokott* addressed the conflict of interest explicitly by stating that “the maintenance of effective competition and the ensuring of transparency require a clear separation between the entity that participates in the authorisation by a public body of motorcycling events and, where appropriate, monitors them, on the one hand, and the undertakings that organise and market such events, on the other.”<sup>70</sup>

The conflict of interest issue was also evident in the Commission’s investigation of *Fédération Internationale de l’Automobile* (hereafter “FIA”). According to the preliminary assessment of the Commission, “FIA had a “conflict of interest” in that it was using its regulatory powers to block the organisation of races which competed with the events promoted or organised by FIA”. FIA was also suspected of abusing its dominant position and breaching the prohibition of agreements restricting competition in several ways, *inter alia* 1) by broadly prohibiting any activity that was competing with FIA’s own motor sports series, 2) by claiming the broadcasting rights to the motor sport series it authorised, 3) by imposing a financial penalty, as part of the agreements with the broadcasters, if they showed motor sports that competed with the Formula 1 series, and 4) by granting the broadcasters exclusivity in their territories for excessive periods of time.<sup>71</sup>

However, the Commission closed the investigation when the FIA agreed to change its regulations and contractual practices in a number of ways. The core of the settlement was that in order to prevent any conflict of interests the FIA is limited to a regulatory role. Commercial rights concerning Formula 1 were sold for a period of one hundred years to Formula One Administration Limited, a company controlled by the high-powered sports entrepreneur *Bernie Ecclestone*.<sup>72</sup>

The cases *MOTOE* and *FIA* illustrate clearly the possibility of a conflict of interest. The crucial question concerning outsourcing of league activities is whether a sports federation can obviate the conflict of interest by outsourcing commercial exploitation of the league to a separate

49 Loewenthal 28 *World Competition* 2005 p. 464, and accordingly Samuli Miettinen: ‘Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the MOTOE Case’, in *ISLJ* 2008/3-4 pp. 13-18, p. 14.

50 DG Competition discussion paper, December 2005, paragraph 80.

51 Case T-30/89 *Hilti AG v. Commission of the European Communities* [1990] ECR II-163.

52 Case T-30/89, paragraph 118.

53 Weatherill *ISLJ* 2006/3-4 p. 20.

54 In more detail *Norros* 2011 pp. 122-129 which also, *inter alia*, discusses the relation between vertical solidarity and prohibited *cross subsidization*.

55 The original formulation is as follows: “Undertakings entrusted with the opera-

tion of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.”

56 See for example *Whish* 2009 p. 234.

57 *IESR* 2006 p. 110-111; and Parrish - Miettinen 2008 p. 134.

58 See for instance José Luis Buendia Sierra in *Faull & Nikpay* 2007 pp. 630-631, *Whish* 2009 p. 234 and Craig - de Búrca 2008 p. 1079.

59 Case C-320/91 *Corbeau* [1993] ECR I-02533.

60 Case C-320/91, paragraph 19 and accordingly José Luis Buendia Sierra in *Faull & Nikpay* 2007 p. 636-637.

61 In more detail *Norros* 2011 p. 129-133.

62 Parrish - Miettinen 2008 p. 134.

63 About significance of conflict of interests in corporate governance see for example John Armour, Henry Hansmann and Reinier Kraakman in *The Anatomy of Corporate Law, A Comparative and Functional Approach*, Second Edition, Oxford University Press, Oxford 2009, pp. 2-3 and pp. 35-37.

64 Case C-49/07 *Motosykletistiki Omospoudia Ellados NPID (MOTOE) v. Elliniko Dimosio* [2008] ECR I-04863.

65 Case C-49/07, paragraph 3.

66 Case C-49/07, paragraph 9.

67 Case C-49/07, paragraph 14.

68 This topic was discussed more closely in section 1.3 above.

69 Case C-49/07, paragraphs 51-53.

70 Case C-49/07, Opinion of Advocate General Kokott, paragraph 102.

71 Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 - Notification of FIA Regulations, COMP/36.638 - Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776 - GTR/FIA & others, 2001/C 169/03, section 5.

72 Commission closes its investigation into Formula One and other four-wheel motor

legal entity. For clarity's sake it should still be pointed out that, regardless of the issue of outsourcing, a federation can usually ensure admissibility of its activity in the light of competition law for instance 1) by avoiding measures that affect other operators too strongly in the market or 2) by creating procedural safeguards.<sup>73</sup>

In the legal literature it has been rather commonly observed that the cases *MOTOE* and *FIA* indicate that a conflict of interest could be avoided by outsourcing some of the functions to a separate legal entity.<sup>74</sup> If a national federation assigns all commercial functions to a separate corporation, then it should be protected from accusations of abuse of dominant market position, because the federation could not even be regarded as an undertaking and the competition law would not be applied to its activity at all.<sup>75</sup> Neither could the league corporation be accused of abuse, because it could not have affected the federation's decisions. However, such an arrangement would obviously not protect the league corporation from competition law intervention if it abuses its dominant position in a manner independent of the federation and the authority held back by the latter, for instance by demanding unreasonable terms in broadcasting contracts.

Notwithstanding the above, the legal adequacy of such an outlook needs to be questioned here. Firstly, we should assess whether the effect of the separation of functions can be nullified by arguing that a federation and a league corporation hold a *collective dominant position*. Secondly, even if they do hold such a collective position it may be asked whether the concept of abuse can be interpreted more permissively on the grounds that the party who performs the abusive measures (here: federation) does not itself derive any economic benefit from the conduct.

#### 4.2 Joint Dominant Position

According to the formulation of the Article 102 TFEU, the prohibition of abuse of dominant position covers "one or more undertakings of a dominant position" (emphasis added). Therefore, Article 102 can be applied not only to a single undertaking holding a dominant position but also to a group of undertakings. A situation where a group of undertakings is in a dominant position is referred to as *joint* or *collective dominance*. Of course, separate undertakings cannot be counted as a collective from the viewpoint of Article 102 unless there are sufficiently strong links between the undertakings at issue. The question of how the sufficiency of the links might be judged is reckoned to be one of the most complex and controversial issues in EU competition law.<sup>76</sup> Dominance of a certain market position is evaluated in the same way, regardless of whether there is one or more undertakings holding this position.<sup>77</sup>

A matter of longstanding consensus has it that a corporate relationship between firms is sufficient for establishing collective dominance.<sup>78</sup> Also other types of economic ties between undertakings may suffice - for instance mutual co-operation agreements, cross-shareholding or an interlocking directorship.<sup>79</sup> In addition, there has been extensive debate over whether undertakings can be sufficiently linked merely by acting consistently, even though they enjoy neither a contractual nor a corporate relationship. The opinion in favour seems to have gained the upper hand.<sup>80</sup>

If a group of firms is held to be collectively dominant, the abuse does not necessarily have to consist of the action of all the undertakings in question. Undertakings holding a joint dominant position may engage in joint or individual abusive conduct. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market.<sup>81</sup> This interpretation is crucial in cases where league functions have been partly outsourced to dissolve the conflict of interest and the alleged abuse relates to regulation of the sport. This is because in these cases the potential abuser (the federation) is separated from the legal entity running the business (the league corporation).

The problem of joint dominance has been central to the discussion in the *Piau* case of the CFI.<sup>82</sup> In the case an individual working as an agent for soccer players alleged that FIFA's system for licensing players' agents would infringe the prohibition of agreements restricting competition and possibly also the prohibition of abuse of dominant position. The CFI held that in the circumstances the prohibition of abuse also concerned FIFA, even though it was not regarded as an economic operator in the market for players' agents. The CFI stated that players and clubs belonging to national member federations of FIFA are buyers of the services which are provided by football players' agents. FIFA was regarded as acting in this market on behalf of the clubs since it was regarded as constituting an emanation of the clubs as a second-level association of undertakings formed by the clubs. However, FIFA itself was not considered as acting in a dominant position; instead it was FIFA and the clubs acting collectively.<sup>83</sup> This view is understood to be analogously applicable to the relationship held between national federations and clubs.<sup>84</sup>

If the relationship between a federation and clubs is sufficient to establish joint dominance, the same must apply to the relationship between a federation and a league corporation. The latter relationship is usually much closer than the former, especially when there is normally a relatively detailed co-operation agreement between a federation and a league corporation. In Finland such an agreement exists at least for ice-hockey, soccer and floorball. In ice-hockey, the federation and the league company have also agreed upon interlocking directorship,<sup>85</sup> which, as noted above, has generally been considered as a point of reference for joint dominance. In floorball, the connection is even closer, since the federation is the sole shareholder in the league company.<sup>86</sup> In soccer, the convention has been that the chairman of the board of each of the two associations gets invited to the board meetings of the other association.<sup>87</sup>

Some counterarguments to the applicability of the doctrine of joint dominance could be offered here. Firstly, the formulation of Article 102 TFEU stating "one or more undertakings" (emphasis added) could indicate that only undertakings can be members of a dominating collective. If this is so, Article 102 could not be applied to a national federation which has outsourced its commercial league functions. This is because a national federation is not an undertaking in this respect. However, the *Piau* case seems to invalidate this argument, because the CFI stated explicitly that FIFA must be included in the dominating collective, regardless of the fact that it is not itself an undertaking.<sup>88</sup>

sports, IP/01/1523, Brussels, 30 October 2001.  
 73 See generally Weatherill *ISLJ* 2009/1-2 p. 6; Miettinen *ISLJ* 2008/3-4 p. 18; and Norros 2011 p. 138. The possibilities of avoiding outsourcing are outlined in *IESR 2006* report (pp. 70-71). For a more conservative view offering broader argumentation, see Weatherill *ISLJ* 2009/1-2 p. 5-6.  
 74 Weatherill *ISLJ* 2009/1-2 p. 5; Miettinen *ISLJ* 2008/3-4 p. 15; and prior to the *MOTOE* case, see Halgreen 2004 pp. 160-161; and Caiger in Simon Gardiner, Mark James, John O'Leary, Roger Welch, Ian Blackshaw, Simon Boyes, Andrew Caiger: *Sports Law*, Third Edition, Cavendish Publishing 2006, p. 366 and 376. Halila seems to consider that if a national federation withholds the power of decision-making over the league, then without

interference from competition law it could carry out measures that a separate league corporation could not do. Halila 2006 p. 353.  
 75 Miettinen *ISLJ* 2008/3-4 p. 18 and slightly more conservatively Weatherill *ISLJ* 2009/1-2 p. 6.  
 76 Whish 2009 p. 556.  
 77 Petri Kuoppamäki: *Markkinavoiman sääntely EY:n ja Suomen kilpailuoikeudessa* [The Regulation of Market Power in EC and Finnish Competition Law], Suomalainen Lakimiesyhdistys, Helsinki 2003 p. 1005; and Kalle Määttä: *Uusi kilpailunrajoituslaki* [New Finnish Competition Act], Edita, Helsinki 2004 p. 202.  
 78 Whish 2009, p. 558; Carles Esteva Mosso, Stephen A. Ryan, Svend Albaek and Maria Luisa Tierno Centella in *Faull & Nikpay*

2007, p. 338; and Craig - de Búrca 2008, p. 1016.  
 79 Carles Esteva Mosso, Stephen A. Ryan, Svend Albaek and Maria Luisa Tierno Centella in *Faull & Nikpay* 2007 pp. 340-341; Whish 2009 p. 560; Kuoppamäki 2003 pp. 1003-1004; and Määttä 2004 p. 201.  
 80 Whish 2009 p. 564; Carles Esteva Mosso, Stephen A. Ryan, Svend Albaek and Maria Luisa Tierno Centella in *Faull & Nikpay* 2007 pp. 342-343; and for a critical view see Petri Kuoppamäki: *Uusi kilpailuoikeus*, WSOYpro, Helsinki 2006 pp. 187-188.  
 81 Case T-228/97 *Irish Sugar plc v. Commission of the European Communities* [1999] ECR II-02969, paragraph 66; and referring to this case Kuoppamäki 2003 pp. 1011-1012; Whish 2009 p. 567; and Carles Esteva Mosso, Stephen A. Ryan, Svend

Albaek and Maria Luisa Tierno Centella in *Faull & Nikpay* 2007 pp. 343-344.  
 82 Case T-193/02 *Laurent Piau v. Commission of the European Communities* [2005] ECR II-00209.  
 83 Case T-193/02, paragraph 110-116.  
 84 SEC (2007) 935, Annex I, section 2.1.3.  
 85 Interview with Mr. Jukka-Pekka Vuorinen, the chief executive officer of the league company Jääkiekon SM-liiga Oy, August 9th 2010.  
 86 Source: <http://salibandyliiga.fi/salibandyliiga/ylhteystiedot> (accessed August 26th, 2010).  
 87 Interview with Mr. Jan Walden, the chief executive officer of the league association Jalkapalloliiga ry, August 11th, 2010.  
 88 Case T-193/02 *Laurent Piau v. Commission of the European Communities* [2005] ECR II-00209, paragraphs 115-116

Secondly, one could try to deny the analogous applicability of *Piau* in the context of a federation and a league corporation by pointing out that the league corporation does not necessarily have any power in the federation. The situation was different in *Piau* with regard to the relationship between an international federation and its member federations and clubs, since the latter exercise their voting power in the international federation. This voting power was perhaps the reason why in *Piau* FIFA was regarded as “the emanation of the national associations and the clubs”. However, this difference falls short of significance at least in that typical circumstance where league clubs are the only shareholders in the league company. In this case the league corporation could be seen to be acting only as an intermediary of the clubs that exercise their voting power in the federation.

But what if a league corporation shares profits with some outside investor rather than with the league clubs? This circumstance could be eased by regarding the league corporation as a separate firm, independent of the federation structure constituted by the federation and its member clubs. This could also explain why outsourcing of commercial functions was considered significant in the *FIA* case, because in this case the outsourcee company FOA was owned by an independent investor, Mr. Ecclestone. However, the significance of this distinction should not be overstated. As pointed out in section 1.2, league clubs usually constitute only a small minority of all clubs belonging to the federation, so their influence in the federation is in any case somewhat exiguous.

To sum up, it appears that a federation and a league corporation can be collectively dominant at least if - and when - the *Piau* case is considered to reflect the prevailing legal state. What is more, and regardless of *Piau*, the criteria of joint dominance seem to be fulfilled in typical circumstances where there is close co-operation or perhaps where there also exists an interlocking directorship between a federation and a league corporation. That is why the outsourcing of commercial league functions does not usually prevent the applicability of EU competition law to the regulative measures of a federation.

#### 4.3 Concept of Abuse

In the previous section it was concluded that a national sports federation cannot usually prevent the application of EU competition law to the regulative measures it performs in relation to the league, even though the commercial functions would be outsourced to a separate legal entity. It might still be asked whether the outsourcing comes within the definition of abuse. Weatherill briefly refers to this kind of effect but offers no reasoning, however.<sup>89</sup> However, his point probably is that if a party performing regulative measures has itself no economic interest in them, the concept of abuse would be interpreted more narrowly even though the prohibition of abuse by definition covers the party in question.

However, this interpretation does not appear to be well-grounded. The criteria of abuse are principally uniform both in cases of ordinary and joint dominance,<sup>90</sup> even though there are some specific questions relating to joint dominance.<sup>91</sup> If the relation of a federation and a league

corporation is considered so close that the criteria of joint dominance are met and therefore the prohibition of abuse is applied to the regulative measures of the federation, it would be difficult to explain, why the federation should benefit from the fact that it does not itself get the income from the commercial functions. It must be kept in mind that the criteria of abuse are usually understood to be applied objectively and regardless of, for example, the amount of blameworthiness displayed by the undertaking in question.<sup>92</sup>

In addition, as a point of comparison one may refer to the discussion in section 3.3 where it was argued that the solidarity defence does not usually affect the application of the concept of abuse. As was stated, the objectives of the abusive conduct may sometimes prevent fulfilment of the criteria of abuse, but the scope of these exemptions is narrow and they mostly relate to situations where the abusive conduct is indispensable for providing some products or services. Against this background it seems natural that the criteria of abuse are usually independent also of the issue of which of the collectively dominant undertakings is directly exploiting the market.

#### 5. Conclusion

The subject of this article was to consider whether the outsourcing of sports league functions affects their evaluation from the point of view of EU competition law. The answer is more or less unambiguous: the outsourcing seems to be neutral as a measure from the viewpoint of competition law. This result might appear slightly surprising: firstly because it is rather uncommon that such a broad juridical question can be answered in such an exact way, and secondly because opposing outlooks have been presented quite often in the discussion to date. The essential conclusions may be summed up here as follows:

- The vertical solidarity of the federation structure can hardly moderate the interpretation of either the prohibition of agreements restricting competition or the prohibition of abuse of dominant market position. In other words, a federation cannot normally get any relief from the demands of competition law by channelling its profits into the financing of grassroots activities.
- Some grassroots activities of a federation could principally be regarded as “services of general economic interest” in the meaning of Article 106(2) TFEU, but this would not mitigate the competition law control directed towards the league, because restrictions of competition relating to the league cannot be considered indispensable for financing the grassroots activities.
- The prohibition of abuse that restricts the regulative powers of a federation cannot usually be mitigated by outsourcing the commercial exploitation of a league to a separate legal entity. This is because 1) the federation and the league corporation would easily be regarded as being in a collectively dominant position and because 2) outsourcing usually has no effect on how the criteria of abuse is applied.

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(numbering erased by the author): “It seems unrealistic to claim that FIFA, which is recognised as holding supervisory powers over the sport-related activity of football and connected economic activities, such as the activity of players’ agents in the present case, does not hold a collective dominant position on the market for players’ agents’ services on the ground that is not an actor on that market. The fact that FIFA is not itself an economic operator that buys players’ agents’ services on the market in question and that its involvement stems from rule-making activity, which it has assumed the power to exercise in respect of the economic activity of players’ agents, is irrelevant as regards the application of Article 82 EC, since FIFA is the emanation of the national associations and the clubs, the

actual buyers of the services of players’ agents, and it therefore operates on this market through its members.”

<sup>89</sup> Weatherill *ISLJ* 2009/1-2 p. 6 (emphasis added and footnote erased): “A sports regulator which went so far as completely to surrender its commercial activities would be in the safest position - it might not even constitute an “undertaking” within the meaning of EC law and, even if it does, *the risk of abuse would be minimized.*”

<sup>90</sup> Kuoppamäki 2003 p. 1008.

<sup>91</sup> For example, Kuoppamäki 2003 pp. 1008-1018; and Whish 2009 pp. 565-567.

<sup>92</sup> Generally Carles Esteva Mosso, Stephen A. Ryan, Svend Albaek and Maria Luisa Tierno Centella in *Faull & Nikpay* 2007 p. 349; and Kuoppamäki 2003 p. 761.

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# De Sanctis and the Article 17: the Last of the Saga?

by Matthijs Withagen and Adam Whyte\*

## Introduction

On 28 February 2011, the Court of Arbitration for Sport (CAS) issued a leading decision regarding Article 17 of the RSTP on the Status and Transfer of Players, hereinafter “RSTP”<sup>1</sup> in the three joint cases between Udinese and Sevilla<sup>2</sup>, Udinese and Mr. Morgan De Sanctis<sup>3</sup>, and Udinese against Mr. De Sanctis and Sevilla<sup>4</sup>.

In these cases, which are commonly referred to jointly as the *De Sanctis* case, the CAS Panel ruled that De Sanctis and Sevilla were jointly and severally liable to pay the amount of EUR 2,250,055 as indemnification to Udinese after it was held that De Sanctis had unilaterally terminated his employment contract with Udinese without just cause.

In this article, we shall give a brief introduction to Article 17 of the RSTP and the most important CAS jurisprudence regarding this article. Afterwards we shall review the facts of the *De Sanctis* case, the decision of the FIFA Dispute Resolution Chamber, and the CAS award. Finally we shall endeavour to explore the future development of Article 17 of the RSTP and the approach the CAS might take to such cases.

## Article 17 of the Regulations on the Status and Transfer of Players

Article 17 is part of chapter IV of the RSTP regarding the “Maintenance of Contractual Stability between Professionals and Clubs”. It is common knowledge that the parties to a contract should respect the terms and duration of that contract, such is also typically referred to as *pacta sunt servanda*. This principle is expressly provided for in Article 13 of the RSTP, which stipulates that “a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement”<sup>5</sup>.

In 2001, FIFA included Article 17 in the RSTP which stipulated what would happen in the event that one of the parties of an employment contract (the player or the club) would terminate said employment contract prematurely and without just cause.<sup>6</sup>

One of the most important aspects of Article 17 is that it states that “in all cases, the party in breach shall pay compensation” to the party that has suffered damage as a result of said breach.

Article 17 of the RSTP now states, with regard to the calculation of the compensation to be paid to the party that has suffered damage, that: “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.”<sup>7</sup>

Furthermore, Article 17 of the RSTP states that if the unilateral termination of the contract occurred during the Protected Period, sporting

sanctions shall be imposed on the party in breach. For players, this sanction can be a 4 to 6 months restriction on playing official matches,<sup>8</sup> whereas Clubs shall<sup>9</sup> be sanctioned with a ban on registering any new players for two Registration Periods as defined in the RSTP.<sup>10</sup> Furthermore, in the event that the unilateral termination of the contract occurs outside the Protected Period no sporting sanctions shall be imposed.

Hereafter we shall discuss the application of Article 17 of the RSTP on cases in which the player was the party who unilaterally breached the contract without just cause.

## CAS jurisprudence on Article 17

In the recent past there have been various cases regarding the *the consequences of terminating a contract without just cause* before the Court of Arbitration for Sport, hereinafter “CAS”, which were decided in accordance with Article 17 of the RSTP.

For the sake of clarity we will first briefly discuss the most important cases in which the party in breach was the player.

One of the very first “Article 17 cases” is the case of Ariel Ortega against Fenerbahçe<sup>11</sup>. Fenerbahçe did not pay Ortega his salary for two months. After playing an international match with the Argentinean team in the Netherlands, Ortega flew to Argentina instead of returning to the club in Turkey.

The CAS Panel ruled that the non-payment of salary by itself would not entitle Ortega to treat the contract as terminated, thus releasing him from his contractual obligations to the Club. It was established that if Ortega wished to be freed from his contractual obligations to his club then he would have had to have formally requested the club to pay his salary, or give notice to the club that the payment of his salary/ies was/were overdue, which he didn’t<sup>12</sup>.

Finally, the CAS Panel decided that Ortega had to pay a compensation fee of USD 11,000,000. This amount was calculated on the basis of the transfer fee Fenerbahçe paid for Ortega, image rights of Ortega and other expenses of Fenerbahçe<sup>13</sup>.

Another important case regarding the liability of a player<sup>14</sup> for the breach of his contract is the case of Philippe Mexès against AJ Auxerre<sup>15</sup>. This was the first case in which a player made specific reference to Article 17 of the RSTP when unilaterally terminating his contract.

Mexès terminated his contract with the French club after four seasons of his initial contract, assuming that the Protected Period had finished. However, as the player and the club had previously signed an extension of the initial contract for one additional year, the CAS Panel considered that the extension was a *new* contract, thus a *new* Protected Period had commenced.

Therefore, the CAS Panel suspended Mexès in accordance with the terms of Article 17 and ordered the payment of EUR 7,000,000 as compensation for the breach of contract without just cause. Such indemnity

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1 The RSTP shall refer to the 2010 edition of such unless otherwise stated.

2 CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.*

3 CAS 2010/A/2146 *Morgan de Sanctis v. Udinese Calcio S.p.A.*

4 CAS 2010/A/2147 *Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD.*

5 Article 13 of the RSTP.

6 Article 17 of the RSTP.

7 Article 17(1) of the RSTP. According to

the RSTP, 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, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional”.

8 Article 17(3) RSTP.

9 However, the interpretation of the word “shall” is somewhat clouded following the *Lens v. Chelsea* case in which Chelsea

escaped the imposition of sporting sanctions following an agreement reached between the two clubs.

10 Article 17(4) RSTP.

11 CAS 2003/O/482 *Ariel Ortega v. Fenerbahçe & FIFA.*

12 More specifically, the Commentary for the RSTP makes specific reference to a Player giving a Club notice that his salaries had not been paid for a period of 3 months, at which point it is certain that the Player shall no longer have any contractual obligations towards the club.

13 Eventually Ortega’s new club River Plate reached a settlement with Fenerbahçe to

pay a certain amount of money so that Ortega would be allowed to resume his playing career after he was obliged to stop paying until the amount of USD 11,000,000 was paid.

14 The responsibility for a Player to pay damages has effectively become the responsibility of his new club in accordance with Article 17.2 of the RSTP which makes the new club jointly and severally liable to pay.

15 CAS 2005/A/902 & 903 *Philippe Mexès & AS Roma v. AJ Auxerre.*

16 However it is interesting to note that Portsmouth had allegedly submitted a bid

ty was fixed at EUR 7,000,000, which corresponded to a sum of the costs incurred by Auxerre of EUR 2,289,644 and an offer submitted by AS Roma of EUR 4,500,000.

The latter amount was based on the negotiations between Auxerre and AS Roma regarding the possible transfer of the player. Roma offered EUR 4,500,000 for the player's registration, and no other offers were made to Auxerre. Thus, the CAS Panel considered this amount to be the "market value" of the player which Auxerre could have received in the event of a transfer of the player, but which it did not receive because of a "failed transfer".

It should be noted that the CAS also took other criteria into account when calculating the amount of damages to be paid, however they did not specifically indicate why they rounded the amount of indemnity to be paid to exactly EUR 7,000,000<sup>16</sup>.

The next case is the oft-referenced dispute between Mr. Andrew Webster and Heart of Midlothian, hereinafter "Hearts"<sup>17</sup>. The Scottish club offered Webster a new contract in February 2006, however Mr. Andrew Webster declined the offer. It was understood that Mr. Webster, having enjoyed many successful seasons with Hearts and having become a fixture in the national team wanted to explore different career possibilities. The club reacted by not selecting Webster for some matches in the Scottish league. Webster decided to use Article 17 of the RSTP to unilaterally terminate his contract at the end of the season.

Hearts claimed an amount of GBP 5,000,000, which was based on the lost possibility of a transfer of the player, the replacement costs of a new player, the transfer fee it had paid to the player's former club, the residual value of the player's contract with the club, the difference of the value of one year of the player's contract with Hearts and the player's contract with his new club, Wigan Athletic FC, and commercial and sporting losses.

The CAS Panel in the *Webster* case decided to calculate the compensation payable on the basis of the residual value of the last year of the player's contract, which was GBP 150,000. It is important to note that in this dispute, the behaviour of Hearts was likely a significant factor in the Panel calculating a relatively low amount of indemnification for the breach of contract of a Player of Mr. Webster's quality.

Later the CAS Panel heard the dispute between FC Shakhtar Donetsk of Ukraine, hereinafter "Shakhtar", Matuzalem Francelino da Silva, "Matuzalem", a Player from Brazil and Real Zaragoza SAD of Spain, hereinafter "Zaragoza". The *Matuzalem*<sup>18</sup> case as it is commonly referred to, involved the player, Matuzalem, unilaterally terminating his contract with the club Shakhtar after the expiry of the Protected Period and subsequently signing for Zaragoza.

Shakhtar claimed EUR 25,000,000, which was the amount stipulated in the "transfer clause"<sup>19</sup> included in the contract with the player. The CAS Panel in the *Matuzalem* case finally awarded an amount that was unexpected in the world of football after the aforementioned award in the *Webster* case.

Instead of awarding the residual value under the contract between Shakhtar and Matuzalem, like the CAS Panel did in *Webster*, this Panel calculated the indemnity in a different fashion.

The Panel rejected Shakhtar's claim for EUR 25,000,000 because the Panel viewed that the clause in the contract containing this figure was not an indemnity clause but rather a transfer clause. The Panel then used several contracts to determine "the value of the services" of the

Player, Matuzalem - The value of the salary for the first year of his contract with Real Zaragoza (2007/2008), the value of the salary for the three years of his contract with Lazio (2008/2009 - 2010/2011), the club that Matuzalem was loaned to after one season with Zaragoza, and the first two years of his second contract with Zaragoza (2008/2009 - 2009/2010).

Furthermore, the CAS Panel decided that the salary that Shakhtar did not have to pay to the player during the two remaining years of his contract with the club (EUR 2,400,000) should be deducted of the aforementioned average remuneration. The Panel deemed that since Shakhtar no longer had to pay the Player these amounts of money that no losses had actually occurred.

Regarding the *specificity of sport*, the Panel decided that Shakhtar was entitled to receive the amount of EUR 600,000, or the amount corresponding to six months of salary of the Player, because he had left the club just before the start of the qualifying round of the UEFA Champions League which the Club was due to participate in. Crucially, this was the first time the *specificity of sport* was recognized in a CAS award regarding a breach of contract.

The most important criterion for the CAS Panel to base its decision on was the option clause included in the loan agreement between Real Zaragoza and Lazio Roma. The amounts required to buy the Player, which were amounts between EUR 13,000,000 and EUR 15,000,000, were contained within said loan agreement. The Panel stated that these amounts reflected or at least helped to establish the value of the services of a player.

The CAS Panel used two calculations to determine the final amount payable to Shakhtar. The value of the services of Matuzalem for both Real Zaragoza and Lazio Roma was EUR 14,000,000, which was calculated as the average value of the option clause, plus the salary both clubs were willing to pay the player in three seasons. These total amounts, corresponding to EUR 21,336,800 for Lazio and EUR 19,640,000 for Zaragoza, had to be recalculated for a period of two years, being the remaining time on the contract between Shakhtar and Matuzalem.

Furthermore, the two years of salary that Shakhtar did not have to pay to the Player had to be deducted from both amounts. Therefore the two resulting amounts EUR 11,824,534 and EUR 10,693,334 were averaged, and the Panel added EUR 600,000 for the *specificity of sport*, resulting in the final amount of EUR 11,858,934 as compensation for the Player's unilateral termination of contract.

The last case we would like to discuss is the *El Hadary*<sup>20</sup> case. In this dispute the goalkeeper Essam El Hadary was adjudged to have unilaterally terminated his contract with the Egyptian club Al-Ahly without just cause. The CAS Panel in this case considered the residual value remaining under the old contract between the player and Al-Ahly USD 292,000 for two years and three months and the value of the new contract between El Hadary and the Swiss club FC Sion for the same period USD 488,500. Furthermore, the CAS Panel considered the loss of a possible transfer fee that Al-Ahly could have recouped for the player.

Due to the fact that FC Sion and Al-Ahly had a meeting to conduct negotiations in view of the transfer of El Hadary, and that FC Sion had offered USD 600,000, the Panel determined that Al-Ahly was deprived of the opportunity to obtain a transfer fee of at least this amount.

The Panel added the amounts of the value of the new contract and the loss of earnings, deducted the amount of the value of the old contract, and finally awarded Al-Ahly with a compensation fee of USD 796,500. The fact that the breach occurred within the Protected Period was not included in the calculation of the compensation by the Panel, because it was determined that proportionate sporting sanctions had already been imposed on the player. The Panel also did not add an amount for the *specificity of sport* as the circumstances did not lead to increase or decrease the amount of compensation.

As we can see, the CAS jurisprudence developed throughout the years. Some of the awards show similarities in the use of the criteria set out in Article 17 of the RSTP, while other Panels have valued these criteria differently. We will now have a close look at the *De Sanctis* case, and it will be demonstrated how the CAS Panel followed and strayed from the previously discussed jurisprudence.

of EUR 7,000,000 which was turned down by Auxerre, and the final amount in the award is identical to this bid amount.

<sup>17</sup> CAS 2007/A/1298, 1299 & 1300 *Webster & Wigan Athletic FC v. Hearts*.

<sup>18</sup> CAS 2008/A/1519 & 1520 *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*.

<sup>19</sup> A "transfer clause" is a clause which refers to an amount of money which is contractually agreed upon by the Parties to the contract in advance, which states that in the event that another club would pay the agreed upon figure to the club which has

registration rights of the player, that club must accept the offer, and the Player is free to negotiate with the new club. On the other hand, an "indemnity clause" is a clause which refers to an amount of money which is contractually agreed upon by the Parties to the contract in advance, that is to be paid by the Party in breach of contract, resulting in its unilateral termination, to the other Party.

<sup>20</sup> CAS 2009/A/1880 *FC Sion v. FIFA & Al-Ahly Sporting Club* and CAS 2009/A/1881 *Essam El Hadary v. FIFA & Al-Ahly Sporting Club*.

## Facts

The *De Sanctis* case began in July 1999 when the goalkeeper Morgan de Sanctis joined Udinese at the age of 22 on a five year deal effective from 1 July 1999. After becoming the goalkeeper of the first team and signing several contract extensions with Udinese, De Sanctis, at the age of 28, and Udinese signed another contract for five years on 1 July 2005.

On 7 July 2006, Udinese agreed upon the loan transfer of their second goalkeeper Samir Handanović to FC Rimini. The latter club had the option to buy Handanović for the amount of EUR 1,200,000 while Udinese had the option to take the player back from FC Rimini should they pay to FC Rimini the amount of EUR 250,000 to Rimini. We will later see that this loan transfer turned out to be of paramount importance in the final decision of the CAS Panel.

On 8 June 2007, approximately two years after the date of the commencement of the latest contract between De Sanctis and Udinese, and after the end of the Protected Period<sup>21</sup>, De Sanctis informed Udinese of the termination of his playing contract with the club in accordance with the provisions of Article 17 of the RSTP.

Udinese, in need of a new first goalkeeper after losing De Sanctis, exercised the option to take back Handanović from Rimini two weeks later, on 21 June 2007. Furthermore, Udinese signed Antonio Chimenti, a veteran keeper, on a free transfer on 29 June 2007 and crucially released three other goalkeepers<sup>22</sup>.

One month after the unilateral termination of his contract, De Sanctis signed a four year contract with Sevilla. The club and the player included an indemnity clause in the contract which stipulated the amount of compensation, EUR 15,000,000, that would be payable by any party to the other in case that one would terminate his contract prematurely.

In April 2008, deliberately short after FIFA's February decision in the *Matuzalem*<sup>23</sup> case, Udinese presented its claim before the FIFA Dispute Resolution Chamber, requesting the huge amount of EUR 23,000,000 as an indemnity for De Sanctis' unilateral termination of the contract.

The FIFA DRC, however, ordered De Sanctis and Sevilla in December 2009 to compensate Udinese with an amount of EUR 3,933,134.<sup>24</sup>

## How did the FIFA DRC reach this amount?

The FIFA DRC calculated the final compensation taking into account the average remuneration due under the last contract between De Sanctis with Udinese on the one hand and the new contract between De Sanctis and Sevilla on the other hand.<sup>25</sup> However, a written explanation for this calculation method was not given by the DRC.

Furthermore, it added an amount of EUR 350,000 related to the *specificity of sport*, but the DRC did not give any explanation as to why this amount corresponded to the value of the damage in accordance with the principles of the *specificity of sport*.<sup>26</sup>

None of the Parties, Udinese, De Sanctis and Sevilla, agreed with the decision<sup>27</sup> of the DRC for various reasons and consequently appealed to the Lausanne based Court of Arbitration for Sport.

It should be noted that Udinese immediately decreased their final amount claimed before the CAS from initially EUR 23,000,000 to EUR 10,000,000<sup>28</sup>. Furthermore, Udinese bizarrely compared the value of the services of a football player with the value of a painting<sup>29</sup>. Udinese attempted to illustrate, no pun intended, the value of the services of the Player must be calculated at the time that the Contract was terminat-

ed. However, they failed to take into account that paintings are not paid a salary which could represent the value of the services of the Player, or that to compare an employee who has human and workers rights to a painting is difficult if not impossible.

## The CAS award

The CAS Panel's first order of duty was to determine whether or not the calculation method of the FIFA DRC was correct. Due to the lack of reasoning behind the awarded sum for the specificity of sport and the fact that the DRC did neither apply the calculation method of the *Webster*<sup>30</sup> case, nor that of the *Matuzalem*<sup>31</sup> case, but rather "mixed" the two methods, the CAS Panel decided that the calculation method used by the FIFA DRC was incorrect.<sup>32</sup>

Instead, according to the CAS Panel, the right manner to reach a final amount of compensation in this case was to apply the principle of "positive interest", meaning that the injured party would be put in the position that it/ they would have been in had the contract been performed properly.<sup>33</sup>

To achieve this similar position, the CAS Panel took some objective criteria into consideration, such as the loss of a possible transfer and replacement costs. These criteria are not included in Article 17 of the RSTP but have been considered by CAS Panels in previous cases.<sup>34</sup>

On losing De Sanctis as a first goalkeeper, Udinese allegedly brought back the aforementioned Samir Handanović to replace him. Rimini had already exercised the option to buy Handanović after his loan period for the amount of EUR 1,200,000. However, this transfer offer (and the money) was rejected by Udinese, who then paid the agreed amount of EUR 250,000 to Rimini to have the player back.

Udinese thought that Handanović was too young and inexperienced and contracted another goalkeeper with more experience, the aforementioned Antonio Chimenti who was 37 years old at that time, on a free transfer.

According to Udinese, both were to replace De Sanctis, even though the club had released three other goalkeepers during the same period; Chimenti being the initial replacement player, and Handanović being the future replacement player. In this regard, the CAS Panel noted the specific position of a goalkeeper in a team: only one is on the pitch at anytime for a club and they tend to rotate less.<sup>35</sup>

Bearing this in mind, it could have been either Handanović or Chimenti who was going to replace De Sanctis as the first goalkeeper of Udinese. Despite the basic principle in football that each team can only field *one* goalkeeper, the CAS Panel felt that Udinese had acted reasonably by replacing De Sanctis with both the young and talented Handanović, and the old and experienced Chimenti.<sup>36</sup>

It is worth mentioning that the counsel of Sevilla attempted to argue that Handanović had been a resounding success at Udinese after the departure of De Sanctis, having tied a Serie A record in the 2011 season for saving 6 penalties over the course of the season, and appearing at the 2010 World Cup with Slovenia<sup>37</sup>. Sevilla attempted to argue that it was only as a result of De Sanctis' departure that Udinese was given the opportunity to see how effective Handanović could have been, therefore Udinese had not suffered any damage from the departure of De Sanctis since they ended up with a potentially better and younger keeper. However, the Panel did not consider this argument.

According to the CAS Panel in the *Matuzalem* case, and confirmed

21 De Sanctis was 28 years old when he signed his latest contract with Udinese, meaning that the Protected Period was 2 entire seasons or two years. The 2006/2007 season ended on 27 May 2007, and so did the Protected Period for De Sanctis.

22 At trial the President of Udinese stated that any top club had to have 3 or 4 goalkeepers, and with the loss of 3 that summer, it was submitted by the representatives of De Sanctis and Sevilla that Morgan De Sanctis' departure did not instigate the repurchase of Handanovi or the signing of Chimenti since Udinese

had lost 3 keepers that summer anyway, and they would have had to have been replaced in any case. The Panel did not take this point into account.

23 FIFA DRC, *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD*, 2 November 2007.

24 FIFA DRC, *Udinese Calcio v. Morgan de Sanctis & Sevilla*, 10 december 2009, par. 45, p. 22.

25 *Idem*, par. 26-28, p. 17-18, and par. 40, p. 21.

26 *Idem*, par. 37-40, p. 20-21.

27 Specifically the method of calculation, or lack thereof was an issue for all the Parties to the dispute

28 This was surprising given the fact that Sevilla and De Sanctis had signed an employment contract with an indemnification clause worth EUR 15,000,000 which surely gave an indication of the value of the services of the Player.

29 CAS 2010/A/2145, 2146 & 2147 *Sevilla FC SAD & Morgan De Sanctis v. Udinese Calcio S.p.A.*, par. 41m.

30 CAS 2007/A/1298, 1299 & 1300 *Webster*.

31 CAS 2008/A/1519 & 1520 *Matuzalem*.

32 *Idem*, par. 57-58.

33 *Idem*, par. 61.

34 CAS 2008/A/1519 & 1520 *Matuzalem*, CAS 2009/A/1880 & 1881 *El Hadary*,

CAS 2009/A/1856 *A v. Club X* and CAS/2009/A/1857 *Club X v. A*.

35 CAS 2010/A/2145, 2146 & 2147 *De Sanctis*, par. 71. The CAS Panel emphasized in the same paragraph that "outfield players can often play in different positions and are easier to replace from a squad". This is contradictory to the Panel's opinion in the *El Hadary* case, in which it "does not share Al-Ahly's view that a goalkeeper is harder than the other players to replace" (par. 115).

36 *Idem*, par. 72.

37 en.wikipedia.org/wiki/Samir\_Handanovi%C4%8D.

by Article 44(t) of the Swiss Code of Obligations, an injured party has the obligation to take reasonable steps to mitigate the effect and loss related to his or her damage.<sup>38</sup> The CAS Panel in the present case accepted that Udinese had not replaced like with like and further mitigated its position by bringing in a second goalkeeper to replace De Sanctis.<sup>39</sup>

One must question whether or not Udinese should have *further* mitigated its position by bringing in a second replacement goalkeeper and automatically committing itself to double salary costs. One would have to opine that one replacement player could have been sufficient to mitigate the effects related to the damage suffered by the club. That is to say, how can you replace one goalkeeper with two?

Subsequently, the CAS Panel pointed out that the speed in which Udinese acted proved that these two players were hired as direct substitutions for De Sanctis; seemingly ignoring their previous statement that they recognized goalkeeper as a special position that only one player could occupy on the pitch at the same time.<sup>40</sup>

It should be pointed out that it would not have been unreasonable if Udinese had taken some more time to consider possible other options to replace De Sanctis, as he informed the club of the termination of his contract on 8 June 2007. This means that Udinese had the opportunity until the end of the summer transfer window, almost three months, on 31 August 2007, to find *one* sufficiently experienced goalkeeper to replace De Sanctis.

We are of the opinion that Udinese should not have been commended for their hasty behaviour in attempting to allegedly replace De Sanctis with one young, albeit promising, goalkeeper and one experienced keeper, who left one season later after having made 3 appearances, and rather Udinese should have more carefully researched how to replace the “talisman” of their club.

Had Udinese done so, it would have fulfilled its obligation to mitigate its own damages by hiring a new goalkeeper, but at the same time lowered the replacement costs by hiring only *one* goalkeeper to replace De Sanctis and consequently committing itself to the costs of *one* player’s salary, instead of *two*. Furthermore, it should again be noted that Udinese had already lost three goalkeepers that summer, and therefore it was not unreasonable to suggest that Handanovič was a replacement for De Sanctis and Chimenti for one of the other back-up keepers.

Moreover, the CAS Panel’s reasoning in this instance might be used in future cases by clubs who quickly buy two players to replace the one who unilaterally terminated his contract.

Despite of these considerations, the CAS Panel accepted that both Handanovič and Chimenti were hired in direct substitution for De Sanctis, as a result of De Sanctis’ termination of his contract.<sup>41</sup> In fact, the situation worked out in the way Udinese thought it would, as eventually Handanovič replaced De Sanctis as the first goalkeeper of the club, which he still is at the moment of writing.<sup>42</sup>

The CAS Panel determined that the total replacement costs were EUR 4,510,000, calculated on the basis of adding the lost transfer fee from Rimini for Handanovič, EUR 1,200,000, the counter offer fee paid to Rimini for Handanovič, EUR 250,000, the salary of Handanovič for three years, EUR 1,179,000, and the salary of Chimenti for three years, EUR 1,881,000.<sup>43</sup>

Subsequently, the CAS Panel considered if Udinese had suffered more loss or damage than the direct loss as a result of the replacement costs, in order to establish the total loss or damage suffered by the club due to the player’s breach which is the purpose of Article 17(t) of the RSTP.<sup>44</sup>

A factor that has been considered part of the total loss in previous cases before the CAS regarding the breach of contract is the loss of a potential transfer fee.<sup>45</sup> However, the fact that no evidence of any offers for De Sanctis had been produced by the parties, the CAS Panel did not use this factor to assess the total compensation.<sup>46</sup>

Again it is necessary to note that the Player was loaned to Galatasaray after one season with Sevilla for the fee of EUR 500,000 and was later sold to Napoli for a fee of EUR 1,700,000. It was surprising that neither of these figures were mentioned in the submissions of Udinese due to the fact that they represented an objective quantification of the value of the services of the Player, and perhaps would have been considered by the CAS Panel.

Furthermore, the CAS Panel widely considered the remuneration and other benefits due to the Player. Udinese claimed that it should be compensated according to the remuneration of De Sanctis under his new contract with Sevilla,<sup>47</sup> whereas, Sevilla and De Sanctis submitted that the compensation should be limited to the net residual remuneration under the old contract with Udinese, maintaining that the value of the termination of contract would have to be calculated at the time of the breach, and the value of the new contract was not decided at this moment, therefore it should not have been considered when awarding damages.<sup>48</sup>

The CAS Panels in the *Matuzalem* and *El Hadary* cases used the remuneration of the player under his new contract, and subsequently deducted the acquisition costs of a replacement player. In the *De Sanctis* case, Udinese did not produce any evidence as to the acquisition costs of a theoretical replacement goalkeeper.<sup>49</sup>

Therefore, the CAS Panel applied a different calculation method, and stipulated that there is not just one way to calculate the compensation payable and that each case must be assessed on its own in the light of the elements and evidence produced by the parties.<sup>50</sup>

Based on the elements and evidence available to the CAS Panel in the *De Sanctis* case, the Panel decided to deduct the yearly salary of De Sanctis, the yearly loyalty bonus he received and the annual rent contribution, amounting to EUR 2,950,734 in the remaining three years of De Sanctis’ contract with Udinese, from the total replacement costs incurred by Udinese (EUR 4,510,000). This came down to an amount of EUR 1,559,266.<sup>51</sup>

Finally, the CAS Panel considered the principle of the *specificity of sport*. The Panel correctly emphasized that the specificity of sport is not an additional head of compensation, nor a transfer fee behind the back door<sup>52</sup>, but merely a correcting factor which allows the Panel to take into consideration other objective elements which are not included in Article 17 of the RSTP.<sup>53</sup>

Among those elements taken into consideration by the CAS Panel were, on the one hand, the number of years left on his contract with Udinese and the success he had brought to the Italian club, but on the other hand the fact that the Player had served the Club for eight years and terminated the employment contract after the expiry of the Protected Period. However, the decisive element for the Panel was the effect of De Sanctis’ breach on the fans and sponsors of Udinese.<sup>54</sup>

The CAS Panel believed that, in the future, clubs will suffer losses, which could probably not be proven in Euros, when a key player leaves them following a transfer or a unilateral termination of contract.<sup>55</sup> The Panel believed that Morgan de Sanctis was a key player to the Udinese fans and sponsors and used the umbrella of the *specificity of sport* to consider this element.<sup>56</sup>

The CAS Panel followed the *specificity of sport* jurisprudence detailed in the *Matuzalem* case, in which that Panel used the concept of fair and just indemnity of the Swiss Code of Obligations. As a result, the Panel in *Matuzalem* awarded six months of salary under the player’s new contract as an additional compensation. Thus, the CAS Panel in the *De Sanctis* case awarded EUR 690,789 which equals six months of salary under the new contract of De Sanctis with Sevilla.<sup>57</sup>

It should be noted that the Panel stated that the value of the com-

38 CAS 2008/A/1519 & 1520 *Matuzalem*, par. 111.

39 CAS 2010/A/2145, 2146 & 2147 *De Sanctis*, par. 72.

40 *Idem*, par. 72.

41 *Idem*, par. 72.

42 On 3 August 2011, Udinese and Handanovič agreed on an extension of the player’s contract until 30 June 2016 ([www.udinese.it](http://www.udinese.it)).

43 CAS 2010/A/2145, 2146 & 2147 *De Sanctis*, par. 73.

44 *Idem*, par. 74.

45 In the *Webster* case, it was a possible factor. In the *Matuzalem* and *El Hadary* cases it was not a possible factor.

46 CAS 2010/A/2145, 2146 & 2147 *De Sanctis*, par. 77 & 78.

47 This was the starting point for the CAS

Panels in the *Matuzalem* and *El Hadary* cases.

48 Compare with the *Webster* case.

49 CAS 2010/A/2145, 2146 & 2147 *De Sanctis*, par. 84.

50 *Idem*, par. 86.

51 *Idem*, par. 87.

52 *Idem*, par. 99.

53 *Idem*, par. 96.

54 *Idem*, par. 100.

55 *Idem*, par. 101.

56 It should be noted that the counsel of Udinese made the insightful point that Mr. De Sanctis was a very respectable professional and amicable person, therefore to replace him would be more difficult due to his popularity within the Club and with the fans.

57 CAS 2010/A/2145, 2146 & 2147 *De Sanctis*, par. 102.

pensation owed for the Player's unilateral termination of contract should be calculated at the moment of such termination, however, by taking into account the Player's new salary with the Club they are using the benefit of hindsight in order to establish the value of the damages payable.

We believe that in the future should clubs wish to objectively establish their valuation of the Player, then it should be the old salary which is examined by the CAS panel since both Parties to the contract have effectively agreed how much the value of the services of the Player are (at least partially) due to the fact that the Parties have agreed to pay "X" amount of remuneration to the Player for his services as an athlete/ football player.

The final amount of compensation payable jointly and severally by De Sanctis and Sevilla, according to the aforementioned calculations, was EUR 2,250,055.<sup>58</sup>

### The future of Article 17

We have already pointed out that the aforementioned cases dealt with by the CAS showed different evaluations, by different Panels, of the objective criteria set out in Article 17 of the RSTP.

Generally, this is caused by a different set of facts in each case. A contract could be terminated by a player or a club, within or after the expiry

of the Protected Period, and new clubs or even third Parties could be involved and so on.

Moreover, each CAS Panel is formed by different arbitrators, each with their own opinions, legal and sporting backgrounds and each with a considerable amount of discretion<sup>59</sup> when determining the amount of compensation due. This results in different awards, tests, and amounts of compensation to be paid.

Various CAS Panels in different cases have already stated that each of the elements set out in Article 17(1) of the RSTP is relevant and should be taken into consideration, but the amount of weight given, if any at all, to each element depends on the particular circumstances of each case and of the submissions of the parties. The parties are therefore able to stress the facts which they believe could be in their favor by adding evidence and arguments to support those facts.

It is therefore very difficult, if not impossible, to predict what the outcome of the next "Article 17 case" will be. If anything, the only thing that has been established following the *De Sanctis* case is that each Article 17 case is extremely facts specific, and factors such as the age, quality, influence, behaviour of the Player; and the quality, and behaviour of the Club; as well as the presence of many other factors, will give Panel's the reason if not motivation to make very different decisions.

The least we can assume and hope for is that the CAS Panel will always be guided by the aforementioned principle of "positive interest" to put the injured party in the position which it would have had if no contractual breach had occurred, and that the calculation made shall be just, fair, transparent and comprehensible.<sup>60</sup>

<sup>58</sup> *Idem*, par. 103.

<sup>60</sup> *Idem*, par. 89.

<sup>59</sup> CAS 2008/A/1519 & 1520 *Matuzalem*, par. 87.

# Webster, Matuzalem, De Sanctis ... and the Future

by Frans M. de Weger\*

## 1. Introduction

On 30 January 2008, the Court of Arbitration for Sport ("CAS") ruled that player Andrew Webster was entitled to unilaterally terminate his employment contract with Heart of Midlothian after the so-called protected period of his contract. The CAS decided that as result of the unilateral termination, player Webster only had to pay the remaining value of his contract as compensation to his former club Heart of Midlothian. This was the first case in which the CAS had to decide with regards to the amount of compensation in case of a unilateral termination of a player after the protected period. On the one hand, the international football world was pleasantly surprised after the decision (the players), but on the other also seriously shocked (the clubs). The question now

was whether the Webster-case was another land mark judgment in the international football world, such as the famous Bosman-case.<sup>1</sup>

After Webster, the main issue was, is every player free to unilaterally terminate his employment contract after the protected period by only paying the remaining value of his contract as compensation? In an earlier edition of the International Sports Law Journal, I wrote an article regarding the Webster-case and its consequences for the future. In that article I analyzed whether the clubs would indeed face more difficulties after the decision, given that the players might be entitled to terminate their contracts unilaterally after the protected period. In that article it was concluded that it should not be presumed beyond doubt after the Webster-case that the remaining value in future cases had to be considered as the only criterion in order to establish the amount of compensation. After Webster we were left with many unanswered questions that gave rise to the suspicion that the remaining value should not be the only decisive criterion in determining the amount of compensation. For example, in future cases aggravating circumstances, more specifically the status and behavior of the parties, could play an important role and could have effect on the amount of compensation to be paid. And, more importantly, does not each request for compensation has to be assessed on a case-by-case basis?<sup>2</sup> Many questions were still unanswered.

On 19 May 2009, the CAS came with a follow up. In the so-called Matuzalem-case, the CAS decided that the remaining value was not the only criterion in order to establish the amount of compensation after a unilateral termination of a player outside the protected period. In this case, the CAS ruled that the award of damages had to be based upon the principle of "positive interest", i.e. putting the injured party in the position it would have been in, had there been no breach of contract.

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<sup>1</sup> Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liègeois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Associations Européennes de Football v. Jean-Marc Bosman*, judgement of 15 December 1995, [1991] ECR I-4837.

<sup>2</sup> See International Sports Law Journal Jan-April 2008, Mr. Frans M. de Weger, "The Webster Case: Justified Panic as there was after Bosman?"

The Matuzalem-case provided clubs and players with judicial handholds to claim extra damages on the party breaching the contract. The CAS was not willing to follow the CAS panel in the Webster-case since it was of the opinion that extra damages could be claimed. Now the CAS panel in the Matuzalem-case ruled differently, it was interesting to see what CAS panels would decide in future with regards to the amount of compensation in case of a unilateral termination after the protected period. It was interesting to see what the future would bring and how this jurisprudence was going to develop. Would the Webster-doctrine be followed or was Matuzalem leading?

In the recent De Sanctis-case, the CAS now seems to clarify things up. In this case, in which was also adjudicated with regards to a termination after the protected period, the Italian player Morgan de Sanctis played with the Italian club Udinese and terminated his contract after the protected period, such as Webster and Matuzalem did previously. Udinese claimed that the player and his new club Sevilla were not entitled to (only) pay the remaining value of the contract and claimed that the award of damages had to be based upon the principle of “*positive interest*”, such as the CAS did in Matuzalem. The player (obviously) referred to the Webster-case and claimed that he only had to pay the remaining value. The FIFA Dispute Resolution Chamber (“DRC”) as well as the CAS (in appeal) had to decide in this matter. Both instances, the latter in its award of 2010, decided that extra damages could be claimed. As result thereof, it was clear that the remaining value was not the only element in order to establish the amount of compensation. The CAS now seemed to follow the line of the Matuzalem-case. However, it was interesting in this case that CAS did use a different calculation method regarding the amount of compensation.

In this article, the De Sanctis-case will play a central role. However, in order to place the De Sanctis-case in the right perspective, the Webster- as well as the Matuzalem-case will be discussed first, also as an introduction to the De Sanctis-case. The facts and the most important considerations of the DRC and the CAS will be brought to the attention. As said before, the De Sanctis-case will play a central role in this article since this case of 2010 now seems to give us a more definitive answer with respect to the question how the amount of compensation should be calculated in case a player unilaterally terminates his contract after the protected period. In that respect, article 17 para. 1 of the Regulations on the Status and Transfer of Player (“RSTP”) provides us with the key to assessing the amount of compensation. In the commentaries of this article, first parallel starting points of the deciding bodies in Webster, Matuzalem and De Sanctis will be outlined. Furthermore, in this article will be anticipated on how the CAS will decide in future cases after De Sanctis and what criteria as listed in article 17 and derived from the jurisprudence can and will most likely be taken into consideration by future CAS panels in order to establish the amount of compensation in case of a unilateral termination after the protected period. All relevant criteria will thus be analyzed. Finally, the clubs will be provided with judicial handholds in order to anticipate adequately regarding this issue in future.

## 2. Protected Period

Before entering into the substance of the matter, a short explanation with regards to the protected period (and the sporting sanctions) is necessary. A club and a player entering into an agreement should in principle respect and honour the contractual obligations during the term of the contract, also known as the principle of “*Pacta Sunt Servanda*”. FIFA

therefore introduced the so-called protected period, which was meant to safeguard the maintenance of contractual stability between players and clubs. The protected period is the period of three entire seasons or three years, whichever comes first, following the entry into force, if such contract was concluded prior to the professional’s 28<sup>th</sup> birthday. If the professional’s contract was concluded after the 28<sup>th</sup> birthday of the player, the protected period is two seasons or two years.

With the introduction of the protected period, FIFA intended to protect a certain period of the contract by discouraging players and clubs from terminating the contract during this period. FIFA believed that unilateral termination of a contract without a justified reason, especially during the protected period, had to be vehemently discouraged.<sup>3</sup> It is noteworthy to mention that sporting sanctions shall only be imposed on a 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 case a club is found to be in breach of contract or is found to be inducing a breach of contract<sup>4</sup> during the protected period, sporting sanctions shall also be imposed.

In that case, the club shall be banned from registering any new players, either nationally or internationally, for two registration periods. Please further note that in the RSTP is also laid down that if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment.

In view of the above, it is important to keep in mind that a unilateral breach of the employment contract without just cause after the protected period shall not result in sporting sanctions. Only 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.<sup>5</sup> Furthermore, it is important to mention in that respect that the protected period starts again when, while renewing the contract, the duration of the previous contract is extended. In order to avoid any misunderstanding, this article only focuses on the unilateral termination of a player *after* the protected period of the employment contract as result of which sporting sanctions will not be imposed.

## 3. Webster

The Webster-case started with a decision of the DRC of 4 April 2007, in which the chamber had to adjudicate with respect to the amount of compensation to be paid by player Andrew Webster now he left his club Heart of Midlothian outside the protected period.<sup>6</sup> The facts, in short, were as follows. The Scottish international Andrew Webster was a professional player with Heart of Midlothian and after a conflict with the club owner Vladimir Romanov in 2006, he was degraded to the bench. That was reason for Webster to terminate his contract. Webster terminated his employment contract outside the protected period and therefore no sporting sanctions would be imposed on him. Following the termination, Webster signed a new contract with Wigan Athletic. However, Heart of Midlothian did not agree with the termination and refused to cooperate with the transfer to Wigan Athletic. As result thereof, Webster appealed to FIFA and asked for a provisional registration for his new club, which was allowed by the Single Judge of the FIFA Players’ Status Committee (“PSC”).

After the provisional registration of the player, the dispute before the DRC was now only about the amount of compensation. Hearts claimed the market value to the amount of £ 5,000,000.- as compensation. The DRC stated that the player had terminated his contract outside the protected period and that this was a very important element in order to establish the amount of compensation. The chamber decided that the unilateral termination undeniably occurred after three seasons, i.e., after the protected period and within 15 days of the last match of the season.<sup>7</sup> In this decision, the DRC referred to article 17 in order to establish the amount of compensation due by the player to the club. However, the DRC committee explicitly stated in this respect that the list as mentioned in article 17 para. 1 was not exhaustive and that each request for termination had to be assessed on a case-by-case basis. In other words, the particularities of the case had to be examined.

The remaining value of the employment contract of the player con-

3 See FIFA Commentary, explanation article 13, p. 38.

4 According to the FIFA Regulations, 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.

5 After the so-called Webster-case (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*”, dated 30 January 2008), FIFA amended the definition of “*last official match*”. It now also includes national cup matches.

6 DRC 4 April 2007, no. 47936.

7 The DRC referred to the maintenance of contractual stability, which represents the backbone of the agreement between FIFA/UEFA and the European Commission signed in March 2001.

cerned was €199,976.-. However, the chamber once again stressed that the player could not terminate his contract by simply paying his club the remaining value of his contract. Besides his basic salary, the player received a number of appearance bonuses and the former transfer compensation of €75,000.- also had to be taken into consideration as well as the five seasons the player had spent with his club, according to the DRC. The DRC furthermore pointed out that another crucial factor to be taken into account was the way in which his club had contributed to the steady improvement of the player concerned. The before-mentioned considerations led to the conclusion of that Webster and Wigan were jointly and severally liable to pay an amount of £ 625,000.- to his former club Hearts. All parties appealed to the CAS.

In line with the DRC, the CAS also referred to article 17 of the RSTP, edition 2005, for determining the level of compensation owed. Heart of Midlothian claimed the market value of the player as lost profit in the amount of GBP 4 million. The panel was unequivocal. It decided there was no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit. In this case, the CAS believed it would be difficult to assume a club could be deemed the source of appreciation in a player's market value while never being deemed to be responsible for a depreciation in value. The CAS panel also considered that the remuneration and benefits due to the player under his new contract is not the most appropriate criterion on which to rely in cases involving unilateral termination by the player beyond the protected period, because rather than focusing on the content of the employment contract which has been breached, it is linked to the player's future financial situation and is potentially punitive. The panel found that Hearts' claim of £ 330,524.- based on the difference between the value of the old and new contract had to be rejected, and that the most appropriate criteria of article 17 to apply in determining the level of compensation owed to Hearts by the player, is the remuneration remaining due to the player under the employment contract upon its date of termination, which the parties have referred to as the residual value of the contract. The CAS noted that the residual value represents £ 150,000.-. The panel thus considered this amount to be due to Hearts as compensation under article 17, for the player's termination of his contract. The CAS decided that Wigan was jointly and severally liable with Webster to pay Hearts the amount of £ 150,000.-.<sup>8</sup>

#### 4. Matuzalem

As mentioned in the introduction of this article, the Webster-case gave rise to the suspicion (at least for some) that every player was free to terminate his contract after the protected period by only paying the remaining value as compensation. However, the CAS panel in Matuzalem did not agree and explicitly refused to follow this line.

This case started with the transfer of player Matuzalem from the Italian club Brescia to the Ukrainian club Shakhtar Donetsk in June 2004 for a fee of €8,000,000.-. In the employment contract with Shakhtar was stated that Matuzalem could be transferred if Shakhtar Donetsk received an offer of €25,000,000.-. During his stay with Shakhtar Donetsk, the player developed very well, being one of the most talented players as well as being the captain of the team. On 2 July 2007, after three years of his five year employment contract with Shakhtar Donetsk, Matuzalem unilaterally terminated his employment contract with the Ukrainian club. Noteworthy to mention; the termination took place during a very unpleasant moment since Shakhtar Donetsk was two weeks from the start of the UEFA Champions League qualification rounds. Matuzalem then signed an employment contract with the Spanish club Real Zaragoza for the duration of three seasons on 19 July 2007. On 17 July 2008, Matuzalem was transferred on a loan basis to

the Italian club SS Lazio Spa. In the loan agreement an option was included to purchase the player's registration rights. Finally, the player Matuzalem signed an employment contract for three years with Lazio. Meanwhile, the Ukrainian club Shakhtar Donetsk started a procedure before the DRC, against Real Zaragoza and Matuzalem, and claimed compensation in the amount of €25,000,000.-, as was included previously in the employment contract.

The DRC had to decide with regards to amount of compensation due to the unilateral termination outside the protected period. Firstly, the DRC decided that the clause regarding the €25,000,000.- could not be seen as a so-called buyout clause since the clause concerned was conditional upon an offer from a third club. The clause had an open end and, according to the DRC, this clause did not regulate compensation payable in the event of a breach of the employment contract by either of the parties, but merely attempted to secure transfer compensation. In other words, the clause concerned did not constitute a provision in the sense of article 17 of the RSTP. More-over, in this case the DRC decided that the remaining value was not the only criterion and it referred to the objective criteria as listed in article 17 para. 1 of the RSTP.<sup>9</sup>

In order to calculate the amount of compensation, the DRC referred to the non-amortised expenses incurred by his former club when engaging the services of the player, the remuneration and other benefits due to the player under the previous and the new contract and the sports-related damage caused to the club by the player in the light of the specificity of sport and the impact of the serious disrespect of the principle of good faith. With respect to the other objective criteria, the DRC decided that the player seriously offended the good faith of his former club since he accepted an increase in his financial entitlements shortly before the end of the season. The player did not anyhow indicate to his club that he might wish to look for other employment opportunities or that certain issues had arisen that did not meet his expectations. Finally, on 2 November 2007, the DRC decided that Matuzalem and Real Zaragoza were jointly and severally liable to pay to Shakhtar Donetsk compensation in the amount of €6,800,000.-.<sup>10</sup> All parties appealed to the CAS.

Shakhtar Donetsk requested the payment of €25,000,000.- in compensation for the unilateral breach of contract, while Matuzalem and Real Zaragoza requested that the compensation had to be fixed at an amount of €2,363,760.-. The CAS underlined that the termination of an employment contract without just cause, even if it occurs outside the protected period, remains a violation of contractual obligations and that article 17 of the RSTP does not give, neither to a club nor to a player, a free pass to unilaterally breach an existing agreement. Contrary to the decision of the CAS in the Webster-case, the CAS panel decided that the remaining value was not the only criterion in order to establish the amount of compensation after a termination outside the protected period. In this case of player Matuzalem, the CAS decided that the award of damages had to be based upon the principle of "positive interest", i.e. putting the injured party in the position it would have been in, had there been no breach. In order to calculate the compensation, CAS applied the following criteria.

In the first place an important element according to CAS, was the value of lost services of player Matuzalem for Shakhtar Donetsk based on the amount of the transfer fee agreed between Real Zaragoza and Lazio, plus the average yearly salary paid by the two clubs. Further to this, the amount of salary expenses that Shakhtar Donetsk did not have to pay to Matuzalem had to be deducted. With regards to the specificity of sport, the CAS decided that the status and the behaviour of the player also had to be taken into account. The player left Shakhtar Donetsk just a few weeks before the start of the qualification rounds of the UEFA Champions League 2007/2008, after the season which he became captain of Shakhtar Donetsk. Therefore, the CAS panel set an additional indemnity amount equal to six months of salary paid by Shakhtar Donetsk. Finally, the CAS decided on 19 May 2009 that the compensation for breach of contract to be paid by Matuzalem to Shakhtar Donetsk awarded in this case was €11,858,934.-. In this respect, the CAS panel decided that the Spanish club Real Zaragoza was jointly and severally liable for this payment.<sup>11</sup>

8 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", dated 30 January 2008.

9 Please do note that this decision was made before the CAS decision of Webster.

10 DRC 2 November 2007, no. 117623.

11 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", dated 19 May 2009.

## 5. De Sanctis

### 5.1. Facts

On 5 July 1999, the Italian goalkeeper Morgan de Sanctis transferred from the Italian club Juventus to the Italian club Udinese. De Sanctis signed his first contract with Udinese for a period of 5 years, starting on 1 July 1999. Noteworthy to mention is that Udinese acquired 50% of the economic rights of De Sanctis from Juventus for the amount of € 1,291,142.-. The other 50% of the economic rights were acquired by Udinese from Juventus on a later date, i.e. on 30 May 2000, for the amount of €4,131,655.-. Subsequently, on 10 November 2000, De Sanctis and Udinese signed a second contract, also for the duration of 5 years, starting on 1 July 2000. On 18 October 2003, another contract was signed, also for the duration of 5 years, effective from 1 July 2003, and on 20 September 2005, De Sanctis and Udinese finally signed a fourth (and final) contract, also for the duration of 5 year, starting on 1 July 1999.

On 7 July 2006, Udinese loaned out another of their goalkeepers, named Handanovic, to the Italian club FC Rimini Calcio. In the loan agreement between Udinese and Rimini an option was included for Rimini to acquire the economic rights of De Sanctis for the amount of €1,200,000.-, but also a counter option for Udinese to call the player back at a cost of €250,000.- to be paid to Rimini. On 7 June 2007, Udinese informed FIFA with regards to an alleged approach by Sevilla to De Sanctis. During that same time, Rimini exercised its option in relation to player Handanovic.

Per letter of 8 June 2007, De Sanctis unilaterally terminated his employment contract with Udinese since he was of the opinion he was outside the protected period. In his letter he explicitly referred to article 17 of the FIFA RSTP. On 21 June 2007, Udinese exercised its counter option with Rimini and Handanovic rejoined Udinese and at the end of June 2007, Udinese also signed a 37-year old goal keeper, named Chimenti.

On 10 July 2007, De Sanctis signed an employment contract for the duration of four years with Sevilla.<sup>12</sup> After the refusal of the Italian Association to issue the International Transfer Certificate ("ITC") for De Sanctis, the matter had to be resolved by the Single Judge of the FIFA PSC, who finally issued the ITC on 13 August 2007. On 18 April 2008, Udinese filed its complaint with the DRC claiming an amount of €23,267,594.- as compensation for the unilateral breach of the player De Sanctis.

### 5.2. Decision DRC

The DRC recalled that the player was already 28 years old when the contract had been concluded in September 2005 and that the protected period therefore lasted two years or two entire seasons, whichever came first. The protected period started on 1 July 2005, finished at the end of the 2006/2007 season and thus it concerned a termination of the contract without just cause outside the protected period.

The DRC had to decide on the basis of article 17 para. 1 of the RSTP what amount had to be paid as compensation. Firstly, the DRC stressed that article 17 of the RSTP did not provide a legal basis for the right to unilaterally terminate an employment contract between a professional player and a club. The DRC focused its attention on the calculation of the amount of compensation for breach of contract.

The DRC recapitulated that, in accordance with article 17 para. 1 of the RSTP, the amount of compensation shall be calculated in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including 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 as well as 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 the protected period. The DRC once again recalled that the list of objective criteria was not exhaustive and that the broad scope of criteria aimed to ensure that a fair amount of compensation was awarded to the prejudiced party.

The chamber held that it first of all had to clarify whether the relevant employment contract between the player and Udinese contained a provision by means of which the parties had beforehand agreed upon an amount of compensation for breach of contract. The DRC committee assured themselves that this was not the case.

The DRC then once again emphasized beforehand that each request for compensation for breach of contract has to be assessed by the chamber on a case-by-case basis taking into account all specific circumstances of the respective dispute. The members explicitly stated in this case that it falls under their responsibility to estimate the prejudice suffered by Udinese in the case at hand, not only in accordance with the criteria contained in article 17 par. 1 of the RSTP and in due consideration of all specific circumstances of the present matter, but also with their specific knowledge of the world of football, as well as with the experience the DRC itself has gained throughout the years. The DRC took into consideration among other both the existing contract and the new contract, the agent fees, the missed transfer fee and also the specificity of sport. The DRC recalled that the specificity of sport allowed for it to take into account the circumstance that players can be considered the main asset of a club in terms of their sporting value but also from a rather economic point of view. One of the elements, according to the DRC, that concretize the concept of specificity of sport was the remaining time of the contract that had been breached. The chamber observed that De Sanctis had terminated the contract after two seasons, with three more seasons of duration remaining under the terms of the contract. The remaining time of the contract was therefore important, as three seasons out of five are a substantial period of time. The DRC outlined the exceptional and outstanding position the player held within the organisation of Udinese; De Sanctis was the first goalkeeper of the team, member of the national team of Italy, one of the best goalkeepers in the Italian championship and he played a fundamental role in Udinese's latest success. De Sanctis was considered as an example and a mentor for his colleagues. Further to this, and although it might be questionable whether the player's position on the pitch had an impact on the damage caused, according to the DRC, the chamber deemed it relevant to lay emphasis on the fact that the player De Sanctis was a goalkeeper, i.e. a masterpiece of the organisation of the team and, consequently a position which is, basically, not easy to replace.

Subsequently, the DRC concluded that the amount of compensation for breach of contract without just cause to be paid by De Sanctis to Udinese was firstly composed of the amount of €3,547,134.- being the reflection of the average remuneration and other benefits due to De Sanctis under the previous and the new contract and the value attributed to his services by the both clubs as well as €36,000.- being the non-amortized agent fee over the term of the contract. Equally, the amount of compensation needed to include €350,000.- reflecting the sports-related damage caused to Udinese by De Sanctis in the light of the specificity of sport, according to the DRC. Finally, the DRC considered that the total amount of €3,933,134.- had to be considered an appropriate and justified amount of compensation to be awarded.

Further, in accordance with the unambiguous contents of article 17 para. 2 of the RSTP, the chamber established that the player's new club, i.e. Sevilla, was jointly and severally liable for the payment of compensation. The DRC was eager to point out that the joint and several liability of Sevilla was independent from the question as to whether they had induced the player to the contractual breach. The DRC stated that the breach of contract outside the protected period could not result in the imposition of sporting sanctions.<sup>13</sup> Also all parties in this case appealed to CAS.

### 5.3. Decision CAS

The CAS panel noted, and each of the parties submitted, that the compensation for the player's breach of the contract with Udinese had to be

12. In addition, the contract with Sevilla contained a clause stating that if the player De Sanctis sought to terminate the contract with Sevilla before its expiry,

then he would be obliged to pay compensation to Sevilla in the amount of € 15,000,000.-.

13. DRC 10 December 2009, no. 129641.

determined in accordance with article 17 of the RSTP. It was clear to this panel that the list was not intended to be definitive. Indeed, if the positive interest principle was to be applied in this case, then other objective criteria can and should be considered, such as loss of a possible transfer and replacement costs, as were considered in the Matuzalem- and the El-Hadary-case<sup>14</sup>. However, the panel also noted that for compensation to be due in such instances there must be the logical nexus between the breach and loss claimed. The loss of a transfer fee was awarded in El-Hadary, where the new club and the old club had been directly negotiating a fee at the time of the breach<sup>15</sup>. In the jurisprudence available and referred to by the parties, the panel noted that previous panels did not feel bound to consider the article 17 criteria in a strict order, but rather consider the most appropriate to the facts of their case first. Udinese in both its submissions and at the hearing provided the panel with details of the replacement costs it had incurred, it alleged, as a direct result of the player's breach. Whilst replacement costs are not referred to in article 17 of the RSTP, these have been considered in previous CAS jurisprudence (such as Matuzalem, El-Hadary and the Appiah-case<sup>16</sup>) in order to establish the "positive interest", and it thus seemed a logical place to start, according to the CAS, to see what loss the injured party had actually suffered as a result of the breach, before comparing this with the theoretical calculations a judging authority is directed to make under article 17 of the RSTP.<sup>17</sup>

Udinese submitted and provided evidence to support the claim that they had to bring back one of their squad who was on loan to Rimini as a replacement. The panel noted the comments of Sevilla during the hearing, stating that three other goalkeepers had left Udinese at the end of the 2006/2007 season, and, as such, queried whether these two goalkeepers were direct replacements for De Sanctis or whether Udinese would have brought these players back-in anyway. The panel noted the submissions of the player that one player should not be replaced by two new ones. Replacing one player with two might seem odd, but the CAS considered as reasonable the strategy of Udinese to replace the player with both the young player, with potential eventually, and the old player, with experience immediately.

With regards to the possible loss of a transfer fee, the CAS panel stated the different approaches of previous panels - on the one hand, the Webster case where that panel felt transfer fees were not a possible factor in assessing compensation; whereas, in both Matuzalem and El-Hadary, the panels felt it was possible, if the injured party could provide sufficient evidence. In this case, none of the parties produced any evidence of any offers made or pending for the player De Sanctis.<sup>18</sup>

With regards to the remuneration and other benefits, the CAS panel noted that this criterion had proved the most contentious to date. The panels in Matuzalem and El-Hadary both sought to calculate the value of the services of the player looking at the amount the injured party, the old club, would have to pay to replace the player. Udinese did not produce concrete evidence of any offers for the player, just the details from a website of some other transfers of goalkeepers over the last few years, where the panel had no details of those players' salaries, unexpired terms, etc. Here, the panel was not put in a position by Udinese where it could safely value the services of the player. In the absence of any concrete evidence with respect to the value of the player De Sanctis, the CAS panel

could not apply exactly the same calculation as in Matuzalem and was obliged to use a different calculation method to determine the appropriate compensation, the one which would be the closest to the amount that Udinese would have got or saved if there had been no breach.<sup>19</sup>

With respect to the fees and expenses amortised, the CAS noted that Udinese had argued before the DRC that the initial fees paid to Juventus should have been amortised over the entire period the player was under contract with it. In addition, it claimed the agent's fees paid in relation to the employment contract with Udinese should be amortised over the 5 year period of that contract on a pro rata basis, year by year. In the DRC decision, it was decided that the fees paid to Juventus had been amortised over the first 5 years of the player's time with Udinese, but € 36,000.- was allowed as part of the compensation for the agent's fees. However, Udinese did not appeal the DRC's decision in regard of the unamortized fees and expenses. The player and Sevilla both submitted that there was no proof the agent was actually paid. Therefore, Udinese confirmed at the hearing that it no longer made any claim in relation to the agent's fees. As such, the CAS panel determined that since no party made any claim under this criterion in the appeal case, it had no relevance in assessing the level of compensation due to Udinese.

With regards to the specificity of sport, the CAS panel noted it should aim at reaching a solution that is legally correct, and that was 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. The panel agreed with the jurisprudence set out in previous cases mentioned herein that the specificity of sport was not an additional head of compensation nor a criterion allowing to decide in equity, but a correcting factor which allows the panel to take into consideration other objective elements which are not envisaged under the other criteria of article 17. The CAS panel was not convinced that the direct replacement costs had fully compensated Udinese for the loss it suffered as a result of the breach of De Sanctis. The panel determined that the specificity of sport had to be considered and used as a correcting factor, and not one that enables a transfer fee through the back door.

The panel noted that Udinese quoted para. 156 of Matuzalem in its submission, in which that panel stated this head of compensation is limited, that it served to correct and should not be misused, yet then Udinese requested between €5,000,000.- and €10,000,000.- under this criterion. In addition, the panel did consider the parties' submission regarding the time left unexpired on the old contract, the special role of the player in the eyes of sponsors, fans and his colleagues at Udinese, the position he played on the pitch and the success he had brought to Udinese, etc.<sup>20</sup>. The panel noted that in the various previous cases, only the panels in Bourgas<sup>21</sup> and Matuzalem awarded any sum for the specificity of sport, where the breach is by the player. The FIFA RSTP offers no express guidance as how a judging authority should calculate compensation under this basis. However, the Commentary on the Regulations on the Status and Transfer of Players ("FIFA Commentary") states, as a footnote on the specificity of sport: "...Furthermore, there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six monthly salaries...". In the appealed decision, the DRC awarded a sum of € 350,000.-, but did not offer any detail as to how they arrived at this

14 CAS 2009/A/1880, "FC Sion v. FIFA & Al-Ahly Sporting Club" and CAS 2009/A/1881, "Essam El-Hadary v. FIFA & Al-Ahly Sporting Club", dated 1 June 2010.

15 It appeared to the panel that, as a consequence of the early termination of the player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of \$ 600,000.-. See para. 221 of the "El-Hadary-case".

16 CAS 2009/A/1856, "Fenerbahçe Spor Kulübü v. Stephen Appiah" & CAS 2009/A/1856, "Stephen Appiah v. Fenerbahçe Spor Kulübü", dated 7 June 2010.

17 The panel also noted in that respect that

in these type of cases, which have different facts from others and will have been through the DRC, a panel has the benefit of hindsight or the benefit of seeing how the breach of contract has actually effected the injured party, as the CAS panel may be looking at a breach that happened many years ago.

18 Udinese did produce the details of 3 other international goalkeepers that had transferred between clubs over the previous couple of years; however, this was not taken by the panel as evidence of any loss suffered by Udinese in relation to this player, more background information to be used in assessing the specificity of sport criterion below. As such, as no party

advanced any submissions under this criterion, the panel did not use it as part of assessing the compensation due to Udinese.

19 Regarding the time remaining under the old contract, the CAS panel noted that the time remaining under the old contract had to be taken into account when looking at the period for replacement costs, i.e. 3 years of the replacement costs, less 3 years of the savings made. However, the panel also noted in that respect that De Sanctis had concluded 2 years of his 5 years on his employment contract with Udinese. In certain previous cases, such as the Matuzalem case, this was dealt with in the specificity of sport and the CAS panel

determined to deal with the same below.

20 But also whether it was felt there was any evidence that the player and Sevilla had met before the player handed his notice in, the time he had given to the club, whether he was a "model professional" or not, the fact he was outside the protected period, that he felt he followed a "process" set out in article 17.3 of the RSTP and whether the player felt as Udinese had not offered him a new deal, after 2 years on the 4th contract.

21 CAS 2008/A/1568 "M. & Football Club Wil 1900 v. FIFA & Club PFC Naflex AC Bourgas", dated 24 December 2008.

22 In Bourgas, the panel rounded the compensation up - having worked from the

sum.<sup>22</sup> The CAS panel determined to follow the specificity of sport jurisprudence in the Matuzalem-case. The CAS panel therefore determined the additional compensation for Udinese had to be an amount of €690,789.-, being 6 months remuneration under the new contract of the player De Sanctis.

Finally, the total compensation due to Udinese was divided as follows. The replacement costs were €4,510,000.- less the savings made €2,950,734.-, was €1,559,266.-, add the specificity of sport €690,789.-, in total €2,250,055.-. In view thereof, CAS decided on 28 February 2011 that De Sanctis and Sevilla were jointly and severally liable to pay Udinese an amount of €2,250,055.- as compensation.<sup>23</sup>

## 6. Commentaries

### 6.1. Basic principles

The De Sanctis-case now seems to provide the international football world with a more definitive answer with respect to the amount of compensation to be paid in case of a termination of a player outside the protected period. One thing can be said after having analysed the Webster-, the Matuzalem- and the De Sanctis-case: only the remaining value of the contract is not the decisive element in any event. This was already clear after Webster in my opinion. However, Matuzalem and (now) De Sanctis make this absolutely clear. The CAS panel in De Sanctis, in line with the panel in the Matuzalem-case, found it even quite logical to find out what loss the injured party had actually suffered and came up with a new calculation method. It did not feel bound to the Webster-doctrine at all in that only the remaining value was decisive in order to establish the amount of compensation as result of the unilateral breach of the player of his employment contract after the protected period.

To start with, there are parallels as regards to important considerations of the CAS panels and DRC committees in the Webster-, Matuzalem- and De Sanctis-case. In other words, in the decisions of the DRC and the CAS in Webster, Matuzalem and De Sanctis, we face and can notice some fundamental principles and starting points, the CAS panels as well as the DRC committees refer to with regards to article 17.

First of all, in all cases, the CAS panels and DRC committees accepted that the amount of compensation for the player's breach of the contract had to be determined in accordance with article 17 para. 1 of the RSTP. So, from a legal point of view, article 17 para. 1 is the starting point in these matters. In that respect it is noteworthy to mention that article 17 is not applicable to the breach of contract of a *coach*, but only applicable to the situation whereby a player breaches his contract. Players and coaches can therefore not be equated in the meaning of the RSTP. In the Adriaanse-case of 2008<sup>24</sup>, the CAS panel referred to article 1 of the FIFA RSPT that provides that the RSTP concern "*players*", not coaches. There are no FIFA-rules that govern the relationship between coaches and clubs, as confirmed in the Berger-case.<sup>25</sup>

Secondly, in all cases, it was emphasized by the deciding bodies that article 17 does not provide a legal basis for the right to a unilateral termination of an employment contract. In other words, article 17 cannot be interpreted as being a provision that *allows* a club or a player to unilaterally terminate an employment contract without just cause. Any such termination is clearly deemed a breach of contract. As clearly stated in the CAS award of Matuzalem: "*article 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement at no price or at a given fix price*". As also referred to in the Matuzalem-case, "*the purpose of article 17 is basically nothing*

else than to reinforce the contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player".

Furthermore, we see that the DRC committees in Webster, Matuzalem and De Sanctis emphasized that the criteria in article 17 are not exhaustive and emphasizes over and over again that each request for compensation for breach of contract has to be assessed on a case-by-case basis. In all cases, the DRC committees referred to the fact that the amount of compensation did not only had to be established in accordance with article 17 and with due consideration of all specific circumstances of the case, but also with their specific knowledge of the world of football, as well as with the experience the chamber itself has gained throughout the years.

Finally, we may conclude after having read the decisions, it will also be of the utmost importance, as the CAS panel explicitly stated in its award of Matuzalem, and as also decided by the DRC committee in Matuzalem, that any party claiming compensation has a responsibility to mitigate the loss that it may have suffered as a result of a breach. As detailed in the Matuzalem-case, "*...any injured party has the obligation to take reasonable steps to mitigate the effects and loss related to his or her damage. This well-recognized principle is confirmed by article 44 para. 1 of the Swiss Code of Obligations, which states that a judge may reduce or completely deny any liability for damages if circumstances for which the injured party bears the responsibility have aggravated the damage*".<sup>26</sup> In the De Sanctis-case, the panel also referred to the fact that Udinese had mitigated its position, in a reasonable way. It did not go out and acquire a more expensive replacement, but it brought in an experienced, older goalkeeper on a free transfer and brought back a younger goalkeeper with prospects. This is also constant jurisprudence of the DRC with regards to this issue.<sup>27</sup>

### 6.2. Criteria for compensation

As mentioned in the introduction and the before mentioned decisions, we see that article 17 of the RSPT deals with the consequences of terminating a contract without just cause. Since a termination of a player after the protected period is clearly deemed a breach of contract without just cause, this provision will (thus) be leading in these matters. The provision states that in all cases, the party in breach shall pay compensation. That is the starting point. The provision further states that 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. The second paragraph explicitly mentions that the amount may be stipulated in the contract or agreed between the parties, also known as the buyout clause.

In the following paragraphs all relevant elements and criteria of article 17, as interpreted by the CAS and DRC panels in Webster, Matuzalem and De Sanctis, will be discussed and analyzed. By doing this, we might be able to anticipate on how future panels will decide and what weight will be given to these elements and criteria. Each element and criterion will end with a conclusion; see the *italicized* passage.

remuneration due under the old contract, but then reviewing the increased remuneration the player received at his new clubs. In Matuzalem, the CAS panel considered Swiss Law as guidance, to fill that gap in particular, article 337c(3) and article 337d(1) of the Swiss Code of Obligations. In the Mazalem-case that CAS panel awarded additional compensation in the form of an additional indemnity amount equal to 6 months of the salary under the new club's contract. The panel used as further support article 42 para. 2 of the Swiss

Code of Obligations, stating "*if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of the events and the measures taken by the damaged party to limit the damages*".

<sup>23</sup> CAS 2010/A/2145, "*Sevilla FC SAD v. Udinese Calcio S.p.A.*", CAS 2010/A/2146 *Morgan de Sanctis v. Udinese Calcio S.p.A.*" and CAS 2010-A-2147, "*Udinese Calcio S.p.A. v. Morgan de Sanctis/Sevilla FC SAD*", dated 28 February 2011.

<sup>24</sup> CAS 2008/A/1464 & 1467, "*Futebol*

*Clube do Porto v. Jacobus Adriaanse*", dated 3 December 2008. In this case, the Portuguese club FC Porto argued that the measure of compensation for breach of the Dutch coach Mr. Adriaanse, should be determined in accordance with article 17 of the FIFA RSTP. However, the CAS panel did not agree with this point of view.

<sup>25</sup> CAS 2004/A/741, "*Mr. Jörg Berger v. Bursaspor Kulubu*", dated 4 August 2005. In this case the CAS panel was (also) faced with the question whether or not specific

FIFA Regulations govern the relationship between coaches and clubs. The CAS panel determined in that respect that there are no specific FIFA Regulations that govern the relationship between coaches and clubs. Therefore, the CAS panel determined the compensation to be paid by the coach concerned in accordance with Swiss law.

<sup>26</sup> See para. 111 of the CAS award in Matuzalem.

<sup>27</sup> See for example DRC 23 October 2009, no. 109868.

### 6.3. Law of the country concerned

First of all, due consideration will be given for the “*law of the country*” concerned. In advance, it needs to be emphasized that the law of the country concerned as mentioned in article 17, is not a choice-of-law clause, as also mentioned by the CAS in Webster. The law of the country concerned refers to the fact that such law is among the different elements to be taken into consideration in assessing the level of compensation. According to the CAS panel in Webster, it means that the deciding body shall take into consideration the law of the country concerned while remaining free to determine what weight, if any, is to be given to the provisions thereof in light of the content of such law, the criteria for compensation laid down in article 17 itself and any other criteria deemed relevant in the circumstances of the case at hand.

In the Webster-case, the CAS panel decided that the laws of the country concerned were FIFA Regulations, Swiss law and Scottish law - Scottish law, since Scotland had the closest connection with the contractual dispute. Scotland was the country where the employment contract was signed and performed and where the club claiming compensation (Hearts) and the player were domiciled at the time of signature and termination.<sup>28</sup> Heart of Midlothian claimed that the particular remedies existing for breach of contract under Scottish law were based on the principle of *restitution in integrum*, which attempted to return the injured party to the position he would have been in had the breach not occurred. The club also pointed out that under Scottish law, damages for loss of profit pursuant to breach of contract were recoverable. On the one hand, the CAS panel considered that Scottish law was applicable, but on the other the panel pointed out that it did have the discretion to decide whether or not any provisions of Scottish law should be applied in determining the level of compensation.<sup>29</sup> At the end, the CAS panel in the Webster-case did not rely on any provisions of Scottish law in determining the level of compensation.

In the Matuzalem-case the CAS panel emphasised that the law of the country concerned was the one of the country of the club, of which the employment contract had been breached or terminated, which is also confirmed in the FIFA Commentary. The law of the country concerned refers to where the club is domiciled.<sup>30</sup> Interesting is that the CAS panel noted that neither of the parties had 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 did the parties specify any arguments of Ukrainian (on or Swiss) law which. The CAS did not take into account this criterion.

Also in the De Sanctis-case, the CAS panel decided that this criterion was of no relevance since none of the parties made any submissions on this criterion. In the De Sanctis-case, the law of the country concerned was Italian law since this had the closest connection to the injured party, the party in breach and the employment contract itself. The CAS panel referred to the El-Hadary-case and emphasized that it is up to the party which believes that such factor could be in its favour to make sufficient assertions in this regards. If it did not, according to the CAS panel in the De Sanctis-case, the judging authority will then not take that factor into account in order to assess and establish the amount of compensation for the breach of contract.

*With respect to the law of the country concerned we see that parties explicitly need to make submissions to this criterion. This is confirmed in Matuzalem, De Sanctis and El-Hadary. However, even if a party makes an explicit submission to this criterion, it is still doubtful whether a CAS panel will take into account this criterion since, as we saw for example in the Webster-case, CAS panels seem to have appropriated the competency to decide whether or not provisions of the law of the country concerned have to be applied in determining the level of compensation. Although CAS panels are permitted to deviate from national law and it*

*is right that it is in the interest of international football law that solutions to establish the amount of compensation must be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country, in my opinion it too easily sets aside provisions of national law, such as the panel in Webster did. Apparently - and this is what parties need to keep in mind for future cases - it is of the utmost importance that a party explicitly submits compelling legal arguments according to which a national law of its choice could have an effect on the calculation of the compensation due.*

### 6.4. Specificity of sport

Another important element is the concept of the specificity of sport. In the Webster-case the CAS panel emphasized that this principle needed to strike a reasonable balance between the needs of the contractual stability, on the one hand, and the needs of the free movement of players, on the other hand. It needs to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of players and clubs. And as said in Matuzalem, the deciding body has to take into consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake. In De Sanctis the CAS panel explicitly stated that the specificity of sport is not an additional head of compensation nor a criteria allowing to decide in equity, but a correcting factor. In other words, the concept of specificity of sport is not a criterion that enables a transfer fee through the backdoor. Extra compensation based on the concept of specificity of sport will be awarded in case the panel is not convinced the costs till sofar fully compensated the party that is entitled to compensation due to the breach of the other party. For example, in De Sanctis, the CAS panel was not convinced that the replacement costs have fully compensated Udinese for the loss it suffered.

In line with the argumentation set out by the CAS in the Matuzalem-case, the remaining time of the contract that has been breached, is an important element that concretize the concept of specificity of sport. In the Matuzalem-case, the remaining time of the contract was three seasons out of five, which was a substantial period of time. In the De Sanctis-case, three years left of five year old contract of the player.

But we also see that the status and behaviour of the parties to the dispute is an important element to concretize the concept of specificity of sport. In the Matuzalem-case the panel took into account that the player accepted an increase of his salary on 1 April 2007 and decided shortly afterwards to leave Shaktar Donetsk. As result of this acting, the player Matuzalem seriously offended the good faith of the club.

It may be concluded that the status and behaviour of one of the parties is an important element with regards to the amount of compensation. Noteworthy to mention is that in the Webster-case the CAS panel also examined the existence of any aggravating factors. However, the CAS panel, contrary to the DRC committee in Webster (that explicitly emphasised the good stance of Heart of Midlothian by contributing the steady improvement of the player) was not convinced that the concept of aggravating factors or of contributory negligence were legally relevant or applicable to the calculation. In the Webster-case, the CAS decided that this legal question had to be left open because the panel found there was no sufficient evidence that either party (Hearts or the player) in fact had ill intentions or had misbehaved in their attitude regarding each other.<sup>31</sup> As said earlier, I would say that it is legally relevant whether aggravating circumstances exist and that it at least could be a factor to be taken into account with by the courts in future. That the concept of aggravating circumstances and the behaviour can be important can also be derived from the CAS cases Bouabé and Mouataz of 31 January 2007.<sup>32</sup> In this case, the CAS referred to the bad faith of the club Sporting Lokeren, who despite a fax dated 2 September 2005 sent by the Deputy Chairman of the ASFAR informing the player was under contract until 31 August 2006 with the club Moroccan, had continued its relationship with the player and asked FIFA to issue an ITC. In that case, the CAS panel decided that the Belgian club violated article 18 of the RSTP which states that a club intending to conclude a contract with a professional must inform his current club in writing before entering into negotiations with that professional. This would mean that clubs should not disobey article 18 too easily since this element could

28 See also FIFA Commentary, explanation article 17 RSTP under 1, sub 2, p. 47, which also states that the laws of the country where the club is domiciled are relevant.

29 See grounds for the decision no. 126.

30 FIFA Commentary, footnote 74.

31 See grounds for the decision no. 110.

32 TAS 2007/A/1314, “Ali Bouabé & Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR)” and TAS 2007/A/1315, “Hassan El Mouataz & Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR)”, dated 31 January 2008.

be taken into consideration in order to concretize the concept of specificity of sport.

In *De Sanctis*, the panel referred with regards to the concept of the specificity of sport, to the position the player *De Sanctis* held within the organization, the fact the player was the first goalkeeper of the team, a member of the national team, one of the best goalkeepers in the championship, the fact the player played a fundamental role in the club's latest success and the fact that the breach took place outside the protected period. The conclusion is that from the latest jurisprudence we can derive that all sorts of sports related reasons can be taken into account in order to concretize the concept of specificity of sport, such as the status and behavior of one of the parties, which is now definitely confirmed in the *De Sanctis*-case.<sup>33</sup>

Although the CAS panel in *Matuzalem* decided that the position of the player is not a "specificity of sport-element" and should not be relevant with regards to the amount of compensation, we do see that it is an important sub criterion in *De Sanctis*. The DRC found it important. In the DRC-case, it was decided that "in addition, and although it might be questionable whether the player's position on the pitch has an impact on the damage caused, the Chamber deemed it relevant to lend emphasis on the fact that the *De Sanctis* was a goalkeeper, i.e. a masterpiece of the organization of the team and, consequently a position which is, basically, not easy to replace". In the CAS-case, the panel also highlighted the position the player played on the pitch and deemed this sub criterion relevant with the "specificity of sport-context". In future cases we may conclude that the position of the player on the pitch can, and in my opinion should, be taken into account regarding the concept of specificity of sport.

After having established that an amount of compensation due to the specificity of sport should be included in the total compensation, it is difficult to establish what amount is reasonable. In other words, how can this loss be quantified? Although the FIFA Commentary is not more than a guideline, as explicitly emphasized in the *Jaramillo*-case of 10 July 2008<sup>34</sup>, the CAS panel in *De Sanctis* hooked on to the FIFA Commentary. In the FIFA Commentary is stated that there is a possibility of awarding additional compensation. However, this compensation may not surpass the amount of six monthly salaries. Although the CAS panel in *De Sanctis* substantiated the concept of the specificity of sport more accurately than the CAS panel in *Matuzalem* did since the latter did not make clear how it calculated the exact amount. The CAS panel in *De Sanctis* also referred to Swiss law, just as the *Matuzalem* panel did, according to which a judging authority is allowed to grant a certain special indemnity to the other party, in the event of an unjustified breach of the contract, we may conclude that additional compensation in the meaning of the concept of specificity of sport can be awarded. However, for future cases we should take into account that the compensation at this point will be limited, more precisely to six monthly salaries. Please note that an additional amount of compensation will not be awarded automatically. Only the CAS panels in *Bourgas*, *Matuzalem* and now *De Sanctis* awarded an additional amount of compensation with regards to this criterion.

*We may conclude that in case a CAS panel is not convinced that a party is fully compensated, extra compensation based on the concept of specificity of sport can and will be awarded. Please note that it is not settled at any event that an amount of compensation will be awarded with regards to this criterion since the correcting factor was only applied by CAS in Bourgas, Matuzalem and De Sanctis. From the latest jurisprudence we can derive that all sorts of sports related reasons in that respect,*

<sup>33</sup> With regards to the protected period, we already know that a breach inside or outside the protected period is relevant with respect to the question whether sporting sanctions must be imposed. However, is it also relevant with regards to the amount of compensation? The CAS panel in *Matuzalem* answered this question by stating it was an open issue whether the breach within a protected period may also be taken into account

when assessing the compensation due. In my opinion, we should take into account that CAS panel a breach within the protected period can increase the compensation.

<sup>34</sup> 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*", dated 10 July 2008.

*can be taken into account in order to concretize this concept, such as the remaining time of the contract and the behavior of one of the parties. In future cases we must take into account that also the position of the player on the pitch can be taken into consideration regarding the concept of sport specificity. Based on Swiss law and the FIFA Commentary, we may conclude that the amount of compensation with regards to the specificity of sport-criterion will be limited by panels to six monthly salaries.*

## 6.5. Other objective criteria

As said, the "other objective 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. Please note that the article explicitly states "in particular", which in my opinion automatically means that other criteria than the "other objective criteria" can also play an important role in order to establish the amount of compensation. All deciding bodies, except the CAS panel in *Webster*, constantly recalls that the list of objective criteria is not exhaustive and that the broad scope of criteria indicated tends to ensure that a fair amount of compensation is awarded to the prejudiced party. In the jurisprudence with respect to the termination without just cause in general, criteria such as the *replacement costs* and the *possible loss of a transfer fee* came across. Both sorts of criteria will be discussed, to start with the ones listed in article 17.

### 6.5.1. Objective criteria listed in article 17

#### 6.5.1.1. Remuneration and other benefits under existing and/or new contract

Let us first start with the first criterion: the remuneration and other benefits due to the player under the existing contract and/or the new contract. In the *Webster*-case, the DRC determined that the remaining value of the player's employment contract with his former club was calculated in the amount of €199,976.-. As regards the financial conditions of the employment contract concluded between the player and his new club, the DRC acknowledged the fact that the player would receive a basic weekly wage of 10,000.- for the season 2006/2007, plus a number of appearance bonuses. In the CAS case, the panel emphasized that the list with "objective criteria" of article 17 applies to players and clubs as result of which not all criteria are applicable to the matter at hand. The CAS panel stated that remuneration and benefits due to the player under the new contract was not the most appropriate criterion on which to rely in cases involving unilateral termination by the player beyond the protected period, because rather than focusing on the content of the employment contract which has been breached, it was linked to the player's future financial situation and is potentially punitive. In that respect the panel decided earlier that there was no moral or legal justification for a club to be able to claim the market value of a player as lost profit. Only the remuneration under the existing contract had to be taken into account. Just as the player would be entitled in principle to the outstanding remuneration due until expiry of the term of the contract in case of unilateral termination by the club, the club should be entitled to receive an equivalent amount in case of termination by the player, since this level of his remuneration will normally bear some correlation to his value as a player. The claim of *Hearts* based on the difference between the value of the old and the new contract had to be rejected. Only the remuneration under the existing contract had to be taken into consideration in order to establish the amount of compensation, also known as the "residual value of the contract", which represented in that case an amount of £ 150,000.-. The criteria as listed in article 17 were not designed to be cumulative per se, as result of which the CAS panel saw no reason to award any other amount as an additional head of damage.

In the DRC case of *Matuzalem*, the committee found the criterion of "the remuneration and other benefits due to the player under the existing contract and/or the new contract" essential. The chamber concluded that the remuneration under the old and new contract was more or less equal. Finally, the DRC came up with an amount that was the reflec-



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# Reversing Field

Examining Commercialization, Labor, Gender, and Race in 21st Century Sports Law



## About the Editors

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*Reversing Field* invites students, professionals, and enthusiasts of sport to explore the legal issues and regulations surrounding collegiate and professional athletics in the United States. This theoretical and methodological interrogation of sports law openly addresses race, labor, gender, and the commercialization of sports, while offering solutions to the disruptions that threaten its very foundation during an era of increased media scrutiny and consumerism. In over thirty chapters, academics, practitioners, and critics vigorously confront and debate matters such as the Arms Race, gender bias, racism, the Rooney Rule, and steroid use, offering new thought and resolution to the vexing legal issues that confront sports in the 21st century.

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tion of the remuneration and other benefits due to the player under the previous and the new contract. The CAS panel considered that while the information on the remuneration under the existing contract may provide a first indication on the value of the services of the player for that employing club, the remuneration under the new contract may provide an indication not only on the value that the new club is giving to the player, but possibly also on the market value of the services of the player and the motive behind the decision of the player to breach or terminate prematurely the agreement. We can notice the difference with the CAS in Webster, whereas the panel in Matuzalem did take into consideration the remuneration under the new contract. The panel decided that these amounts showed the value that third parties, including Real Zaragoza and the player himself, gave to the services of the player. Therefore, it was appropriate to consider such figures as part of the calculation of the overall loss suffered by Shakhtar Donetsk. However, contrary to the DRC committee, the CAS panel did not take the average of the remuneration under the old and new contract, but the remuneration under the old contract was treated as being saved and deducted from the remuneration of the new contract and the costs that were related to the value of the services of the player.

Just as the DRC in Webster, the DRC committee in De Sanctis also found the criterion of “*the remuneration and other benefits due to the player under the existing contract and/or the new contract*” essential. In that respect the DRC took into account the salary, loyalty and collective bonuses. The DRC recalled that the remuneration paid by the player’s new club to the player was particularly relevant insofar as it reflects the value attributed to his services by his new club at the moment the breach of contract occurs and may possibly also provide an indication towards the player’s estimated market value at that time. Finally, the DRC took into account an amount with regards to this criterion that was the reflection of the average remuneration and other benefits due to the player De Sanctis under the previous and the new contract.

According to the CAS panel, the criterion of “*the remuneration and other benefits due to the player under the existing contract and/or the new contract*” had proved the most contentious to date. Udinese claimed that the compensation should be the remuneration under the new contract, for the 3 years that were unexpired on the old contract. It felt that any savings made under the old contract should not be deducted, as they had been used to acquire the replacement players. If the panel attempted to follow the Matuzalem- or El-Hadary-calculation, then it would need to look at the remuneration under the new contract and to complete the theoretical calculation, that sum would be less the savings under the old contract, but then the panel would seek to assess the acquisition costs Udinese would have to pay for a replacement goalkeeper by looking at the value of the player. The CAS panel emphasized that Udinese did not actually advance the argument that the panel had to look to calculate the value of the player’s services, as would be requested under the Matuzalem approach. The CAS panel posed itself the question whether it was safe for a judging authority to use a transfer fee paid 2 years after the breach as evidence as to the amount a replacement player might have cost Udinese at the time of the breach? The CAS panel considered that a lot can happen in football in 2 years and posed itself the question, how much of that transfer fee was down to the player’s “*own efforts, discipline and natural talent*” or from his “*charisma and personal marketing*”, as was decided in Webster. Since Udinese did not produce concrete evidence of any offers for the player (just the details from a website of some other transfers of goalkeepers over the last few years), the panel was not put in a position by Udinese where it could safely value the services of the player. As result thereof, the panel decided not to apply exactly the same calculation as in the Matuzalem-case and felt

forced to use a different calculation method to determine the appropriate compensation, the one which would be the closest to the amount that Udinese would have got or saved if there had been no breach by the player. The CAS panel explicitly emphasized that by using the value of the replacement costs only rather than the estimated value of the player, the panel did not seek to depart from the Matuzalem-jurisprudence but wished to emphasize that there was not just one and only calculation method and that each case had to be assessed in the light of the elements and evidence available to each CAS panel. The CAS panel in De Sanctis still used the remuneration of the old contract, as directed by article 17 when considering the issue of whether Udinese had saved the remuneration that it would have paid the player. The CAS panel believed it was correct to deduct these as part of the calculation of compensation, but also to give credit for the actual replacement costs incurred.<sup>35</sup>

*Interesting is that the DRC committees constantly take the average remuneration under the old and new contract, whilst the CAS panels in Matuzalem and De Sanctis also take into consideration the old and the new contract, but decided that the remuneration under the new contract would be less the savings under the old contract of the player. Due to the fact the former club Udinese had not been able to demonstrate the exact value of the services of the player, the panel in De Sanctis did not apply the same calculation as in Matuzalem and therefore applied a different calculation method in order to determine the appropriate amount of compensation. The CAS used “the value of the replacement costs” in De Sanctis and the CAS panel in the Matuzalem-case used “the estimated value of the player”. For the future it is not unlikely that CAS can and will use the same calculation as in Matuzalem in case the former club will be able to demonstrate the exact value of the services of the player, as Shakhtar Donetsk did. In De Sanctis, the CAS panel felt forced to use “the value of the replacement costs”. Furthermore, keep in mind that DRC committees will take into consideration the reflection between the remuneration under the old and the new contract, since the DRC committee in De Sanctis did not follow the “Matuzalem-calculation-method” (i.e. deducting the remuneration under the old contract).*

#### 6.5.1.2. Time remaining under the existing contract

In the De Sanctis-case, the panel noted that the time remaining under the old contract was taken into account when looking at the period for replacement costs, i.e. 3 years of the replacement costs, less 3 years of the savings made. However, the panel also noted that the player had concluded 2 years of his 5 years on his employment contract with Udinese. In the De Sanctis-case, as well as the Matuzalem-case, this was dealt with in the specificity of sport. Therefore, this issue will be discussed later and be dealt with under the “*specificity of sport*”-criterion.

#### 6.5.1.3. Fees and expenses paid or incurred by the former club

One of the objective criteria as laid down in article 17 contain the fees and expenses paid or incurred by the former club (amortised over the term of the contract).

In general, for example payments to agents can be considered as being part of the costs incurred by a club in order to obtain the services of a player, which was also confirmed in the Mexès-case<sup>36</sup>. The DRC committee in the Matuzalem-case pointed this out. Shakhtar Donetsk claimed that payments made to some agents had to be considered as expenses. However, in the present matter, the panel shared the view of the DRC on this point and considered that Shakhtar Donetsk was not able to convince the panel that such payments were linked to the transfer of the player or, at least, that the final financial burden of such payments, made by a company called Medco, has been taken by Shakhtar Donetsk. In the DRC case of De Sanctis, the committee took due note that Udinese had paid an amount of €60,000.- to an agent in relation to the signature of the contract at the basis of the present dispute and that this amount had not been fully amortized as a direct consequence of the breach of contract committed. Regarding the agent’s fees paid in connection with the conclusion of the previous employment contracts, the DRC unanimously decided that these costs should not be taken into account when establishing the compensation. In the appeal procedure, Udinese did not appeal the DRC’s decision in regard of the unamortized agent fees. As such, CAS determined that no party made any claim

35 The panel determined that the loyalty bonus and the rent should be treated as remuneration, whether they were detailed in the employment contract with Udinese or an agreement between the same parties, supplemental to the employment contract with Udinese. The panel did not agree with Sevilla’s submissions that the loyalty bonus “*is effectively an appearance*

*bonus*.” If the player had remained, yet never physically played again, say due to an injury or loss of form, that bonus would still be due. Only the squad bonuses were uncertain and required participation in matches.

36 CAS 2005/A/902 & 903, “*Mexès & AS Roma v. AJ Auxerre*”, N. 118.

under this criterion and therefore determined it had no relevance in assessing the level of compensation. We may conclude that the agent fees may be included as one of the criteria to be taken into account in the calculation of compensation. However, the deciding body must be convinced that these payments are linked to the transfer of the player. The club claiming compensation needs to demonstrate and sufficiently prove that these costs are explicitly linked to the transfer of the player concerned.

The question can be posed whether payments such as training compensation and solidarity contribution can be awarded in the meaning of article 17. In Webster it was already decided by the CAS panel that article 17 was not intended to deal directly with compensation for training. In determining the level of compensation for damages payable under article 17 as a result of a player's unilateral termination without just cause, the amounts having been invested by a club in training and developing the player are irrelevant, according to the panel in Webster. In the CAS case of Matuzalem, the panel decided that Shakhtar Donetsk did not seek to "build up" fictive figures and had not submitted having made any particular investments on the training or formation of the player that the panel would need to take into consideration when assessing the compensation due by the player. For these reasons, the panel did not have to take account of any further investments in determining the level of compensation owed to Shakhtar Donetsk in application of article 17 RSTP. In the Matuzalem-case, the CAS panel as well as the DRC committee also refused to take into consideration as expenses the amount allegedly paid by Shakhtar Donetsk as solidarity contributions. The DRC recalled that according to article 1 of annex 5 of the RSTP, solidarity payments are to be deducted by the new club from the total amount of compensation payable in connection with the transfer of the player. The CAS panel concurs, because based on the RSTP, Shakhtar Donetsk had the right to deduct the solidarity contribution from the transfer fee. If it did not do so, according to the CAS panel in the Matuzalem-case, it was because of its own decision or of the contractual arrangements it entered into with the club of Brescia, respectively. In future it is for sure that deciding bodies will not take into account payments as training compensation since article 20 and annex 4 of the RSTP, as mentioned by the CAS panel in Webster, already provide for a system of compensation to clubs for the training and education of players. Also solidarity payments will not be taken into account. A party has the right to deduct such payments from the transfer fee since according to article 1 of annex 5 of the RSTP, solidarity payments are to be deducted by the new club from the total amount of compensation payable in connection with the transfer of the player. In my opinion this is absolutely fair and reasonable.

Other fees in the meaning of this criterion can be earlier paid transfer fees. In the CAS case of Webster, the panel decided that Hearts could not claim the right to reimbursement of any portion of the fee of £ 75,000.- initially paid by it to purchase the player from his former club Arbroath, since according to the criteria laid down in article 17 para. 1, which the panel finds reasonable, that fee must be deemed amortised over the term of the contract, and in this case the player remained with the club for a longer period in total than the initially agreed fixed term of four years. In addition, the panel was not convinced that beyond the protected period it is admissible for a club to reclaim a portion of the engagement fee as compensation for unilateral termination unless such form of compensation is stipulated in the employment contract, since contractual fairness would tend to require that upon accepting his employment a player be fully aware of the financial engagements he has undertaken and the way in which they can affect his future movements.<sup>37</sup> In other words, if a club expects an engagement fee to be proportionately reimbursable beyond the protected period of the contract in question there should, according to the CAS panel, be a negotiation and a meeting of the minds on the subject.

The DRC decided in Matuzalem that a transfer compensation had been paid for the player's transfer, documentation of which has been

<sup>37</sup> Vice versa this would mean that it can be admissible for a club to reclaim a portion of the engagement fee as compensation

for unilateral termination in case it concerns a breach inside the protected period.

presented. According to article 17 para. 1 of the RSTP, this amount had to be amortised over the term of the relevant employment contract. Also the CAS panel in Matuzalem decided that pursuant to art. 17 of the RSTP the amount of fees and expenses paid or incurred by the former club, and in particular those expenses made to obtain the services of the player, is an additional objective element that must be taken in consideration. Article 17 para. 1 requires those expenses to be amortised over the whole term of the contract. In the present matter, the DRC had recognised the fee paid by Shakhtar Donetsk to the club Brescia, i.e. € 8,000,000.- as being such a kind of expenses. The panel agreed and shared also the calculation made in the appealed decision according to which such fee had to be amortised in accordance with article 17 over a period of five years, i.e. the entire contract period. Therefore, the non-amortised part of the transfer fee was equal to 2/5 of €8,000,000.-, i.e. €3,200,000.-. However, since in the present case the CAS was able to calculate the value of the lost services of the player at the moment of the breach and on the basis of convincing evidence, and taking into consideration that within such value of the lost services, the value of the fees to acquire such services had been incorporated, there was no reason to add to such value the amount of the non-amortized fees of Shakhtar Donetsk.

In the De Sanctis-case, the DRC committee also turned to the essential criterion relating to the fees and expenses possibly paid by Udinese for the acquisition of the player's services insofar as these have not yet been amortised over the term of the relevant contract. The DRC committee noted that Udinese requested an amount of €2,519,632.- as non-amortised fees or expenses. This figure apparently included the transfer compensation paid to its former club in order to acquire the player's services for the 1999/2000 season, i.e. at the time of the conclusion of the first employment contract between Udinese and the player. In that sense, the chamber recognised the transfer compensation paid by Udinese to the former club as being such kind of expenses, but recalled that the player had remained with Udinese eight years in total, whereas the first employment contract provided for an initial period of validity of five years. Therefore, the DRC considered that all the fees and expenses paid in connection with the conclusion of the first employment contract, in particular, the amount of €5,422,797.25 paid to the former club, had been fully amortised over the period of time of five years. Consequently, and in line with the wording of art. 17 par.1 of the RSTP, this amount, or any part of it, could therefore not be claimed as part of the compensation for the breach of contract without just cause. The CAS panel stated that it was argued before the DRC that the initial fees paid to Juventus should have been amortised over the entire period the player was under contract with it. In the DRC decision, it was decided that the fees paid to Juventus had been amortised over the first 5 years of the player's time with Udinese. However, Udinese did not appeal the DRC's decision in regard of the unamortised fees and expenses.

*With regards to this criterion we may conclude that fees and expenses paid or incurred by the former club, such as agent fees and paid transfer fees can be elements to be taken into account in the meaning of article 17. As said, the agent fees can be taken into account as long as the deciding body is convinced that these payments are linked to the transfer of the player. Also the CAS panel in Matuzalem decided that pursuant to art. 17 of the RSTP the amount of fees and expenses paid or incurred by the former club, and in particular those expenses made to obtain the services of the player, can be an additional objective element to be taken into consideration. However, from the jurisprudence can be derived that article 17 para. 1 of the RSTP does require those expenses to be amortised over the whole term of the contract. These costs will not be reimbursed in case the costs are fully amortised, which was the case in De Sanctis, according to the CAS. Please note that payments such as training compensation and solidarity contribution will (most likely) not be awarded by future CAS panels in the meaning of this criterion as listed in article 17.*

#### 6.5.1.4. Protected Period

With regards to the protected period, we already know that a breach inside or outside the protected period is relevant with respect to the question whether sporting sanctions must be imposed, as explained in the introduction. However, is the concept of the protected period only

invented in order to determine whether or not sporting sanctions must be imposed? Or, does it also have direct consequences for the exact amount of compensation? Pursuant to article 17 it does, since it is mentioned in the list of criteria that need to be taken into account in order to calculate the amount of compensation, despite the fact it is constant jurisprudence, as referred to earlier, that any such termination, whether inside or outside the protected period, is clearly deemed a breach of contract. In my opinion, and especially since this criterion is mentioned in the “*article 17 list*”, it must be concluded that this criterion must (also) be taken into consideration regarding the calculation of the amount of compensation.

Although the CAS panel in Matuzalem answered this question by stating it was an open issue whether the breach within a protected period may also be taken into account when assessing the compensation due. In my opinion, we should take into account that a breach within the protected period can increase the amount of compensation. Vice versa, this would mean that in case a breach takes place outside the protected period, not only no sporting sanctions will be imposed, but the amount of compensation should also be reduced comparatively. If the facts and circumstances of two cases are completely the same, apart from the fact that in the one case the breach takes place inside and in the other, outside the protected period, the outcome with regards to the amount of compensation must be different.<sup>38</sup>

*In view of the above, we may conclude that in case a breach takes place outside the protected period, not only no sporting sanctions will be imposed, but this can (and in my opinion should) also have effect on the exact amount of compensation. It can be concluded that due to the fact the principle of Pacta Sunt Servanda will be applied less strict in case it concerns a termination outside the protected period, this will have effect on the exact amount of compensation. Otherwise, it should not have been mentioned in the list of criteria that determines the amount of compensation.*

#### 6.5.2. Objective criteria derived from jurisprudence

##### 6.5.2.1. Missing profits coming from stadium tickets and/or sponsors

In the DRC decision of De Sanctis, the committee took note that Udinese among other requested compensation as “*missing profit coming from stadium tickets revenues*”, and “*image damages towards the sponsors*”. According to the DRC it was not clear whether those elements could be taken into account as “*objective criteria*” in the sense of art. 17 para. 1 RSTP in order to calculate the compensation. However, the committee did not have to answer this question since Udinese did not demonstrate the existence of such damages and, *a fortiori*, a link between the said damages and the breach of contract committed by De Sanctis. Thus, in the evident absence of any proof of a casual link, the DRC decided that these amounts did not have to be taken into consideration when establishing the compensation. In the appeal procedure these claims were not made to the CAS panel by Udinese.

*Although it will be difficult to demonstrate any entitlement to compensation as “missing profit coming from stadium tickets revenues” and/or “image damages towards the sponsors” and it is not clear whether these costs can be claimed, we must take into account that this might be possible in case the claiming club demonstrates the existence of such damages and proves the existence of a link between the said damages and the breach of contract committed by the player. For example, and as indicated by the CAS panel in Matuzalem, in case the club has to pay a penalty to a sponsor due to the termination, the club might demonstrate the damage. Please note that even the CAS panel gave a slight opening in order to claim commercial losses. Although the CAS panel in Webster was of the opinion that the claim of Hearts related to sporting and commercial losses had to be rejected, we may conclude that the aforementioned losses could be claimed in case Hearts demonstrated the causality of the termination and the existence of the damage.*

##### 6.5.2.2. Replacement costs

In the Webster-case, the panel decided that the alleged estimated value of the player on the transfer market, upon which Heart’s was basing its main claim of £ 4 million, by alternatively claiming such amount as lost profit or as the replacement value of the player, could come into con-

sideration when determining compensation on the basis of article 17 para. 1, because any such form of compensation was clearly not agreed contractually and to impose it by regulation would simultaneously cause the club to be enriched and be punitive vis à vis the player. In any event, subject to it being validly agreed by an enforceable contract, the panel explicitly decided that there was no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit. Although the CAS is quite clear with respect to the replacements costs in Webster, we do see an opening. In case it is agreed upon it contractually, as stated by the CAS, replacements costs can be taken into account.

Nonetheless, based on the Matuzalem-case we can conclude that replacement costs can be taken into account, even if parties do not make contractual agreements in respect thereof. However, the club must prove this. In the Matuzalem-case, Shakhtar Donetsk had not been able to prove this. Shakhtar had to prove that the new player was hired in substitution of the other player, which requires not only that the players were playing in more or less the same position on the pitch, but also that the club decided to hire the new player because of the termination by the other player. Further to this, the club had to prove that there was a link between the amount of the transfer fee paid for the new player and the premature termination by the other player. According to CAS, this will possibly be the case for a part of the fee if the club is able to determine that it had to raise the fee for instance in order to anticipate the transfer, because of the gap left by the other player, or if the club is entering a loan agreement on a temporary basis only for the purposes of filling the gap caused by the termination of the player. In the present matter, Shakhtar Donetsk had claimed that to replace the player it had to hire on an urgent basis a new player and had to pay a transfer fee of € 20,000,000.-. The panel was aware that the new player was, similarly as the player, a midfielder. However, beside this, Shakhtar Donetsk was not able to demonstrate that the transfer of the new player and the payments made for this transfer were linked to the gap left by Matuzalem or that the costs of hiring the new player had been somehow increased by the termination of the player.

Although Shakhtar Donetsk had not been able to prove that replacements costs were made before the panel, we do see that it seems possible to claim replacements costs. In the De Sanctis-case, Udinese demonstrated this successfully. Udinese provided the panel with details of the replacement costs it had incurred as a direct result of the player’s breach. Udinese submitted and provided evidence to support the claim that they had to bring back one of their squad who was on loan to Rimini as a replacement. Although the CAS panel underlined that replacing one player with two might seem odd, the panel considered the strategy of Udinese as reasonable to replace the player with both the young player, with potential eventually, and the old player, with experience immediately. More-over, the speed in which Udinese acted and the fact that it concerned a goalkeeper and not a midfield player, for example, made it easier for the injured party, to make the logical nexus between these replacement costs/loss and the breach of the employment contract, proving that these two new players were hired in direct substitution for the player De Sanctis.

*The conclusion with respect to the replacement costs is that it is possible to claim these costs as part of the compensation in the meaning of article 17. This is possible in case parties agree upon it contractually. However, in case parties have not agreed upon it contractually, we see that the club claiming replacements costs as part of the amount of compensation, can still be entitled to claim replacement costs in case it can demonstrate this. Firstly, it must demonstrate that the new player had to come in substitution of the replaced player. In that respect the club must prove that the players are playing in more or less the same position on the pitch (which in my opinion is far easier to demonstrate in case the player is a goalkeeper, as De Sanctis was). Further to this, the club also has to demonstrate that the new player had to join the team because of the unilateral termination by the replaced player. Secondly, the club must demonstrate that*

<sup>38</sup> The CAS panel in Matuzalem decided that the compensation should not be increased due to the fact the breach took

place outside the protected period. See para. 167 of the CAS award.

*there is a necessary link between the amount of the transfer fee paid for the new player and the premature termination by the replaced player. In that respect, the club must prove and demonstrate that there is a logical nexus between the replacement costs and the breach of the employment contract.*

### 6.5.2.3. Possible loss of a transfer fee

In the Webster-case, the panel rejected the claim of Heart of Midlothian with regards to the loss of a transfer fee. However, in Matuzalem, the panel decided that these kind of costs can be compensated in case there is link between the termination and the loss. In other words, in case of the logical nexus. The panel was of the opinion that there was no logical nexus, despite the offer of Palermo. The panel decided that the transfer must be failed because of the unjustified departure of the player to another club. In De Sanctis, the DRC did not find a justification in order not to follow the jurisprudence related thereto and remarked that Udinese had not invoked the existence of any negotiations with a third party nor another “*necessary logical nexus*”. In particular, Udinese did not present any offer from a third party, which could have given important information on the value of transfer of the player. In other words, the DRC considered that the player had not provided it with sufficient proof that it had lost an opportunity to realize a profit because of the premature termination of contract.

In the appeal procedure of De Sanctis before CAS, the panel referred to the Matuzalem- and El-Hadary-case, in which the panels felt it was possible, if the injured party could demonstrate that the club missed a transfer fee. However, none of the parties produced any evidence of any offers made or pending for the player De Sanctis.<sup>39</sup> As also referred to by the CAS panel, the loss of a transfer fee was awarded in El-Hadary, where the new and the old club had been directly negotiating a fee at the time of the breach<sup>40</sup>. The panel noted in the El-Hadary-case that, differently from other CAS cases, there was evidence of what the club itself where the player concerned wanted to transfer to, i.e. FC Sion was willing to pay as transfer fee. Therefore, according to the CAS in that case, Al-Ahly had an evident opportunity to obtain a certain fee by trading the services of the player to the Swiss club but this opportunity was frustrated by the unjustified departure of the player.

*We may conclude that in future cases the loss of a possible transfer fee can be considered as compensable damage head if the usual conditions are met, i.e. in particular if between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit there is a necessary logical nexus. Please do note that it is of crucial importance that the transfer must be failed (i.e. the club finally missed the transfer fee) because of the unjustified departure of the player to another club. In other words, this logical nexus must be demonstrated by the club.*

## 7. Judicial handholds for the future

As from De Sanctis we have to take into account that all sorts of criteria can play an important role in order to establish the amount of compensation in case of a unilateral termination of a player after the protected period. In my opinion this is fair since it should always depend on the merits of each case in order to determine what criteria are important to establish the amount of compensation. It would not be fair if only the remaining value is the decisive element since a club can have all sorts of extra damages due to the unilateral termination. Besides the mentioned criteria as listed in article 17, criteria as the replacement costs,

<sup>39</sup> Udinese did produce the details of three other international goalkeepers that had transferred between clubs over the previous couple of years; however, this was not taken by the panel as evidence of any loss suffered by Udinese in relation to this player, more background information to be used in assessing the specificity of sport criterion below. As such, as no party advanced any submissions under this criterion, the panel did not use it as part of assessing the compensation due to Udinese.

<sup>40</sup> It appeared to the panel that, as a conse-

quence of the early termination of the player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of \$ 600,000.-. See para. 221 of the El-Hadary-case.

<sup>41</sup> See International Sports Law Journal 2011/1-2 of Mr. Frans M. de Weger and Mr. Thijs Kroese, “*The unilateral extension option through the eyes of FIFA DRC and CAS*”.

<sup>42</sup> According to the FIFA Commentary, the parties then aim at longer contractual stability. See FIFA Commentary, explanation article 17, under footnote 87, p. 50.

the loss of a transfer fee and also the concept of aggravating circumstances, can and will most likely be taken into account by the deciding bodies in the future. However, it is important, following the jurisprudence, that the claiming club is obliged to sufficiently prove that extra costs exist and (thus) need to be reimbursed. As said, the “*logical nexus*” between the costs concerned and the breach of the employment contract must be demonstrated.

Although the De Sanctis-case is in line with the Matuzalem-case, we do see that a different calculation method is used by the CAS in De Sanctis. The CAS panel used “*the value of the replacement costs*” in De Sanctis and “*the estimated value of the player*” in Matuzalem. The CAS panel explicitly emphasized that by using the value of the replacement costs only rather than the estimated value of the player, it did not seek to depart from the Matuzalem-jurisprudence but wished to emphasize that there was not just one and only calculation method and that each case had to be assessed in the light of the elements and evidence available to each CAS panel. It will depend on the merits of the case. This means that in case a club will be able to validly demonstrate and sufficiently prove the exact value of the services of the player, CAS panels in future will most likely apply the same calculation method as in the Matuzalem-case in order to determine the appropriate amount of compensation. In case the club is not able to demonstrate the exact value of the services of the player concerned, we must take into consideration that the “*De Sanctis-calculation*” and the concept of replacement costs, will most likely be applicable by deciding bodies to determine the amount, which was also leading in recent jurisprudence before the CAS, such as in the El-Hadary- and the Appiah-case. However, the fact that all sorts of criteria can and will most likely be taken into account does mean that the outcome with respect to the amount of compensation in these “*article 17-cases*”, will always be quite unpredictable. In that respect, it cannot be left unmentioned that the clubs still have sufficient judicial handholds and legal measures in order to avoid this insecurity.

### 7.1. Unilateral extension option

Let us first note that the above mentioned way of establishing the amount of compensation is related to a termination *after* the protected period of the contract. The mentioned calculation method of the DRC committees and CAS panels in Webster, Matuzalem and De Sanctis referred to the termination of the employment contract after the protected period. In case the player terminates his contract *during* the protected period, not only sporting sanctions will be imposed, but we may also conclude, as stated previously in this article, that the amount of compensation will increase substantially.<sup>41</sup> At any event, the player cannot terminate his contract within the protected period by only paying the remaining value of his contract. Therefore, it must be avoided that the player reaches the end of his protected period. In that respect reference must be made to article 17 para. 3 of the RSTP, in which is stated that the protected period recommences when, while renewing the contract, the duration of the previous contract is extended. This would mean that in case the clubs conclude contracts in future for the duration of two or three years (depending on the age of the player concerned) years with a unilateral extension option of two more years, the protected period (after and in case the extension option will be lifted of course), will recommence after two or three (depending on the age of the player concerned) years, resulting in the player being prevented from unilaterally terminating his contract.<sup>42</sup> In other words, the extension of a contract, including the lifting of legally binding options, will establish that the protected period will be extended. However, please note and be aware that deploying the unilateral extension option is rather problematic since (especially) DRC committees and (also) CAS panels are more than skeptical towards the validity of this clause. Although this discussion falls outside the scope of this article, it is of the utmost importance to be aware of this risk.

### 7.2. Buyout clause

There is another solution to avoid the insecurity and risk of a potential negative outcome of a future court case, as described above. That solution has been offered by the RSTP itself and confirmed by the CAS panels.<sup>43</sup> The amount of compensation ‘*may be stipulated in the contract or*

agreed between the parties', known as the earlier mentioned buyout clause. In that respect it is stated in the RSTP that "unless otherwise provided for in the contract", the amount of 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. Before applying the criteria of article 17, all DRC committees and CAS panels in Webster, Matuzalem and De Sanctis first examined whether or not the former contracts of the players with Hearts, Shakhtar and Udinese respectively, were provided with a buyout clause. However, the contracts of Webster and De Sanctis were not provided with such a clause and the provision in the contract of Matuzalem was not carefully drafted. As result thereof, the CAS panels had to calculate the amount of compensation according to their interpretation of article 17. In case there is no buyout clause, clubs and players are left to the discretion of the deciding body. Therefore, I would suggest and strongly recommend to provide the contract with a buyout clause. In that case, parties can stipulate the amount the player will have to pay as compensation after the protected period.<sup>44</sup> According to FIFA, such clauses in employment contracts are valid.<sup>45</sup>

Please do note that it is of the utmost importance to draft the clause very carefully and in a legal right way. It did not help Shakhtar Donetsk in the Matuzalem-case and the club could not fall back to this clause. The CAS panel was of the opinion this clause was not a provision in the meaning of article 17. Also in a case of the DRC of 15 February 2008<sup>46</sup>, the committee clearly emphasized that a release clause must be distin-

guished from a buyout clause since the latter is an obligation for the player to terminate his contract. A release clause is not referable to a termination of the contract, but is conditional upon an offer from a third party, as was decided in the Matuzalem-case. The advantage of a buyout clause speaks for itself. Parties agree the amount mutually at the very beginning and record this in the player's contract.

### 7.3. Choice-of-law-clause

Please finally note that in case a party explicitly wants to let the compensation assess according to a national law they prefer, it must be noted that this is possible. Neither Webster, Matuzalem nor De Sanctis included a so-called "choice-of-law-clause" as result of which the CAS panel had a certain freedom to decide according to the law of their found applicable. Although this freedom is restricted by article 187 of the PILAct, in which is stated that "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", parties can force CAS panels to decide according to their wishes. Therefore, it is important for parties to be aware of the fact that article 187 thus gives the parties a large degree of autonomy in selecting the applicable rules of law. The lesson to learn is that in case a club explicitly wants to let the compensation assess according to a national law they prefer, they must insert a choice-of-law-clause. Interesting is that in case the contract of Webster would have contained a choice-of-law-clause according to which Scottish law was applicable to the matter at hand, the principle of *restitution in integrum*, which attempts to return the injured party to the position he would have been in had the breach not occurred, would have overruled and set aside the "remaining value of the contract-principle" of the CAS panel in the Webster-case. But it would also have helped the Italian club Udinese in the De Sanctis-case. According to the provisions of Italian law, the club would have received more compensation.

<sup>43</sup> FIFA Commentary, explanation article 17 of the RSTP under 1 sub 3, p. 47. In that respect, it is important to know that on the one hand, the sports legislation of certain countries such as Spain (*Real Decreto 1006*) made it compulsory for a buyout clause to be included in contracts. On the other, there are countries that

cannot include the buyout clause in their contracts as it is not compatible with mandatory labour law.

<sup>44</sup> Article 17 para. 2 of the RSTP.

<sup>45</sup> FIFA Commentary, explanation article 17 under footnote 76, p. 47.

<sup>46</sup> DRC 15 February 2008, no. 28533.

# Social Dialogue in European Professional Football

by Michele Colucci\* and Arnout Geeraert\*\*

## Introduction

'Autonomy' and 'specificity' are the two key words in the regulation of sport.<sup>1</sup> Sports organisations adopt their own rules and regulations which take into account the peculiarities of the games, the nature and structure of the associations at international, national and local levels.<sup>2</sup> Nevertheless, as professional sports increasingly became more commercialised, governments have been trying to intervene in the sports world and stakeholders have started to question the legitimacy of sports organisations in an attempt to have a greater input in their activities and regulations. As a result, the increasing litigation within the sports sector often arises out of (labour-related) disputes involving athletes, clubs and sports associations and usually reveals a dissatisfaction of the stakeholders regarding their lack of representativeness in the governance of their respective sports.

In this context, the so-called 'social dialogue' is considered as a means to conclude agreements and to foster co-operation between employers and employees, sometimes with the assistance of a third party (often the government).<sup>3</sup>

At the EU-level, European social dialogue is defined as 'discussions, consultations, negotiations and joint actions involving organisations representing the two sides of industry (employers and workers). It takes two main forms - a tripartite dialogue involving the public authorities, and a bipartite dialogue between the European employers and trade union organisations'.<sup>4</sup>

Social dialogue can take different forms. First, the EU institutions, namely the European Commission, can simply consult the relevant social partners; second, social partners can conclude sectoral and cross-sectoral joint actions and negotiations; and third, social partners and EU institutions can conduct tripartite deliberations.<sup>5</sup> European tripartite social dialogue takes place within the Tripartite Social Summit for Growth and Employment, established in March 2003, as well as the dialogues on macroeconomics, employment, social protection and education and training. European bipartite social dialogue takes place within the cross-industry social dialogue committee and sectoral social dialogue committees.<sup>6</sup>

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In this article, the authors make an assessment of the composition, work and functioning of the sectoral social dialogue committee in professional football. It is their aim to evaluate the recent (August 2011) compromise agreement on the implementation of the European Professional Football Player Contract Minimum Requirements, taking into account its genesis, the parties' interests and difficulties linked to their implementation.

## 1. The Genesis of Social Dialogue in Sport

### 1.1. The European Sports Forum

In an attempt to deal with the above described issues, the European Union (EU) started encouraging dialogue within the sports sector as early as 1991, when the European Sports Forum initiated by the European Commission met for the first time. This Forum, which continued to meet until 2003, brought together representatives of the sports movement and of Member States' governments in order to discuss and promote sport policies. In 2008, the Commission decided to reinstate the Forum to follow up on the initiatives presented in the White Paper on sport.<sup>7</sup>

### 1.2. The Declarations on Sport

Since 1991, several initiatives have been taken by the EU to encourage dialogue within the sports sector. The Amsterdam Declaration, by the Heads of State and Government in 1997, encouraged the dialogue between sports associations and EU institutions.<sup>8</sup>

In the 1999 Helsinki Report, issued by the European Commission, it was recognised that at each level a greater consultation between the sport movement, the Member States and the European Union was needed to stimulate the promotion of sport in Europe.<sup>9</sup>

In the 'Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing Common policies', issued at the Nice European Council of December 2000, the European Council stressed that the sporting organisations had to fulfil their task to promote their particular sports on the basis of a democratic method of operation.<sup>10</sup> Moreover, the European Council expressed its support for a dialogue on the transfer system between the sports movement, in particular the football authorities, organisations representing professional sportsmen and -women, the Community and the Member States.<sup>11</sup>

### 1.3. The 2001 Gentlemen's Agreement

In 2001, an agreement on the new FIFA rules on international transfers of football players was reached between the main football associations, Fédération Internationale de Football Association (FIFA)<sup>12</sup> and the Union of European Football Associations (UEFA)<sup>13</sup>, on the one side, and the EU Commissioners in charge of competition, sport and social affairs, on the other side.<sup>14</sup> These new regulations replaced the old transfer rules which had to be abolished as a consequence of the Bosman ruling<sup>15</sup>, in which the European Court of Justice held that FIFA's transfer regulations infringed upon the right of every European (worker) to move freely under Article 45 of the Treaty on the Functioning of the European Union (TFEU).<sup>16</sup> On the occasion of this agreement, the involved Commissioners at the time invited FIFA and UEFA to encourage clubs to start or pursue social dialogue with the representative bodies of football players. They stressed that social dialogue could be an effective method to find common solutions on matters pertaining to the employment relationship between clubs and players. Thereunto, they offered the Commission's assistance to the establishment of a social dialogue in the sport sector at European level and ever since, the Commission has been supporting projects for the consolidation of social dialogue in sport in general and in football in particular.<sup>17</sup> Amongst others, these projects were aimed at identifying the relevant social partners in the sector at both the EU and the national level.

## 2. The White Paper on Sport

The 2007 White Paper on Sport<sup>18</sup>, issued by the European Commission, was the result of a consultation process which started in 2005 following the reconsideration of the Commission's dialogue with the sports movement.<sup>19</sup> Together with other high-level meetings held between the Commission throughout 2004-2006, these conferences resulted in the White Paper on Sport, which defined the Commission's sport policy for a period of at least 5 years. In this document, the European Commission addressed the main challenges in the field of sports and recalled the autonomy of sports associations which nevertheless needs to be 'respectful of good governance principles'.<sup>20</sup> In that regard, the White Paper strongly encouraged the use of social dialogue in the sports sector, because '[it] can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in

1 See Commission of the European Union, White Paper on Sport, COM (2007) 391 Final, July 2007, 13 (see: [ec.europa.eu/sport/white-paper/doc/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/wp_on_sport_en.pdf), accessed 10 July 2011); Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, (see: [ec.europa.eu/sport/information-center/doc/timeline/doc244\\_en.pdf](http://ec.europa.eu/sport/information-center/doc/timeline/doc244_en.pdf), accessed 9 July 2011); M. Colucci, 'EU Sports Law and Policy beyond the White Paper on Sport and the Treaty of Lisbon', in M. Colucci, R. Blanpain and F. Hendrickx (eds.), *The Future of Sport in the European Union*, The Hague, Kluwer Law, 2008.

2 On the autonomy and specificity of sport, see R. Blanpain, 'The Specificity of Sport from a Legal Perspective'; M. Colucci, 'EU Sports Law and Policy beyond the White Paper on Sport and the Treaty of Lisbon'; R. Siekmann, 'Is Sport "Special" under EU Law and Policy?'; J. Zylberstein, 'The Specificity of Sport in the EU Policy'; J. de Dios Crespo Pérez, 'The Specificity of Sport in the CAS Jurisprudence' in M. Colucci, R. Blanpain and F. Hendrickx (eds.), *The Future of Sport in the European Union*, The Hague, Kluwer Law, 2008.

3 The International Labour Organization (ILO) defines social dialogue as follows: 'to include all types of negotiations, consul-

tation or simply exchange of information between or among representatives of governments, employers and workers, on issues of common interest relating to economic and social policy'. ILO, *Social dialogue*, 2011 (see: <http://www.ilo.org/public/english/dialogue/themes/sd.htm>, accessed 9 July 2011).

4 Commission of the European Union, *Social Dialogue*, (see [ec.europa.eu/social/main.jsp?catId=329&langId=en](http://ec.europa.eu/social/main.jsp?catId=329&langId=en), accessed 9 July 2011).

5 S. Smismans 'The European Social Dialogue between Constitutional and Labour Law', *European Law Review*, vol. 32, 2007, 342.

6 Commission of the European Union, Communication from the Commission: Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM (2004) 557 final, 12.

7 Commission of the European Union, White Paper on Sport, COM (2007) 391 Final, July 2007 [Hereinafter White Paper on Sport], 18 (see: [ec.europa.eu/sport/white-paper/doc/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/wp_on_sport_en.pdf), accessed 10 July 2011).

8 Declaration 29 on sport to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.

9 Commission of the European Union (1999), Report from the Commission to

the European Council with a view to safeguarding sports structures and maintaining the social significance of sport within the Community framework: The Helsinki Report on Sport, COM(1999) 644, p.10.

10 Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, § 7 (see: [ec.europa.eu/sport/information-center/doc/timeline/doc244\\_en.pdf](http://ec.europa.eu/sport/information-center/doc/timeline/doc244_en.pdf), accessed 9 July 2011). The Declaration of Nice was not incorporated into the Treaty and was merely adopted by the Council as a joint declaration. Discussing and summing up the relevance of sport for shaping the European Union comprehensively and in such detail at top political level for the first time, it proved to be of great political relevance and influence.

11 *Ibid.*, § 16.

12 FIFA is the worldwide international governing body of football (for further information see: <http://www.fifa.com>, accessed 10 July 2011).

13 UEFA is the governing body of European football and has the responsibility for safeguarding the development and interests of the sport at all levels (both professional and amateur) both in the EU and the rest of Europe (for further information see: [www.uefa.com](http://www.uefa.com), accessed 10 July 2011).

14 Letter from Mario Monti to Joseph S. Blatter, D/000258, 5 March 2001.

15 ECJ, *Union Royale Belge Sociétés de Football Association and others v. Bosman and others*, Case C-415/93, [1995] E.C.R. I-04921.

16 Consolidated Version of the Treaty on the Functioning of the European Union art. 45, 2008 O.J. C 115/47 [hereinafter TFEU].

17 A list of these projects can be found at Commission of the European Union, Commission Staff Working Document, The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport, footnote 149, COM (2007) 391 final, July 2007 [Hereinafter White paper on sport staff working document], (see: [ec.europa.eu/sport/white-paper/doc/dts935\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/dts935_en.pdf), accessed 8 July 2011). Recently Commission of the European Union, Developing the European Dimension in Sport, 12, COM (2011) 12 final, January 2011 (see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF>, accessed 10 July 2011).

18 White Paper on Sport, *supra* note 7.

19 'The EU & Sport: matching expectations': Consultation Conference with the European Sport Movement, 14-15 June 2005 and 'The Role of Sport in Europe': Conference with the European Sport Movement, June 2006.

20 White Paper on Sport, *supra* note 7, section 4.

the sector in accordance with EC Treaty provisions'.<sup>21</sup> The Commission acknowledged the difficulty to predetermine the form of a social dialogue in the sport sector and therefore, it declared to be ready to 'examine any request to set up a sectoral social dialogue committee in a pragmatic manner'.<sup>22</sup>

### 3. Who should dialogue? The representativeness issue

At the beginning, the troubles with predetermining the form of a social in football in particular followed from the difficulty to identify among all the sport stakeholders the 'appropriate' social partners, i.e. those who could negotiate about working conditions and other issues such as doping, players' agents, transfer and training compensations, related to the particular nature of the employment relationship in sport. This is a consequence of the situation of the sector, which is quite complicated to define because it is made up of several segments organised not only around sports activities in the strict sense, but also around a wide range of services. In the sports world we can identify four categories which enjoy relative autonomy: professional sports businesses, competitive sports associations, sporting leisure associations and not-for-profit organisations.<sup>23</sup> This complexity of the sector has certainly slowed down the creation of social partners at the EU-level. Moreover, in some cases national legislation sets apart the workers' organisations from social dialogue and on employers' side, there are very few single organisations representing all the employers in the sector.<sup>24</sup>

The European Commission even gave important economic support to the sports stakeholders in order to consolidate the social dialogue in the sports sector and therefore facilitated the creation of the European Association of Sport Employers (EASE) in 2003.<sup>25</sup> EASE amongst others identifies suitable national employers' organisations in the sports sector. Thereto, it co-operates with EURO-MEI, the Media, Entertainment, Arts and Sports sector of UNI Europa which helps to establish a trade union awareness in the sector through EU funded projects.<sup>26</sup> UNI-Europa/EURO-MEI and EASE have recognised each other as the European social partners for the sports sector in February 2008.<sup>27</sup> Currently, EASE and EURO-MEI have decided to submit jointly to the European Commission an application for the establishment of a European Sectoral Social Dialogue Committee for the sport and active leisure sector.<sup>28</sup> EASE and UNI Europa Sport -following their mutual recognition- have already agreed on minimum requirements regarding employment contracts and health and safety regulations in the sport and active leisure sector through joint statements signed in 2008 and 2009. Those minimum requirements aim to secure the working relations between employers and workers (including athletes).<sup>29</sup>

In the professional football sector, projects funded by the Commission relating to the encouragement of social dialogue in the sports sector have had a substantial impact on the emergence of suitable social partners for a social dialogue in European professional football. On 10 December 2007, a request was submitted to the Commission for the establishment of a Social Dialogue Committee in the Professional Football sector by the International Federation of Professional

Footballers Associations- Division Europe (FIFPro) and Association of European Professional Football Leagues (EPFL).<sup>30</sup>

In March 2008, the Commission confirmed the representativeness of FIFPro and EPFL and later on, the European Club Association (ECA). The Employment and Social Affairs Commissioner, Vladimír Špidla, and the Education, Training, Culture and Youth Commissioner, Ján Figel, launched a new social dialogue committee, bringing together FIFPro, EPFL and ECA. Given the specificity of sport governance, the social partners invited the European Federation of Football Association (UEFA) to chair their dialogue. The aim of the committee was to improve employment relations for all players and reduce disputes through dialogue. Hereto, minimum requirements for professional players' contracts were the first issue to be discussed in the committee.<sup>31</sup>

### 4. European sectoral social dialogue

#### 4.1. Legal Basis

Aimed at strengthening the sectoral dimension of the European social dialogue, the sectoral social dialogue committees were established through the Commission Decision of 20 May 1998.<sup>32</sup> In those sectors where the social partners make a joint request to take part in a dialogue at European level, organisations representing both sides of industry must fulfil the following criteria, which are assessed by the Commission:

- a they shall relate to specific sectors or categories and be organised at European level;
- b they shall consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States; (c) they shall have adequate structures to ensure their effective participation in the work of the Committees.<sup>33</sup>

Provisions on the EU's social policy are at present to be found under title X of the TFEU, which captures the important role for the social partners as representatives of management and labour in the governance of the EU.<sup>34</sup> These provisions continued the path which the EU has followed for several decades. Pursuant to article 152 TFEU:

*The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.*<sup>35</sup>

In particular, on the basis of art. 154 (1) TFEU, the European Commission has a special role in promoting the consultation of social partners and taking action to support social dialogue. The encouragement of social dialogue by the Commission is one of the key elements of the European social policy.<sup>36</sup> With every legislative proposal in the social policy field, the Commission has to consult the relevant social partners twice. A first time about the possible direction of EU measures and in a second phase about the content of the Commission's proposal. In each of these steps, the involved social partners may make recommendations or opinions pursuant to articles 154(2) and 154(3) TFEU.

21 *Ibid*, section 5.3.

22 White paper on sport staff working document, *supra* note 17, section 5.3.

23 R. Blanpain and M. Colucci, 'The European Social Dialogue in Sports' in: G. Di Cola (ed.), *Beyond the Scoreboard. Youth employment opportunities and skills development in the sports sector*, Geneva, ILO, 2006, 109.

24 *Ibid*, 110.

25 See: [www.easesport.org/art.php?id=3210](http://www.easesport.org/art.php?id=3210), accessed 10 July 2011.

26 UNI Europa is a European trade union federation. It unites trade unions organising in services and skills sectors in 50 different countries and has over 320 affiliated trade union organisations, representing 7 million workers. EURO-MEI, the Media, Entertainment, Arts and Sports sector of UNI Europa, is developing worker repre-

sentation in the sport and active leisure sector. For more information, see: [http://www.uniglobalunion.org/Apps/iportal.nsf/pages/20100319\\_pec9En](http://www.uniglobalunion.org/Apps/iportal.nsf/pages/20100319_pec9En), accessed 10 July 2011.

27 EURO-MEI and EASE sign joint statement on sport social dialogue, 27 May 2009, (See: [www.uniglobalunion.org/Apps/UNINews.nsf/0/2557CCAAC9559E42C125761500544B79](http://www.uniglobalunion.org/Apps/UNINews.nsf/0/2557CCAAC9559E42C125761500544B79), accessed 10 July 2011).

28 For more information, see: [ease.franceolympique.com/art.php?id=26274](http://ease.franceolympique.com/art.php?id=26274), accessed 10 July 2011.

29 EASE and UNI EUROPA Sport, 'Common position on European Social Dialogue in the European Commission's Communication "Developing the European Dimension in Sport"', 21 February 2011 (see: [www.easesport.org/](http://www.easesport.org/)

[ease/fichiers/File/Communication\\_CE\\_2011/Positions\\_communes/EASE\\_\\_UNI\\_Europa\\_Sport/ease\\_uni\\_europa\\_sport\\_common\\_position\\_ec\\_com\\_feb11\\_en.pdf](http://ease/fichiers/File/Communication_CE_2011/Positions_communes/EASE__UNI_Europa_Sport/ease_uni_europa_sport_common_position_ec_com_feb11_en.pdf), accessed 30 July 2011).

30 EPFL was founded only in June 2005.

EPFL, *History* (see: [www.epfl-europeanleagues.com/history.htm](http://www.epfl-europeanleagues.com/history.htm), accessed 11 July 2011).

31 Commission Press Release, IP/08/1064 (Jul. 1, 2008), Footballers and employers launch new EU forum for social dialogue (see: [europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1064](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1064), accessed 10 July 2011).

32 Commission of the European Union, Commission Decision on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, 20 May 1998

[hereinafter Commission ESSDC Decision] COM (1998) 500 final.

33 *Id.*, art. 1

34 This Social Chapter of the Treaty was introduced with the amendment of the Treaty of the European Community (TEC) by the Treaties of Amsterdam and Nice (Articles 136 ff. TEC, now Articles 151 ff. TFEU), and incorporated the Agreement on Social Policy of 31 October 1991 between 11 of the then 12 Member States (the U.K. was not party to the Agreement), which proposed a radical change in the Community legislative process in the sphere of social policy.

35 Consolidated Version of the Treaty on the Functioning of the European Union art. 152(1), 2008 O.J. C 115/47 [hereinafter TFEU].

36 R. Blanpain and M. Colucci, *l.c.*, 105.

In addition, the social partners have the possibility to autonomously start formal negotiations concerning the legislative initiative by the Commission. Subsequently, the partners have 9 months to reach a mutual agreement, during which the Commission cannot continue its own legislative proposal.<sup>37</sup>

Even when there is no legislative initiative by the Commission, the social partners are free to autonomously -after a consultation by the Commission or on their own initiative- conclude agreements.<sup>38</sup> Once the social partners have jointly adopted a text, the Treaty provides two routes for the implementation of the agreement. As article 155(2) TFEU states:

*Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.*

*The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).<sup>39</sup>*

Firstly, implementation of an agreement is possible according to national procedures and practices; this is the so-called 'voluntary route', based on the different structures of industrial relations within the respective Member States.<sup>40</sup> In this case, the responsibility to implement lies with the national divisions of the European social partner organisations. The latter play a prominent role in overseeing the implementation of these so-called 'voluntary agreements', which are not generally binding, do not form an integral part of EU-law and, therefore, have no direct effect. In its first Communication concerning the application of the Agreement on social policy, the Commission confirmed that the terms of these agreements merely bind the members of the social partner organisations and will affect solely them and only in accordance with the practices and procedures specific to them in their respective Member States.<sup>41</sup> Pursuant to the Declaration, annexed to article 155(2) TFEU, 'this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation'.<sup>42</sup> According to Franssen, the legal duties and obligations of the national affiliates have to be derived from the internal rules of the European social partner organisations in combination with international private law.<sup>43</sup> Because article 155(2) TFEU uses the phrasing 'shall be implemented' (emphasis added), an obligation to implement these agreements and for the signatory parties to exercise influence on their members in order to implement the European agreement is implied. Also, it should be noted that the 'voluntary route' does not exclude the agreement from being applied or transposed through national legislation.<sup>44</sup>

As a second choice for the implementation of their mutually agreed

texts, the social partners can submit a joint proposal to the Commission requesting to submit their agreement to the Council of the European Union. Although -in theory- this may also result in a Council Regulation, this procedure will in practice result in a Directive, which the Member States subsequently have to convert within a given period into their respective national legislations.<sup>45</sup> This way, European social dialogue has the capacity to be an autonomous source of European social policy legislation. However, according to article 155(2), the implementation through a Council decision is only possible for agreements falling under one of the fields listed in article 153 TFEU.<sup>46</sup>

While the European Parliament has no role in this second implementation route<sup>47</sup>, the Council shall decide on the implementation of the collective agreement by qualified majority<sup>48</sup> or, for agreements relating to any of the territories mentioned in Article 153 (2) TFEU, by unanimous votes.<sup>49</sup> The Council cannot make amendments and it only retains the political choice to adopt the agreement or not.<sup>50</sup> In the latter case, the Commission may still decide to produce a normal legislative proposal<sup>51</sup>, according to the appropriate (normal or special) legislative procedure stipulated in 153(2) TFEU.

Because of the possibility to bypass the democratic involvement of the European Parliament, it is very important that the Commission ensures that the management and labour sides really represent who they claim to represent.<sup>52</sup> Hence, the above mentioned representativeness criteria for the social partners are an important prerequisite for ensuring the democratic legitimacy of the bipartite sectoral social dialogue.

#### 4.2. Social dialogue in motion

Sectoral social dialogue committees are composed by 40 representatives from both sides of industry represented in equal manner.<sup>53</sup> They are chaired by a representative from one side of industry or, at their own joint request, by a Commission representative.<sup>54</sup> Each Committee establishes, together with the Commission, its own rules of procedure<sup>55</sup> and holds at least one plenary session a year.<sup>56</sup>

Currently, there are over 40 sectoral social dialogue committees, which cover more than 145 million workers in the EU. They have issued around 500 texts of varying legal status going from joint opinions and responses to consultations, to agreements that have been implemented through Directives.<sup>57</sup> The latter is however quite rare and atypical for sectoral social dialogue, as demonstrated in *infra*.

Since the Maastricht Treaty, legally binding agreements were gradually replaced by voluntary agreements within European social dialogue.<sup>58</sup> In December 2001, the inter-sectoral partners fixed their vision on the future of European social dialogue in the Laeken Declaration.<sup>59</sup> They opted for more emphasis on autonomous bipartite dialogue which ought to be focussed on voluntary non-legally binding agreements. The European Commission also endorses this clear movement away from legally binding agreements.<sup>60</sup> The reason for this desire for more auton-

37 TFEU, *supra* note 35, art. 154(4), 2008 O.J. C. 115.

38 *Id.* art. 155(1).

39 *Id.* art. 155(2).

40 S. Smismans, *l.c.*, 343.

41 Commission of the European Union, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, (December 1993), point 37.

42 Declaration annexed to TFEU, *supra* note 35, art. 155(2), 2008 O.J. C.

43 E. Franssen, *Legal Aspects of the European Social Dialogue*, Antwerp, Intersentia, 2002, 128-136.

44 See: Commission of the European Union, Commission Staff working Paper of 2 July 2008: Report on the implementation of the European social partners' Framework Agreement on Telework SEC (2008) 217.

45 TFEU, *supra* note 35, art. 288, 2008 O.J. C. 115.

46 These fields are (a) improvement in par-

ticular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including codetermination,

subject to paragraph 5 153 TFEU; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c).

47 This essentially means a deviation from the normal legislative procedure as listed in TFEU art. 294. According to TFEU

art. 155(2), the European Parliament shall be informed.

48 TFEU art. 16 (3) states: 'the Council shall act by a qualified majority except where the Treaties provide otherwise'.

49 TFEU, *supra* note 35, art. 155(2), 2008 O.J. C. 115.

50 Commission of the European Union, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, (December 1993), point 41.

51 *Id.* point 42.

52 S. Smismans, *l.c.*, 346.

53 Commission of the European Union, Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, COM (1998) 500 final, art. 3.

54 *Id.* art. 5(2)

55 *Id.* art. 5(1)

56 *Id.* art. 3

57 Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final.

58 P. Pochet, *European Social Dialogue between Hard and Soft Law*. Conference paper presented at the EUSA Tenth Biennial International Conference, Montreal, 17-19 May 2007, 5 (see: <http://www.unc.edu/euce/eusa2007/papers/pochet-p-08f.pdf>, accessed 12 March 2011).

59 The Laeken Declaration on the Future of the European Union, Annex 1 to the Presidency Conclusions of the European Council Meeting in Laeken, 14-15 December 2001, Brussels, No. SN 300/1/01 REV 1, 19-27.

60 Commission of the European Union, Communication from the Commission: The European social dialogue, a force for innovation and change COM (2002) 341

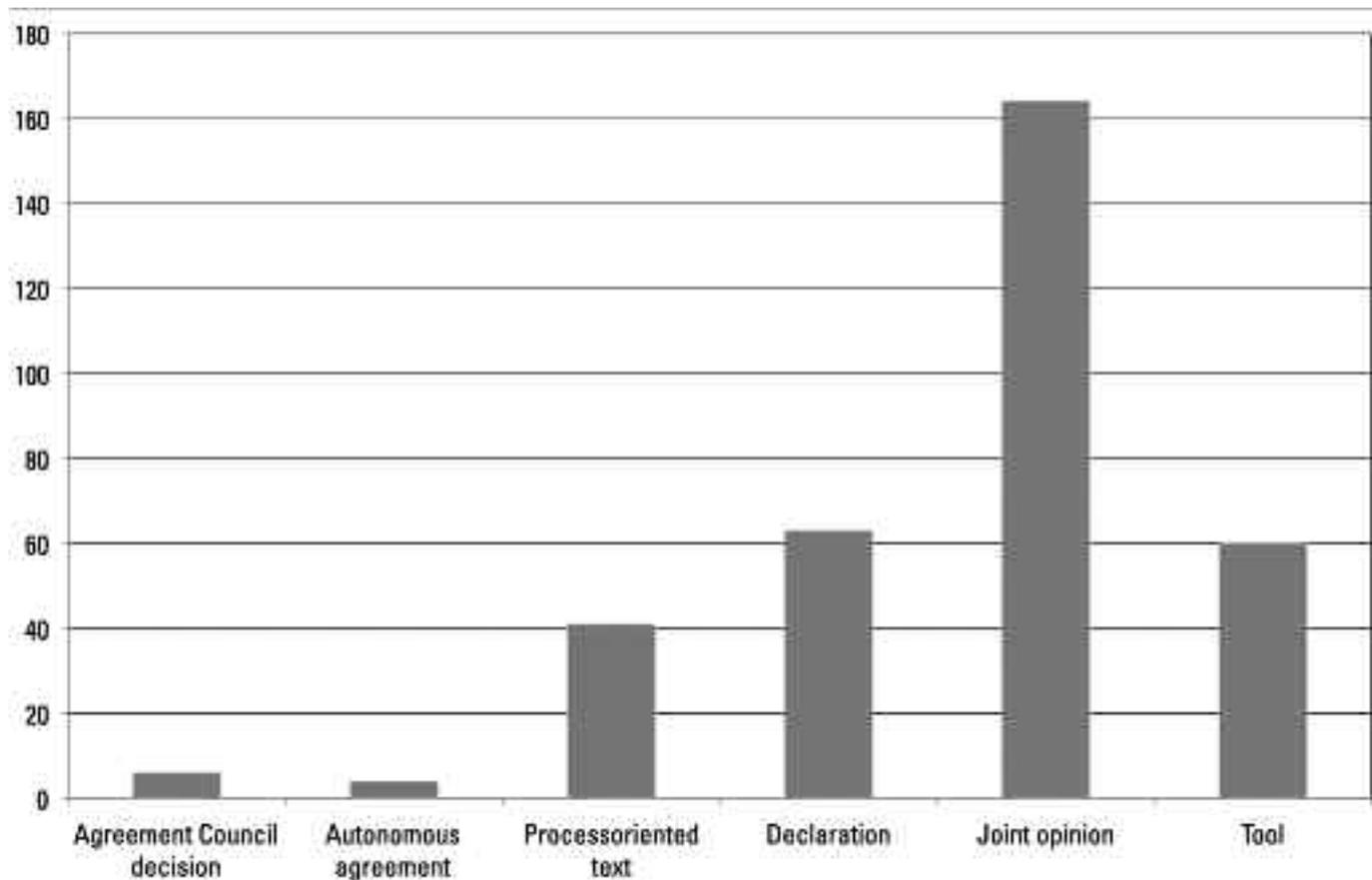


Figure 1: Joint outcomes of the European sectoral social dialogue committees (1998- February 2010)

Source: Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final, annex 4.

omy is different for the respective sides of industry. For the unions, this follows from the cautious attitude of the Commission to launch legislative initiatives in the EU social policy. On the one hand, the Commission gave less and less response to the demands of the unions, resulting in a redefinition of its role. Employers, on the other hand, wanted once and for all to get rid of the pressure from the Commission.<sup>61</sup>

As a result of this shift toward more voluntary/autonomous agreements, alongside the more traditional methods of concluding agreements between the social partners as provided in Article 155(2) TFEU, a whole range of categories of instruments approved by the Commission exists. In its 2004 Communication on 'enhancing the contribution of European social dialogue', the Commission proposes a typology to classify possible outcomes of the sectoral social dialogue committees.<sup>62</sup> By doing this, the Commission aimed to stress that the added value of texts not only depends on whether they are legally binding or not, but also on the operational follow-up and effective implementation of the out-

come. When assessing the outcomes of EU sectoral social dialogue, one must conclude that most of them are of a 'soft' nature, meaning that they aim to raise awareness, disseminate good practice, or help to build consensus and confidence (see figure 1).<sup>63</sup>

There are several completely autonomous agreements like process-oriented texts, declarations, joint opinions and tools. These texts form the vast majority of the produced texts, with joint opinions as an absolute outlier. These outcomes mirror what Pochet described as a lack of pressure from the Commission and the Member States for the development of an ambitious European social policy and the lack of interest in the social dialogue on employers' side.<sup>64</sup> On the other hand, the peak in joint opinions, which are mostly aimed at influencing EU policy and by no means force obligations on the partner's national affiliations<sup>65</sup>, shows that the sectoral social dialogue has mainly taken a place within the European multilevel system of policymaking. Indeed, the influence the sectoral social partners can exercise is not limited to EU's social policy, but it extends over a range of European policies. As such, one of the key values of the sectoral dialogue committees (and, by extension, the European social dialogue) is that it gives the social partners a certain amount of clout within the European agenda and the whole European policy process.<sup>66</sup>

## 5. Social Dialogue in European Professional Football

### 5.1. The Stakeholders

As mentioned in *supra*, the EU Sectoral Social Dialogue Committee (hereafter: ESSDC) in the Professional Football sector was installed in July 2008, following the signing of the Rules of Procedure by the participating parties. According to the latter document, the ESSDC is composed by up to a maximum of 54 representatives, equally composed from both sides of industry.<sup>67</sup> The employers' side is composed of representatives from EPFL and ECA. On the workers' side, FIFPro Division

final; R. De Boer, H. Benedictus and M. van der Meer, 'Broadening without Intensification: The Added Value of the European Social and Sectoral Dialogue', *European Journal of Industrial Relations*, vol. 11, 65.

61 E. Arcq, A. Dufresne and P. Pochet, 'The Employers: Hidden Face of European Industrial Relations', *Transfer*, vol. 9, 2003, 302-321; A. Branch and J. Greenwood 'European Employers: Social Partners?' in H. Compston and J. Greenwood (eds.), *Social Partnership in the European Union*, Houndmills, Palgrave, 2001, 41-70.

62 Commission of the European Union, Communication from the Commission: Partnership for change in an enlarged Europe - Enhancing the contribution of

European social dialogue COM (2004) 557 final.

63 Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final, 9.

64 P. Pochet, *l.c.*, 17.

65 R. De Boer *et al.*, *l.c.*, 61.

66 *Ibid.*, 66; P. Pochet, *l.c.*, 15.

67 European Commission, Rules of procedure for the European sectoral social dialogue committee in the professional football sector, July 2008 [hereinafter ESSDC-CPF Rules of Procedure], art. 3 (see [ec.europa.eu/employment\\_social/dsw/public/actRetrieveText.do?id=8679](http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=8679), accessed 11 July 2011)

Europe (hereafter FIFPro) provides representatives for the committee. The social partners agreed to invite the UEFA President to chair the ESSDC (see figure 2).<sup>68</sup>

Chairman	
UEFA President	
Employers	Workers
EPFL	FIFPro Division Europe
ECA	

Figure 2: composition of the European Sectoral Social Dialogue Committee in the Professional Football Sector

In this section, we discuss the stakeholders of the ESSDC in professional football. More specifically, for each party, we concentrate on three important questions, namely: a) Who are they?; b) Why do they engage in a social dialogue?; and c) What is their degree of representativeness?

While the first question seems to be an obvious one, the two others may need some clarification. The question as to why the stakeholders engage in a social dialogue is asked to identify the possible motives and incentives for their participation and co-operation in the ESSDC. More specifically, the authors seek to identify the 'added value' of a European social dialogue for each stakeholder. According to the research conducted by De Boer *et al.*, agreements between the social partners are only possible when these contain an added value for both sides of industry.<sup>69</sup> When one or more of the involved stakeholders fail to identify clear benefits associated with a European social dialogue, this will lead to unfavourable prospects for the development of a fruitful dialogue in the ESSDC. Moreover, if more favourable results with regard to European policy can be achieved through other channels of the European multi-level decision-making, the social partners will not be committed to the European social dialogue.<sup>70</sup>

As regards to the third question on the stakeholders' representativeness, one must understand that most European sectoral social partner organisations are characterised by a low degree of centralisation, meaning that they have limited capacity to influence their national affiliates. However, involving national sectoral social partners effectively in EU dialogue is crucial to assure an effective follow-up at the national level. Also, the ESSDCs should be as inclusive as possible because the effective follow-up at the national level is also clearly linked to the representativeness of social partners. Moreover, national organisations which are not involved in the work of the committees at European level may not want to implement provisions which they do not endorse and to whom they made no contribution.<sup>71</sup> Thus, a strong mandate to negotiate at the European level is of vital importance.

Given the fact that every organisation that wishes to participate in a ESSDC must fulfil the representativeness criteria established and assessed by the Commission<sup>72</sup>, one might conclude that an additional assessment of the representativeness of the stakeholders in the professional football ESSDC is rather unnecessary and quite redundant. However,

there is no information available about the method used by the Commission to assess these criteria. An analysis conducted by Siekmann on the existing ESSDCs shows that the Commission has a rather flexible approach regarding the application of the criteria for representativeness of social partner organisations. E.g., as long as the relevant interests are more or less represented and the geographic area of the EU is to some extent covered by the representative organisations, the social partner organisations may comprise of a limited number of undertakings.<sup>73</sup> For this reason, an assessment of the capacity of the stakeholders to influence their national affiliates and their inclusiveness does not seem redundant at all.

### 5.1.1. UEFA

UEFA was founded on 15 June 1954 by 28 European national football associations which at the time felt that their interests were not being served adequately by FIFA's structures.<sup>74</sup> Extending to 53 national football associations, UEFA's geographical scope is wider than that of the EU, which currently comprises 27 Member States, or the European Economic Area (EEA). UEFA membership is however largely dominated by football associations located in EU Member States. In the hierarchical network that governs world football, UEFA is one of the 6 continental organisations that are located under the global football association FIFA.<sup>75</sup> This means that UEFA has to comply with FIFA's rules and regulations,<sup>76</sup> in particular FIFA's regulations on the status and transfer of players.<sup>77</sup> UEFA's national member associations are in the same way required to comply with and to enforce UEFA's statutes and regulations in their jurisdiction.<sup>78</sup>

### Why do they engage?

With the growing importance of the economic aspect of football due to the extensive commercialisation of the sport, stakeholders who are traditionally at the bottom of the hierarchical structure of the sport became more powerful.<sup>79</sup> Especially top professional clubs and national football leagues started criticising UEFA's position in the governance of European football by questioning its legitimacy to govern European football unilaterally.<sup>80-81</sup> For this reason, UEFA has been seeking recognition by the European authorities as the sole rulers of their sport on the European continent. However, the White Paper on Sport did not officially recognise the sports bodies as the governing bodies for their respective sports, which was heavily criticised by football's governing bodies and the International Olympic Committee (IOC).<sup>82</sup> Moreover, the Commission refused to recognise one specific organisational model as typical for the European sports world and it acknowledged the emergence of the new stakeholders in professional football, i.e. FIFPro, ECA and EPFL.<sup>83</sup>

For all these reasons it seemed only natural that when EPFL and FIFPro submitted a joint request to the European Commission to start up a new ESSDC, UEFA wanted to participate in order to keep matters in the governance of European football under its reign and control.

UEFA itself has responded to the threats to its legitimacy by giving FIFPro, ECA and EPFL a place within its professional Football Strategy Council (PFSC), created in 2007.<sup>84</sup> The PFSC is a consultative body

68 *Id.*, art. 4.

69 De Boer *et al.*, *l.c.*, 55.

70 *Ibid.*, 55-56.

71 Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final, 17.

72 Commission ESSDC Decision, *Supra* note 32, art. 1.

73 R. Siekmann, 'Study into the possible participation of EPFL and G14 in a social dialogue in the European Professional Football Sector', *The International Sports Law Journal*, vol. 3, 2006, 80.

74 UEFA, *Vision Europe, the Direction and Development of European Football over the Next Decade*, Nyon, UEFA, 2005.

75 The other continental organisations are AFC (Asian Football Confederation), CAF (Confédération Africaine de Football), CONCACAF (Confederation of North, Central American and Caribbean Association Football), CONMEBOL (Confederación Sudamericana de Fútbol) and OFC (Oceania Football Confederation).

76 FIFA Statutes, August 2010 edition, art. 20(3) a (see: [www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010_e.pdf), accessed 11 July).

77 FIFA Regulations on the Status and Transfer of Players, edition 2010 [hereinafter FIFA Regulations] (see [www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010_e.pdf), accessed 11 July 2011).

78 UEFA Statutes, edition 2010, art. 7bis (see: [www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997_DOWNLOAD.pdf), accessed 11 July 2011).

79 See e.g. S. Szymanski, 'The future of football in Europe', in P. Rodriguez, S. Kesenne, and J. Garcia (eds.), *Sports Economics After Fifty Years: Essays in Honour of Simon Rottenberg*, Oviedo, University of Oviedo, 2007, 200; M. Holt, 'The Ownership and Control of Elite Club Competition in European Football', *Soccer & Society*, vol. 8, 2007, 51.

80 M. Holt, 'The Ownership and Control of Elite Club Competition in European

Football' *Soccer & Society*, vol. 8, 2007, 52-53.

81 For instance in 2000, Media Partners, a private business group linked to the Fininvest conglomerate that owns the club A.C. Milan had plans to set up a European Super League by luring fourteen of the most successful European clubs away from their respective national leagues.

82 IOC-FIFA, joint declaration, 2007 (see: [www.fifa.com/aboutfifa/organisation/news/newsid=550327/index.html](http://www.fifa.com/aboutfifa/organisation/news/newsid=550327/index.html), accessed 11 July 2011).

83 B. García, 'Sport governance after the White Paper: the demise of the European model?', *International Journal of Sport Policy*, vol. 1, 2009, 274.

created to build a network for (social) dialogue and consultation with other stakeholders in the governance of professional football. It has no decision making power and merely informs the Executive Committee, the actual decision making body of the UEFA.<sup>85</sup> So, with the PFSC, UEFA created a forum for social dialogue within its own structures. Moreover, according to the rules of procedure of the ESSDC in professional football, every item for discussion must first be submitted to - and agreed by- the PFSC.<sup>86</sup> This way, some could argue that UEFA has *de facto* a strong control over the ESSDC. In the White Paper on Sport, the European Commission acknowledged that 'relevant third bodies' could be invited to take part in the social dialogue 'as observers'. The Commission however stressed that '[i]t should be kept in mind social dialogue is, above all, a bi-partite dialogue between social partners'.<sup>87</sup> When considering UEFA's control of the ESSDC, questions can be raised on the actual bi-partite nature of the committee and certainly about UEFA's supposed observer status.

UEFA -like FIFA- traditionally has a strong aversion for any government interference, certainly from the traditionally very market-oriented EU. Ever since the *Bosman* case, FIFA and UEFA argue that they should be afforded decision-making autonomy by the EU institutions. As Parrish describes, according to FIFA and UEFA, the need to promote competitive balance, to encourage the education and training of young players, to maintain the integrity and proper functioning of sporting competition and to protect national team sports all justify the imposition of market restrictions in the professional football sector. This urged them to adhere to a strong protectionist vision of sport governance.<sup>88</sup> Concluding, one cannot expect UEFA to be strong advocates for a European social dialogue which increases EU-interference in the sector and also empowers EPFL, ECA and FIFPro even more.

Finally, UEFA does not need the ESSDC to gain more influence within the EU institutions. As García already pointed out, UEFA has rightly built up a strong partnership with the European Commission and uses clever lobbying strategies with the EU institutions to promote their policies.<sup>89</sup> Also, national politicians have traditionally been supportive of the 'football community' and the European Parliament is regarded as a loyal ally.<sup>90</sup>

#### Representativeness

Although UEFA in theory is not a social partner, because of its powers as a rule making body within European football, any agreement concluded within the ESSDC will surely also need its signature. UEFA's objectives are amongst others to deal with all questions relating to European football and monitor and control every type of football in Europe.<sup>91</sup> As already mentioned in *supra*, UEFA however has to comply with FIFA's rules and regulations,<sup>92</sup> in particular FIFA's regulations on the status and transfer of players.<sup>93</sup> This means that they have no mandate to conclude any agreements contrary to FIFA's rules and regulations. Therefore, a wider bargaining agreement in European football that contravenes with FIFA's rules is not an option within the context of the ESSDC.

#### 5.1.2. FIFPro

Founded in December 1965 under the chairmanship of the Belgian professor Roger Blanpain in Paris, FIFPro is a worldwide federation of national associations with 42 members.<sup>94</sup> FIFPro Division Europe was founded in July 2007 and currently has 24 member associations.<sup>95</sup> FIFPro's specific intention is to pursue and defend the rights of professional football players.<sup>96</sup> The membership of FIFPro is composed of national representative associations, of which one per country is admitted as a member.<sup>97</sup>

#### Why do they engage?

Due to football's hierarchical governance network, professional football players, who are at the very bottom of this so-called 'football pyramid', are subjected to the rules and regulations of the governing bodies when exercising their profession. As a result, for decades they had no voice in the governance of their sport. The extensively discussed *Bosman* ruling<sup>98</sup> of the ECJ initially seemed to change this. As 'Guardian of the Treaty',<sup>99</sup> and therefore guarantor of the fundamental rights therein enshrined, the European Commission initiated negotiations with FIFA and UEFA on a new transfer system and strongly encouraged them to involve FIFPro.<sup>100</sup> FIFPro's eventual input in the new transfer rules, approved by the Commission in 2001, was close to none. This was mainly due to their limited organisational capacity at the time. Moreover, there were serious doubts regarding their legitimacy as a representative organisation,<sup>101</sup> strong internal divisions<sup>102</sup> and a constantly changing position of its then president, Gordon Taylor.<sup>103</sup> Altogether, at the time, there was no strong representative players' union at the European level that could adequately defend players' interests.

The European social dialogue in professional football and the European Commission's encouragement in this matter strongly improved FIFPro's position in the governance of European football, making it a stronger stakeholder with whom the other stakeholders are now forced to be reckoned with. First of all, the European Commission's support<sup>104</sup> truly improved FIFPro's organisational capacity. Moreover, the encouragements by the Commission for a social dialogue in professional football strengthened FIFPro's representativeness and legitimacy. Today, FIFPro is recognised by not only the Commission but also by UEFA<sup>105</sup> and the other stakeholders. Finally, the ESSDC in professional football, outside UEFA's structures, certainly allows FIFPro to put more pressure on UEFA to change its policy into a more 'workers oriented' direction.

Taking into account the above, it is clear that FIFPro has a strong interest in conducting a European social dialogue. The ESSDC not only increases its influence regarding UEFA, but also regarding the clubs. In this context, it is important to realise that professional football players are at the very bottom of the football pyramid, not only subject to the rules of FIFA and UEFA, but also contractually bound to their clubs. In recent years, we witnessed an increase in labour related disputes between players and their clubs, the latter still holding a strong preponderance within their employment relationship.<sup>106</sup>

84 These movements however fall short of the ambitions expressed by some professional leagues and clubs, who are seeking direct representation (i.e. on the executive committee). See: B. García, 'The European Union and the Governance of Football: A Game of Levels and Agendas' [Thesis (PhD)], Loughborough University, 2008, 37.

85 UEFA Statutes, *supra* note 78, art. 35.

86 ESSDCPF Rules of Procedure, *supra* note 67, 5.

87 White paper on sport staff working document, *supra* note 17, section 5.3.

88 R. Parrish, 'Social Dialogue in European Professional Football', *European Law Journal*, vol. 17, 2011, 215-216.

89 B. García, 'UEFA and the European Union: From Confrontation to

Cooperation', *Journal of Contemporary European Research*, vol. 3, 2007, 202-223.

90 M. Holt, *l.c.*, 2007, 62.

91 UEFA Statutes, *supra* note 78, art. 2.

92 FIFA Statutes, *supra* note 76, art. 20(3) a

93 FIFA Regulations, *supra* note 77.

94 See: <http://www.fifpro.org/about>, accessed 12 July 2011.

95 FIFPro, 'About Division Europe' (see:

<http://www.fifpro.org/division/index/1/show:details>, accessed 12 July 2011).

96 FIFPro Statutes, art. 1(2) (See: [www.fifpro.org/img/uploads/file/FIFPro\\_Articles\\_eng.pdf](http://www.fifpro.org/img/uploads/file/FIFPro_Articles_eng.pdf), accessed 12 July 2011).

97 *Ibid.*, art. 3(1).

98 *Supra*, note 15.

99 Consolidated Version of the Treaty on European Union art. 17, 2010 O.J. C 83/01.

100 Letter Mario Monti to Michael Zen-Ruffinen (FIFA general secretary), November 2000. Also, see: 'Statement from Mario Monti on football transfers', annexed in R. Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, The Hague, Kluwer Law, 2003, 143.

101 J. Irving, 'Red Card: The Battle over European Football's Transfer System', *University of Miami Law Review*, vol. 56, 2002, 713.

102 B. Dabscheck, 'International Unionism's Competitive Edge: FIFPro and the European Treaty', *Industrial Relations*, vol. 58, 2003, 97-102.

103 J. Irving, *l.c.*, 713.

104 *Supra*, note 17.

105 UEFA, Memorandum of understanding between the UEFA and the FIFPRO, 2007, (see: [www.uefa.com/MultimediaFiles/Download/uefa/Others/601340\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340_DOWNLOAD.pdf), accessed 12 July 2011).

106 The tensions between players and clubs largely concern issues regarding the restrictions of labour market mobility through contractual stability. Divergent views have been expressed regarding the interpretation of the rather vague article 17 of the FIFA Regulations. Especially some rulings of the Court of Arbitration for Sport have been heavily criticised by FIFPro. E.g. see: W. Van Megeen, 'The Olivier Bernard case compared', *European sports law and policy bulletin*, vol. 1, 2010, 93-103.

## Representativeness

As already mentioned in *supra*, one of the causes of FIFPro's lack of input in the 2001 FIFA transfer regulations was its (perceived) lack of representativeness.<sup>107</sup> Today, FIFPro is recognised by all the parties in the ESSDC as the only umbrella organisation of trade unions for professional association football players. Moreover, the Université Catholique de Louvain *Study on the representativeness of the social partner organisations in the professional football sector* confirmed the representativeness of FIFPro.<sup>108</sup>

However, there are some concerns raised on FIFPro's internal division. The different points of view from the national unions were painfully exposed during the negotiations on new FIFA transfer rules and this also proved to be a factor leading to FIFPro's lack of input in the eventual 2001 agreement. The associations from the stronger leagues had substantially divergent views with those from smaller competitions.<sup>109</sup> Currently, at least on the matter of contractual stability, there are no signs that this situation has changed.

### 5.1.3. EPFL

Professional football leagues usually negotiate with their respective national Football Associations in matters such as management of league championships, division of competencies and selling of TV rights. In recent years, they have become active at the European level as well. In 1997, the EUPPFL (Association of European Union Premier Professional Football Leagues) was created on the initiative of the English and Italian football leagues, as there was a need for an organisation to represent the views and positions of Leagues and clubs on matters of mutual interest and concern. The EUPPFL objectives were to participate in and appoint representatives to UEFA's Professional Football Committee and to work with UEFA for the good of professional association football in Europe and to foster friendly relations between the Association and the players' unions operating within the territory of member Leagues.<sup>110</sup>

It was however not until October 2005 when a Constitution containing Statutes was signed between EPFL's members and EPFL was created as a result of this.<sup>111</sup> Under its statutes, it is EPFL's aim to be the voice of professional football leagues in Europe on all matters of common interest<sup>112</sup>, to consider social dialogue issues at a European level and act as a social partner.<sup>113</sup> EPFL is thus an umbrella organisation for the national football league organisations that organise national competitions. Remarkably, these organisations are controlled by the clubs that play in these national leagues. EPFL therefore indirectly represents the European football clubs that play in the top national European leagues.

UEFA recognised the EPFL as the legitimate representative of the professional leagues in Europe<sup>114</sup> and commits to ensure that the views of the leagues are incorporated in its decision-making process.<sup>115</sup> In return, the leagues commit among others to abstain from organising 'any supra-national sporting competitions, tournaments or football matches'.<sup>116</sup> The EPFL currently works in close co-operation with UEFA. An expression of the latter can be found in article 4.4 of the Memorandum of understanding between the UEFA and the EPFL, which states that if requested by the EPFL, UEFA would provide administrative and logistical support for EPFL close to the UEFA headquarters including office spaces. Currently, in recognition of its close relationship with UEFA, the EPFL has its main office very close to the UEFA headquarters.<sup>118</sup>

## Why do they engage?

Since EPFL indirectly represents the European football clubs, their incentives to participate in a social dialogue at the EU-level are very similar to those of the ECA. In addition, a recognition of EPFL at the EU-level by means of a participation in a ESSDC also increases its credibility and contributes to its *raison d'être* and consequently to its organisational strength.

## Representativeness

In his *Study into the possible participation of EPFL and G-14* in a social dialogue in the European professional football sector,<sup>119</sup> Siekmann reached the conclusion that the EPFL is very representative. This conclusion is confirmed by the in *supra* mentioned *study on the representativeness of the social partner organisations in the professional football sector*.<sup>120</sup> Siekmann however noted that EPFL is not independent from UEFA's structures and argued that, analogous to the fundamental principle in a democratic society of independent social partner organisations, social partner organisations involved in a European social dialogue should be independent from national and international football governing bodies.<sup>121</sup>

In addition to this, the power to negotiate and conclude agreements from EPFL is seriously undermined by the fact that, analogous to similar issues in other industries, their strongest national member leagues (such as for instance the English, Italian, or Spanish ones) will never give away their bargaining powers to their representatives in Brussels.

### 5.1.4. ECA

Founded only in 2008 and simultaneously recognised by UEFA,<sup>122</sup> the ECA is an independent autonomous body directly representing the European football clubs. The 197 represented clubs are drawn from every one of the 53 National Associations within UEFA.<sup>123</sup> The ECA is composed of 103 clubs with the precise number of clubs from each member association to be established every two years at the end of the UEFA season on the basis of the then current UEFA ranking position of its member associations.<sup>124</sup> Under article 2(c) of its statute, one of the objectives of the ECA is 'to represent the interests of the clubs as employers in Europe including in the social dialogue process and to act as a social partner where appropriate'.

The ECA was founded as a result of the dissolution of the G-14, the association of 18 of the leading professional football clubs in Europe, constituted in 2000 but originating from an informal network founded in 1997.<sup>125</sup>

## Why do they engage?

Due to football's hierarchical governance network, professional football clubs are subjected to the rules and regulations of the governing bodies just like professional football players. With the growing commercial nature of professional football, clubs began contesting the monopolistic power of football's governing bodies. In this sense, the G-14 was founded as a pressure group against UEFA and FIFA<sup>126</sup> and it used the EU institutions as mediators in its conflict with them.<sup>127</sup> This conflict reached a climax with the so-called *Charleroi/Oulmers* case<sup>128</sup> concerning the payment of compensation to the national football clubs when their players are called up for their national team. The G-14 decided to join this case citing a lack of clubs' representation in the governance of

107 *Supra*, note 101.

108 Université Catholique de Louvain, *Study on the Representativeness of the Social Partner Organisations in the Professional Football Players Sector, Report for the European Commission*, Project No VC/2004/0547,

2006 (see: <http://ec.europa.eu/en/social/BlobServlet?docId=4111&langId=en>, accessed 12 July 2011).

109 *Supra*, note 102.

110 EUPPFL, Accord of the Association, art. 2

111 EPFL Constitution, version November 2007 (see: [www.epfl-europeanleagues.com/](http://www.epfl-europeanleagues.com/)

[files/EPFL\\_Constitution\\_2007.pdf](http://www.epfl-europeanleagues.com/files/EPFL_Constitution_2007.pdf), accessed 12 July 2011).

112 EPFL, *History* (see: <http://www.epfl-europeanleagues.com/history.htm>, accessed 12 July 2011).

113 EPFL Constitution, *supra* note 111, art. 1.3.1

114 *Ibid.*, art. 1.3.8

115 UEFA, *Memorandum of understanding between the UEFA and the EPFL*, 2009, art. 1.1 (see: [www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/84/881784\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/84/881784_DOWNLOAD.pdf), accessed 12 July 2011).

116 *Ibid.*, art. 4.2

117 *Ibid.*, art. 3.2

118 B. García, *l.c.*, 2008, 45.

119 *Supra*, note 73.

120 *Supra*, note 108.

121 *Ibid.*

122 UEFA, *Memorandum of understanding between the UEFA and the ECA*, January 2008 (see: [www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/82/881782\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/82/881782_DOWNLOAD.pdf), accessed 12 July 2011).

123 ECA, *Vision and mission* (see: [www.ecaeurope.com/Default.aspx?id=1085058](http://www.ecaeurope.com/Default.aspx?id=1085058), accessed 12 July 2011).

124 For the current ranking, see: [www.ecaeurope.com/Default.aspx?id=1102433](http://www.ecaeurope.com/Default.aspx?id=1102433), accessed 12 July 2011; for a list of the current members, see: [25.enable.com/epa/getfile.aspx?k:A3;E:24;D0:10:89b:D6](http://25.enable.com/epa/getfile.aspx?k:A3;E:24;D0:10:89b:D6), accessed 12 July 2011).

125 B. García, *l.c.*, 2008, 40.

126 In 2000, the G-14 even threatened to establish a Super League, see *supra*, note 81.

127 B. García, *l.c.*, 2008, 41.

128 Sporting du Pays de Charleroi, G-14 Groupement des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA), Case C-243/06, [2006].

professional football rules, which results in unfair and undemocratic rules for its decision.<sup>129</sup>

The parties to the dispute however decided to arrange matter out of the courts and met in January 2008 in FIFA's headquarters. There, representatives of FIFA, UEFA and the clubs agreed on a set of actions aimed at regulating their future relationship. The *Charleroi/Oulmers* case was withdrawn and the payment of financial contributions to clubs for player participation in European Championships and World Cups was agreed. Furthermore, the G-14 was dissolved and in its place the ECA was established and subsequently recognised by FIFA and UEFA.<sup>130</sup> Finally, UEFA agreed to grant four ECA-representatives a seat in its Professional Football Strategy Council.

With the above described tensions, it is clear that football clubs can use the EU institutions as a means to pressure football's governing bodies. The added value of the ESSDC, which in general is often used to lobby EU policies,<sup>131</sup> must be seen in this sense. However, since the amicable settlement of the *Charleroi/Oulmers* dispute out of the EU's Courts, tensions between the clubs and UEFA have dramatically decreased. Some clubs are nevertheless not satisfied with the mere consultative role they have been given within the context of the Professional Football Strategy Council and seek representation in UEFA's Executive Body.<sup>132</sup>

### Representativeness

Unlike EPFL (see *supra*), ECA is very much independent of UEFA.<sup>133</sup> With a member base extending even far beyond the EU-territory, there can also be no doubt about ECA's representativeness. However, because its membership is based on the UEFA ranking of its member associations, wealthy and powerful clubs are clearly overrepresented. Also, ECA does not fulfil the criterion set by the European Commission that a social partner organisation at European level should consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and with the capacity to negotiate agreements.<sup>134</sup> Contrary to the EPFL, whose member leagues in some countries act as representative organisations, the ECA represents clubs directly so that they can never fulfil this criterion. The Commission however acknowledged the difficulty to predetermine the form of a social dialogue in the sport sector and stressed that it would examine any request to set up a ESSDC in a pragmatic manner.<sup>135</sup> It seems that this has encouraged the Commission to be rather flexible in the application of its own criteria when assessing ECA's suitability for the ESSDC. Given the above described difficulties in determining suitable social partners in the professional football sector and by extension the sports sector globally, this seems only reasonable. Moreover, ECA's independence from UEFA is certainly an advantage compared to EPFL's stronger ties with UEFA.

### 6. Negotiations: key points

Recently, FIFPro has reported about the many abuses in Eastern Europe regarding players' contracts. Amongst these are: incentives and bonuses only paid in the event of good performance, to be determined by the club; no contract guarantee during illness and/or injuries; a net salary of which only 10 percent is guaranteed; penalties from 10% to 100% of salary and bonuses unilaterally determined by the club management; the club can reduce the level of the incentive premiums and bonuses during the term of the contract, etc.<sup>136</sup> The adoption of Minimum

Requirements in standard players' contracts at European Union level becomes thus very important in order to better define duties and obligations of the contractual parties in conformity with EU law and FIFA relevant rules on the status and transfer of players.

Already in 2006, FIFPro, EPFL and UEFA agreed upon Minimum Requirements for a professional football players' contract, elaborated by a working group consisting of members of the three parties.<sup>137</sup> The implementation of this agreement thus seemed like a suitable starting point for the ESSDC.

Table 1 depicts the emergence of the ESSDC in the professional football sector from the Joint Request by FIFPro and EPFL to the establishment of the Rules of Procedure.

<b>10 December 2007</b>	EPFL and FIFPro joint request to the Commission for the establishment of a Social Dialogue Committee in the Professional Football sector
<b>13 March 2008</b>	European Commission's letter, confirming the existence of the conditions for the creation of a Social Dialogue Committee in the Professional Football sector
<b>14 May 2008</b>	Professional Football Strategy Council agreement on EU social dialogue (Rules of Procedure and Work Programme)
<b>1 July 2008</b>	Official Launch of the ESSDC in the Professional Football sector
<b>27 October 2008</b>	Addendum to the Rules of Procedure of the European Social Dialogue (agreed by the PFSC)

Table 1: the ESSDC: from Joint Request to Rules of Procedure

The first Work Programme of the ESSDC<sup>138</sup>, annexed to the rules of procedure, set the framework for the next two years by identifying the strategy and goals the social partners jointly wanted to achieve and react on. Should UEFA, FIFPro, EPFL and ECA so decide, other issues may also be included on the agenda. According to the Work Programme, the main objective of the Committee was to discuss and, where agreed, promote and develop the concept of 'the European Professional Football player contract minimum requirements' throughout the European Union Member States. The Programme is silent about the national football associations affiliated to UEFA which are not situated in EU Member states.

FIFPro's hopes were that the conclusion of the agreement on Minimum Requirements would serve as a starting point for a broader cooperation at the European level between the social partners. They already had their minds set on new topics that could be added to the agenda of the ESSDC, like the establishment of a general pension fund for professional footballers.<sup>139</sup> FIFPro's eventual goal was to conclude a real Collective Bargaining Agreement at European level on fundamental labour conditions in professional football.<sup>140</sup>

### 6.1. The European Professional Football player contract minimum requirements

A compromise proposal has been reached in January 2011 on the

129 BBC, 'Fifa set for Charleroi court case', 20 March 2006 (see: [news.bbc.co.uk/sport2/hi/football/europe/4825680.stm](http://news.bbc.co.uk/sport2/hi/football/europe/4825680.stm), accessed 13 May 2011).

130 *Supra*, note 122.

131 R. De Boer *et al.*, *supra* note 60.

132 *Supra*, note 84.

133 Siekmann also agrees on this, see R. Siekmann, 'Some Thoughts about the European Club Association's Possible Participation in a Social Dialogue in the European Professional Football Sector', *The International Sports Law Journal*, vol. 1-2, 2008, 95-96.

134 *Ibid.*

135 European Commission, White Paper on Sport Staff working document, *supra* note 17, section 5.3.

136 FIFPro press release, 'You can always change a bizarre standard contract', 9 September 2011 (see: [www.fifpro.org/news/news\\_details/1693](http://www.fifpro.org/news/news_details/1693), accessed 10 September 2011).

137 FIFPro press release, 'FIFPro confident about Social Dialogue meeting', 11 February 2010 (see: [www.fifpro.org/news/news\\_details/162](http://www.fifpro.org/news/news_details/162), accessed 14 July 2011); The Minimum Requirements have already been approved by the PFSC, See Annex 1 'European

Professional Football Player Contract Minimum Requirements' of the Memorandum of understanding between the UEFA and the FIFPRO, 2007, (see: [http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340_DOWNLOAD.pdf), accessed 12 July 2011) and Annex 2, art. 4 of the Memorandum of understanding between the UEFA and the EPFL, 2009 (see: [www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/8817/84/881784\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/8817/84/881784_DOWNLOAD.pdf), accessed 12 July 2011).

138 European Commission, Work pro-

gramme annexed to the ESSDCPE, *supra* note 67.

139 FIFPro press release, 'FIFPro confident about Social Dialogue meeting', 11 February 2010 (see: [www.fifpro.org/news/news\\_details/162](http://www.fifpro.org/news/news_details/162), accessed 14 July).

140 W. Van Megen, 'Minimum Requirements: FIFPro', Presentation to the ESSDC in Professional Football, 11 December 2008 (see: [circa.europa.eu/Public/irc/empl/sectoral\\_social\\_dialogue/library?l=/professional\\_football/2008/20081119\\_plenartagung/081119\\_requirements/\\_EN\\_1.o\\_&a=d](http://circa.europa.eu/Public/irc/empl/sectoral_social_dialogue/library?l=/professional_football/2008/20081119_plenartagung/081119_requirements/_EN_1.o_&a=d), accessed 15 July 2011).

European Professional Football Player Contract Minimum Requirements (hereafter referred to as 'MRSPC'), elaborated by a working group comprising members of UEFA, FIFPro and EPFL. The first fifteen articles of the Agreement are almost identical to the provisions of the 2006 agreed minimum requirements.<sup>141</sup> Added to these provisions are quite innovative articles like those concerning anti-racism and discrimination, more favourable provisions, implementation and enforcement, the complete agreement and revision, the length of the agreement and, finally, the role of UEFA.

In the preamble of the Agreement it is made clear that the provisions of the EU Treaties, the Charter of Fundamental Rights of the European Union, and secondary EU law apply to professional football players' contracts without prejudice to more stringent and/or more specific provisions contained in this agreement. The Parties commit to further elaborate provisions regulating the employment relationship in the professional football sector, taking into account its specific nature, in future agreements. Where appropriate, agreements on matters falling into the scope of Article 153 of the TFEU may be submitted to the Commission for adoption by Council decision in line with the procedure laid down in Article 155 TFEU.

The first minimum requirement concerns the contract, its form and essential elements. Pursuant to art. 3 'the Contract must be in writing, duly signed by the Club and the Player with the necessary legal binding power of signature. It also includes indications with regard to place and date of when the Contract was duly signed. In the case of a minor the parent/guardian must also sign the Contract'. Following the current procedure in many national sports associations, the Club and the Player each (must) receive a copy of the Contract and one copy has to be forwarded to the professional league and/or national association for registration according to the provisions of the competent football body. Then reference must be made to the essential data to identify the contracting parties, such as the name, surname, birth date, nationality(-ies) as well as the full address of the residency of the Player (only an individual person). In the case of a minor the parent/guardian must also be mentioned accordingly. The Contract states the full legal name of the Club (incl. register number) and its full address as well as the name, surname and address of the person who is legally representing the Club.<sup>142</sup>

Of course, the Contract should define a clear starting date as well as the ending date and Club and Player have equal rights to negotiate an extension and/or an earlier termination of the Contract in accordance with the relevant international and national legislation land case law. This is by far one of the most important minimum requirements whereas several clubs in Europe still foresee such a clause only in favour of the clubs and this despite a consolidated jurisprudence of the FIFA Dispute Resolution chamber which expressly forbids these so-called 'potestative clauses'.<sup>143</sup>

Any early termination must be founded (just cause). In cases of prolonged periods of injury/illness or of permanent incapacity of the Player, the Club may serve a reasonable notice to the Player<sup>144</sup>

The national legislation of the country where the Club is duly registered applies to the Employment agreement unless another legislation is not explicitly otherwise agreed. Moreover, the Contract shall be governed by the law chosen by the Club and the Player. Such a choice may not, however, have the result of depriving the Player of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the state where the Club is established.

The Contract regulates the employment relationship among the parties and no further contract should cover the employment relationship between the Player and the Club. If another contract exists or is signed at a later stage then the parties are obliged to refer to this Contract or to any subsequent employment agreement. Any additional contract related to the Contract must be sent to the professional league and/or the national association.<sup>145</sup>

The Contract must contain all rights and duties between the Player and the Club. In particular pursuant to art. 6 the Contract should define the Club's financial obligations such as, for example: a) salary (regular; monthly, weekly, performance based); b) other financial benefits (bonuses, experience reward, international appearances); c) other benefits (non-financial ones such as car, accommodation, etc.); d) medical and health insurance for accident and illness (as mandatory by law) and payment of salary during incapacity (definition to be determined including its consequences with regard to salaries paid); e) pension fund/social security costs (as mandatory by law or collective bargaining agreement); f) reimbursements for expenses incurred by the Player.

The Contract must define the currency, the amount, the due date for each amount (e.g. by the end of each month) and the manner of payment. In that regard it is important to stress that in order to guarantee transparency the payment -at least for an international transfer- should be done only via bank account or via the so called FIFA Transfer Match System. The Contract also regulates the financial impact in case of major changes of revenue of the Club (e.g. promotion/relegation). As minimum requirement, the Club and the Player agree on the payment of taxes according to national legislation. Also, the Contract should define the paid leave (holidays)<sup>146</sup>, clearly explain health and safety policy of the Club<sup>147</sup>, and should even include provisions which are quite uncommon in a national collective bargaining agreement in football, such as those concerning gambling,<sup>148</sup> protection of human rights (e.g. right of free expression of the player) and the non-discrimination against the Player.<sup>149</sup>

Peculiar is the clause according to which the Contract also regulates the keeping of proper records on injury (incl. those incurred on national team duty) whilst respecting confidentiality. If law does not provide otherwise, as a principle the records on injury are kept by the responsible team doctor.<sup>150</sup>

Of course, to the above enumerated obligations for clubs correspond those for players which are listed in art. 7 of the minimum requirements and which are *de facto* the obligations already inserted in the vast majority of contracts around the world.<sup>151</sup>

141 See Annex 1 'European Professional Football Player Contract Minimum Requirements' of the Memorandum of understanding between the UEFA and the FIFPRO, *supra*, note 137.

142 A Contract can only be concluded by a Club and its legal entity. Such entity is defined according to the national club licensing manual/regulations as license applicant. It must be a direct or indirect member of the national football association and/or professional league and be duly registered. Any other legal entity may not conclude such a Contract without the prior written consent of the competent national football body.

143 For all, see FIFA DRC case 74508 of 22 July 2004; case 55161 of 13 May 2005; case 75975 of 28 July 2005 (see [www.fifa.com/mm/document/affederation/administration/75975\\_954.pdf](http://www.fifa.com/mm/document/affederation/administration/75975_954.pdf), accessed

4 August 2011), where 'the Chamber deemed that in view of its potestative nature, the aforementioned contractual clause shall not have any effect'; case 261245 of 21 February 2006; case 36858 of 23 March 2006; case 117707 of 30 November 2007; case 58860 of 7 May 2008; case 19174 of 9 January 2009.

144 Art. 4.5 MRSPC. See FIFA Regulations, *Supra* note 77, art. 15. An established professional who has, in the course of the season, appeared in fewer than ten percent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. The existence of sporting just cause is established on a case-by-case basis and in such a case, sporting sanctions shall not be imposed. A professional may only terminate his contract on this basis in the 15 days following the last official match of the sea-

son of the club with which he is registered.

145 Art. 5.2 MRSPC.

146 Art. 6.7 MRSPC, the minimum is four weeks in each 12-month period. Periods of paid leave must be agreed by the Club in advance and must be taken outside the regular football season. It has to be ensured that at least two weeks are taken consecutively. The Contract defines the length of the player's normal working day or week.

147 Art. 6.8 MRSPC, the Contract explains the, which includes the mandatory insurance coverage for the Player for illness and accident and regular medical/dental examination as well as medical/dental treatment with qualified personnel during football duties. It also covers anti-doping prevention. The Council Directive 89/391/EEC applies, in particular provisions on risk assessment, preven-

tive measures, as well as information, consultation, participation and training of players.

148 Art. 7.2(n) MRSPC.

149 Art. 6.8 MRSPC.

150 Art. 6.10 MRSPC.

151 Among the players' obligations there are a) to play matches to the best of his best ability, when selected; b) to participate in training and match preparation according to the instructions of his superior (e.g. head coach); c) to maintain a healthy lifestyle and high standard of fitness; d) to comply with and act in accordance with Club officials' instructions (reasonable; e.g. to reside where suitable for the Club); e) to attend events of the Club (sporting but also commercial ones); f) to obey Club rules (including, where applicable, Club disciplinary regulations, duly notified to him before signing the Contract); g) to behave in a

A specific provision is foreseen for the protection of minors<sup>152</sup> which makes reference to Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work. The Contact ensures that every youth player involved in its youth development programme has the possibility to follow mandatory school education in accordance with national law and that no youth player involved in its youth development programme is prevented from continuing their non-football education. This may also apply to prepare a second career after football (retirement). This provision is in line with the policy adopted by FIFA at international level in its Regulations on the Status and transfer of players.<sup>153</sup>

Since the employment relationship between a club and a player may end in a labour dispute, art. 10 of the minimum requirements is dedicated to player discipline and grievance. It is expressly stated that the Club establishes in writing appropriate internal disciplinary rules with sanctions/penalties and the necessary procedures, which the Player abides by. And then - it is quite curious to read that *'The Club has to explain such rules to the Player'*. The Club fixes these rules and procedures as well as the sanctions including fines according to local agreement and standards. If the Player violates any of the obligations to which he is subject under the Contract, according to these disciplinary regulations the Club may impose a range of penalties, depending on the severity of the offence. The Player has a right to appeal and the right to be accompanied/represented by the Club captain or a union representative. The Contract fixes the process for disputes between the Player and the Club on issues not covered by the Contract. Particularly important are the provisions on Dispute resolutions. Subject to national legislation and national collective bargaining agreements, any dispute between the Club and the Player regarding the Contract shall be submitted of Players,<sup>154</sup> disputes may be settled by the Dispute Resolution Chamber, with an appeal possibility to the Court of Arbitration for Sport (CAS).<sup>155</sup>

## 6.2. The implementation strategy of the European Commission

Implementation is the key issue of the Minimum Requirements as because of their legal nature, they are not legally binding *per se*. As the European Professional Football player contract minimum requirements were for the most part already agreed upon by FIFPro, EPFL and UEFA in 2006, the actual content of these provisions was not so much subject to debate in the ESSDC. The discord between the parties was on the method of implementation of these minimum requirements.

On this note, FIFPro but also other stakeholders wanted a full agreement between all the parties, not only for the territory of the European Union but for the whole UEFA territory.<sup>156</sup> Bearing in mind the two implementation routes provided for by the Treaty, this *a priori* poses a problem. An agreement through a Council decision resulting in a Directive would definitely mean a full agreement which would ensure a uniform implementation in all EU Member States. However, the implementation would naturally be limited to the 27 EU Member states and as a consequence it would not be extended to the remaining national football associations who are outside the EU or the EEA but nevertheless affiliated to UEFA. FIFPro nonetheless aimed for a binding agreement for all the parties for the whole UEFA territory, which was not agreed in the Work Programme, and refused to conclude an agreement

through the voluntary route. The latter would impose no real binding obligations on the parties and would hardly be enforceable. Tensions in the ESSDC between FIFPro and the other parties mounted as the latter were reportedly not prepared to sign a binding agreement.<sup>157</sup>

In an attempt to resolve the differences among the signatory parties and in order to reconcile their diverging visions (the players' representatives aiming at having a legally binding document while the clubs willing to have a voluntary agreement), the European Commission - on the basis of a specific request from all negotiating parties - proposed a compromise agreement to the professional football ESSDC parties on the implementation of the European Professional Football player minimum contract requirements.<sup>158</sup> By doing this, the Commission took an important role within the committee. Pursuant to article 152 TFEU, the Commission shall merely *'facilitate dialogue between the social partners, respecting their Autonomy'*. Article 154(1) TFEU however adds that *'[...]the Commission [...] shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties'*. Consequently, the drafting of a compromise agreement can be seen as a relevant measure to facilitate the dialogue through a balanced support of the parties. In addition, as the Commission did not lay down any rules on the method of implementation of agreements, the ESSDC parties may conclude agreements in any way they mutually agree. This would have allowed the professional football ESSDC partners to implement the Commission's compromise proposal, if they had decided to do so.

The Commission's implementation proposal was largely aimed at strengthening the implementation through the 'voluntary route' in all countries covered by UEFA. In case a national collective bargaining agreement existed, the relevant partners concerned would implement the Minimum Requirements in the national collective bargaining agreement. An analysis on the existence of Standard Player Contracts and collective bargaining agreements in the UEFA territory, conducted within the context of the ESSDC in Professional Football<sup>159</sup> shows that in England, The Netherlands, Belgium, Denmark, Sweden, Latvia, Portugal, Spain, France, Italy, Austria, Greece and Macedonia, the minimum requirements would be implemented in the existing bargaining agreements.

In case no national bargaining agreement exists, implementation would have to be supervised by a taskforce created under the compromise agreement. Composed of experts from each of the four ESSDC parties, the 'European Professional Football Social Dialogue Taskforce' would have the assignment to coordinate the promotion and implementation of the agreement in close cooperation with the Parties on a country-by-country basis.

Within 6 months after the signing of the Commission's proposal, the agreement on minimum requirements already had to be implemented in the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, England, N.Ireland, Wales, Scotland, Norway and Switzerland. The Université Catholique de Louvain *Study on the representativeness of the social partner organisations in the professional football sector* showed that in these countries, there is already a model contract or standard employment contract, which serves as a reference at the time of setting up and sign-

sporting manner towards people involved in matches, training sessions, to learn and observe the laws of the game and to accept decisions by match officials; h) to abstain from participating in other football activities, other activities or potentially dangerous activities not prior approved by the Club and which are not covered by Clubs' insurance; i) to take care of the property of the Club and to return it after termination of the Contract; j) to immediately notify the Club in case of illness or accident and to not undergo any medical treatment without prior information to the Club's doctor (except in emergencies) and to provide a medical certificate of incapacity; k) to undergo regularly medical

examination and medical treatment upon request of the Club's doctor; l) to comply with the terms of any association, league, player's union and/or club anti-discrimination policy; m) not to bring the Club or football into disrepute (e.g. media statements); n) not to gamble or undertake other related activities within football.

<sup>152</sup> Art. 6.5 MRSPC

<sup>153</sup> See FIFA Regulations, *Supra* note 77, art. 15. The transfer of a minor is allowed only when it takes place within the territory of the European Union or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must provide the player with an adequate football education and/or

training in line with the highest national standard and it must 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.

<sup>154</sup> FIFA Regulations, *Supra* note 77, art. 24.

<sup>155</sup> Art. 12.2 MRSPC

<sup>156</sup> W. Van Megen, 'Minimum Requirements: FIFPro', Presentation to the ESSDC in Professional Football, 11 December 2008 (see: [circa.europa.eu/Public/irc/empl/sectoral\\_social\\_dialogue/library?l=/professional\\_football/2008/20081119\\_plenartagung/](http://circa.europa.eu/Public/irc/empl/sectoral_social_dialogue/library?l=/professional_football/2008/20081119_plenartagung/)

[o8119\\_requirements/\\_EN\\_1.o\\_&a=d](http://o8119_requirements/_EN_1.o_&a=d), accessed 15 July 2011), slide 6.

<sup>157</sup> FIFPro press release, 'Only FIFPro is ready to sign minimum requirements', 1 March 2011 (see: [www.fifpro.org/news/news\\_details/1469](http://www.fifpro.org/news/news_details/1469), accessed 10 July 2011).

<sup>158</sup> European Commission, *Compromise proposal HW 24 January 2011 based on comparison of "employers November 2010 and FIFPro January 2011"*, not published.

<sup>159</sup> UEFA, ESSDC in the Professional Football Sector, 'Analysis of Questionnaires on Standard Player Contracts, Results of all 4 stakeholders', Version 21.10.2009, unpublished.

<sup>160</sup> Université Catholique de Louvain, *Study on the Representativeness of the Social*

ing a contract.<sup>160</sup> Therefore, there is no valid reason to postpone the implementation of the agreement in these countries and thus, this provision in the Commission's proposal seems only fair.

FIFPro immediately was prepared to sign the Commission's proposal. However, the other involved parties still had serious concerns about its legal implications. On Monday 28 February 2011, ECA, EPFL and UEFA refused to sign the Commission's proposal, stating that they needed more time to study its legal consequences and to have the agreement approved internally. FIFPro declared that *'the parties apparently were not ready to sign a legally binding agreement'*.<sup>161</sup> It seemed that the ESSDC in professional football had come to a severe impasse.

### 6.3. The August 2011 compromise Agreement

In the summer of 2011, UEFA, ECA and EPFL issued a proposal regarding the implementation of the MRSPS to the board of FIFPro Division Europe. The latter accepted this compromise proposal and at the time the authors are finalising this article small details remain to be drawn up in order to complete the relevant approval procedures.<sup>162</sup> Nevertheless, in August, the parties reached a final agreement on the MRSPC. The Agreement will now have to be approved or ratified by the internal bodies of the signatory parties. If this goes well, the official signing ceremony of the Agreement should be held in 2012.

The Agreement is strongly based on the above treated compromise proposal by the European Commission. However, compared to the latter proposal, the provisions concerning the implementation of the MRSPC -i.e. article 18 MRSPC- are considerably more extensive. Explicit reference is made to article 155 TFEU, emphasising that the parties agreed to transform the MRSPC into a European autonomous agreement in the framework of the ESSDC in the professional football sector. Unlike in the Commission's proposal, it is also stressed that the Agreement commits the Parties to use *best endeavours* (emphasis added) to ensure the implementation at national level where possible, not only in the EU territory but also in the rest of the UEFA Territory. Furthermore, article 18 MRSPC stipulates that implementation of the Agreement will follow only after it has been approved and/or ratified by the appropriate Organs of the Parties (i.e. General Assembly, Congress etc.). This provision was also not included in the compromise proposal by the Commission. Finally, any disagreement concerning the implementation process at national level must be resolved by negotiations both at national and at European level.

In Annex 8 to the Agreement, the implementation and enforcement of the MRSPC are dealt with in more detail. Again, it is stressed that the parties will use best endeavours to ensure the implementation of the Agreement. Whereas the proposal by the Commission envisioned a period of maximum six months in the relevant countries, article 1.1 of Annex 8 stipulates that within one year after the date of signature of the Agreement, the members of the Social Partners will implement this Agreement in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, England, N.Ireland, Wales, Scotland, Switzerland and Norway. Pursuant to article 1.2, the members of the Social Partners will implement the Agreement in Bulgaria, Greece/Cyprus, Hungary, Poland, Romania, and Slovenia within 2 (or 3) years after the date of signature of the Agreement. In the remaining countries the Agreement should be implemented no later than three years after the date of signature of the Agreement.<sup>163</sup>

Pursuant to article 1.4 of Annex 8, the Parties have individually the right to postpone the deadline for all countries mentioned in articles 1.2 and 1.3. However, a party doing this has to consult the rest of the Parties

to the Agreement before effecting the postponement and all Parties to the Agreement have to agree on the duration of the postponement.

The remaining provisions in Annex 8 on the implementation of the Agreement in existing national bargaining agreements are the same as those envisioned in the implementation strategy of the European Commission. If there is no collective bargaining agreement in place, the most appropriate and effective implementation method will be used. Finally, a European Professional Football Social Dialogue Taskforce will be established.

It is clear that the compromise Agreement is weaker than the compromise proposal of the European Commission. Nevertheless, thanks to the fact that UEFA is one of the stakeholders which is at the moment very engaged in the so-called 'Financial Fair Play', it could facilitate the acceptance of the minimum requirements by clubs and leagues.

### Conclusions

Social dialogue in professional football is essentially about the credibility of the autonomy of sports associations and the EU institutions have always expressed great respect for their self-regulations. However, in its recent (January 2011) Communication 'Developing the European Dimension in Sport', the Commission of the European Union stresses that good governance is a condition for the self-regulation and autonomy of the sports sector, which must also respect EU law.<sup>164</sup> In general, transparency, democracy, accountability and representation of stakeholders (associations, federations, players, clubs, leagues, supporters, etc.) are considered as principles of good governance.<sup>165</sup> In this sense, social dialogue is an important element of good governance because it contributes to the shaping of employment relations and working conditions in an active and participative way by giving the stakeholders the opportunity to give their input.

Finding the right balance between treating football (and sports in general) as a 'normal' economic activity and taking into account the notion of 'specificity' is yet very difficult. The recognition of too few specificities of sport may lead to an ineffective sports market, while too many will undermine the fundamental rights of stakeholders within the sector.<sup>166</sup>

Therefore social dialogue is the best instrument for allowing the stakeholders to take into account the specificity of sport while guaranteeing a right balance between the fundamental rights of professional football players but also those of professional clubs to compete in a free market.

In addition, it is an essential tool which enables the sports organisations to better define their own legal framework in compliance with the relevant EU rules as well as with the needs of their members. The alternative to this is the regulation of the sector through the enforcement of private rights by the Court of Justice of the European Union. Given the fact that the Court only rules on a case by case basis regarding the conformity of (international) sport regulations with EU law, this can lead to an uneven regulation in the sector.

In this article, we demonstrated that despite many difficulties related to the nature and role of the stakeholders as well as the (sporting and economic) interests at stake, they were eventually able to agree on an agreement on minimum requirement which is probably the best they could achieve for the time being. The fact remains that social dialogue is a tool for ensuring a balanced regulation of the sector which is respectful of the fundamental rights of all the parties involved. If the professional football sector wants to remain autonomous, it is of vital importance that all football stakeholders get an equal input in its governance.

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*Partner Organisations in the Professional Football Players Sector, Report for the European Commission, Project No VC/2004/0547, 2006 (see: ec.europa.eu/social/BlobServlet?docId=4111&langId=en, accessed 12 July 2011).*

<sup>161</sup> FIFPro press release, 'Only FIFPro is ready to sign minimum requirements', 1 March 2011 (see: [www.fifpro.org/news/news\\_details/1469](http://www.fifpro.org/news/news_details/1469), accessed 10 July 2011).

<sup>162</sup> ¶ 4 .  
<sup>163</sup> Annex 8 to the MRSPC, art. 1.3

<sup>164</sup> Commission of the European Union, Developing the European Dimension in Sport, 10, COM (2011) 12 final, January 2011 (see: [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF), accessed 10 July 2011).

<sup>165</sup> White Paper on Sport, *supra* note 7, 12.  
<sup>166</sup> S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, The Hague, Kluwer Law International, 2005, 391-400.

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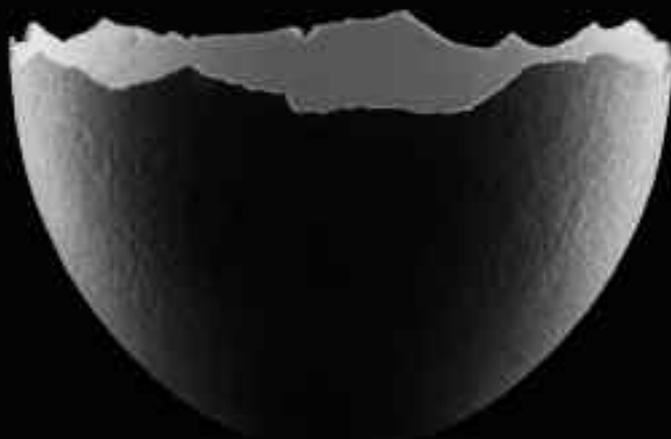
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TWO EGGS ON BROWN  
TOAST FOR BREAKFAST  
THIS MORNING**



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RUSSIA, SLOVAKIA, SLOVENIA, SWITZERLAND, UKRAINE, USA

# The FEI and the Continuing Fight against Doping in Equestrian Sport

by John T. Wend

## Introduction - The New Rules

Over the last decade there has been a continual fight against doping in sport. Jacques Rogge, President of the International Olympic Committee (IOC) has made the fight against doping his number one priority.<sup>1</sup> It is based on the fundamental assumption of athletes want to compete on a fair and level playing field free of performance enhancing substances. However, there have been crises and equestrian sport has not been immune. Either because of confusion or deliberate actions, a number of horses have tested positive and have been disqualified with embarrassing results. The Fédération Equestre Internationale (FEI) is the international governing body for equestrian sport. Under its current president, HRH Princess Haya Al Hussein, the FEI has made tremendous strides not only as an organization but also in anti-doping efforts in recent years. Equestrian sport is also unique because it involves animal and human athletes working together as a team and there is recognition that horses are competitive athletes who deserve the greatest care and whose welfare is paramount.

Anti-Doping efforts in the FEI are governed by the new Equine Anti-Doping and Controlled Medication Regulations (EADCMR) and the Equine Prohibited Substances List which went into effect for all FEI events on April 5, 2010. These new regulations attempt to clarify the responsibilities and sanctions for riders and support personnel. FEI Secretary General Alex McLin, a leader in the anti-doping movement stated,

Today, 5 April, is a landmark day for our sport, the beginning of the Clean Sport Era... Today marks the culmination of a collective effort by the entire equestrian community to protect the integrity of our sport and the welfare of our horses. Under the new Equine Anti Doping and Controlled Medication Regulations, anything prohibited in competition, no matter how the substance is classified, is called a "Prohibited Substance". Doping substances, which have no place in equine sport, are called "Banned Substances," while medication substances that are commonly used in equine medicine but prohibited in competition, are called "Controlled Medication Substances."<sup>2</sup>

To educate riders and support personnel, the FEI has also created a new site dedicated to FEI anti-doping efforts (FEI Cleansport.org), which is similar to the websites created by the World Anti-Doping Agency (WADA) for human athletes. One of the main advantages of the website is that it includes a Prohibited Substances Database to aid veterinarians and riders to quickly and easily determine whether the substances that they are using are prohibited.

## Past Crises in Equestrian Sport

Throughout the years there have been allegations of doping in sports, including equestrian sport. But recent crises in horse sport have brought the issue to the forefront.<sup>3</sup> In equestrian sport, the rider is designated as

the "Person Responsible" (PR) for the horse and is held strictly liable whenever a Prohibited Substance is found in the horse's sample.<sup>4</sup> It is not necessary to establish that there was an intention to cheat or gain a competitive advantage - the mere presence of a prohibited substance in the horse's system is sufficient. The PR has the opportunity to reduce or eliminate their sanctions, including the period of ineligibility, if they can establish that they bear no fault and no negligence or no significant fault and no significant negligence. Some of the equestrian violations at Games may have been inadvertent as there was substantial confusion between therapeutic medication and deliberate doping.

At the 2004 Olympic Games in Athens there were record number human doping violations. Equestrian sport was not immune and also had a record number of doping violations including two gold medal winners, Goldfever ridden by Ludger Beerbaum of Germany, and Waterford Crystal ridden by Cian O'Connor of Ireland. In the case of Goldfever, the horse tested positive for betamethasone, a prohibited glucocorticoid, The FEI Judicial Committee found that while it was applied for a "legitimate treatment"; that there was no competitive advantage given to the horse; and no intention by Beerbaum to cause a breach of regulations. However, because of the strict liability standards Goldfever was disqualified and Germany lost the team showjumping gold medal.<sup>5</sup>

Cian O'Connor and Waterford Crystal won Ireland's first-ever equestrian gold medal. However, again the horse was disqualified. O'Connor argued that the medication used was administered by a veterinarian for therapeutic reasons well in advance of the Games and absolutely denied that his horses were doped with sedatives to cover-up evidence of abuse.<sup>6</sup> Again, the FEI Judicial Committee found that there was no intent to deliberately gain a competitive advantage, but again, because of the strict liability standard, the horse was disqualified and the medal awarded to Brazil's Rodrigo Pessoa riding Baloubet Du Rouet.<sup>7</sup> FEI spokesperson Malina Gueorguiev later said, "Athens was really a bad moment for the sport... It was a big problem and it was very spectacular. Should anything like that happen again it could be very detrimental for the sport..."<sup>8</sup>

In response to this scandal in November, 2004 the FEI established the Task Force on Anti-Doping and Medication Policy to examine and improve the system and to make it more transparent and equitable. There were cases where legitimate treatment was necessary for the health and welfare of the horse, but riders and veterinarians withheld treatment for fear of being disqualified. The Task Force attempted to differentiate between those drugs needed for medication versus those intended for performance enhancing doping,<sup>9</sup> and in 2006 the FEI Competitor Guide to Doping and Medication Control<sup>10</sup> was published.

## 2008 Olympic Games

Yet, at the 2008 Olympic Games held in Beijing/Hong Kong, equestrian sport was stung again.<sup>11</sup> The revised policy was not working well. At

1 John Leicester & Mattias Karen, Jacques Rogge Set For New 4-Year Term As IOC Chief (2009), [www.cbsnews.com/stories/2009/10/08/ap/sportsline/main5371608.shtml](http://www.cbsnews.com/stories/2009/10/08/ap/sportsline/main5371608.shtml) (last visited May 5, 2011).

2 Thehorse.Com, 2011 FEI: Equine Anti-Doping And Controlled Medication Regulations And Prohibited Substances List Goes Live (2010), [www.thehorse.com/ViewArticle.aspx?ID=16131](http://www.thehorse.com/ViewArticle.aspx?ID=16131) (last visited May 5, 2011).

3 See generally A. J. Higgins, From ancient Greece to modern Athens: 3000 years of doping in competition horses, 29 *Journal*

of Veterinary Pharmacology And Therapeutics 4-8 (2006). See also Ed Houghton & Steve Maynard, Some Aspects of Doping and Medication Control in Equine Sports, 195 in *Handbook Of Experimental Pharmacology* 369-409 (2010), [www.springerlink.com/content/w28157384q326v07/](http://www.springerlink.com/content/w28157384q326v07/) (last visited Jan 31, 2010). See also John Wendt, The Crisis of Doping in Equestrian Sport, 27 *Entertainment And Sports Lawyer* 10-14 (2009).

4 Federation Equestre Internationale, 2011 Athlete's Guide To Anti-Doping And Controlled Medication Regulations

(2010), <http://www.feicleansport.org/athlete's%20guide%20to%20anti-doping.pdf>.

5 Federation Equestre Internationale, 2011 COurt Of Arbitration For Sport Dismisses Appeal Of Ludger Beerbaum (GER) (2005), <http://www.equestrian.org.au/?page=628&format=> (last visited May 5, 2011).

6 CNN.com, Ireland Stripped Of Olympic Medal (2005), [edition.cnn.com/2005/sport/03/28/irish.olympics/](http://edition.cnn.com/2005/sport/03/28/irish.olympics/) (last visited Feb 2, 2011).

7 CBC Sports, 2011 Gold, silver, bronze? Not in 1932 (2008), [www.cbc.ca/news/](http://www.cbc.ca/news/)

<http://www.feicleansport.org/athlete's%20guide%20to%20anti-doping.pdf>.

8 Graham Dunbar, Equestrianism: FEI focuses on drug-free Games (2008), [www.independent.co.uk/sport/racing/equestrianism-fei-focuses-on-drug-free-games-808204.html](http://www.independent.co.uk/sport/racing/equestrianism-fei-focuses-on-drug-free-games-808204.html) (last visited May 5, 2011).

9 Federation Equestre Internationale, 2011 FEI General Assembly: Task Force On Anti Doping And Medication Policy (2005), [www.horsetackreview.com/article-display/1273.html](http://www.horsetackreview.com/article-display/1273.html) (last visited May 5, 2011).

10 Federation Equestre Internationale, 2011

the beginning of the Games, Courtney King-Dye's horse Mythilus tested positive for Felbinac, a prohibited substance usually applied topically for the relief of local pain and inflammation. The FEI Tribunal did find King-Dye of the United States and the team veterinarian credible and believed that neither she nor anyone on her behalf had knowingly administered the medication to Mythilus. They also examined her record and the special circumstances of Mythilus' hospitalization and possibility of contamination, and reduced her suspension to one month.<sup>12</sup> However, the ramifications were severe. As a result of King-Dye's disqualification, the US Dressage Team was disqualified and all medals, points and prize money were forfeited.<sup>13</sup>

On August 21, 2008 four horses were banned from competition because of the use of capsaicin, an over-the-counter liniment, found in "Equi-Block," typically used to soothe sore muscles. While it can be used for therapeutic reasons, capsaicin can also be used as a "hypersensitizing agent" and if it is applied to a horse's legs it would make the horse more sensitive causing the horse and to jump higher to avoid hitting a fence. For that reason the FEI classified capsaicin as a doping prohibited substance.<sup>14</sup> The FEI had only recently broadened its screening program to search for capsaicin.<sup>15</sup>

Lantinus was ridden by Dennis Lynch of Ireland and for the second Olympic Games in a row an Irish rider was disqualified for a doping offence. Lynch said that he had used Equi-Block, for more than a year to help warm his horse's back muscles for competition, not as a hypersensitizing agent and Lantinus had never tested positive. However, the FEI Tribunal found that manufacturer's warnings should have "rung bells" with Lynch that it may be a prohibited substance and that Lynch should have contacted the Team Vet or Veterinary Committee before using Equi-Block. Lynch was also fined and banned for three months.<sup>16</sup>

Pat Hickey, President of the Olympic Council of Ireland said, I am sick and tired of our name being dragged through the mud like this. I am deeply ashamed of what happened. Yesterday, my IOC colleagues were continually making reference to what they called "another scandal for Ireland." (They) are shocked and appalled that this is happening in this sport. There seems to be something wrong in the equestrian movement. They just have to get their act together. This sport could be in very serious difficulties for next year's vote, whether they remain on the programme or not.<sup>17</sup>

The FEI Tribunal also found that Brazil's Bernardo Alves was negligent in using Equi-Block on his horse Chupa Chup, even if its use may only have been to assist circulation.<sup>18</sup> The Tribunal also stressed that the Brazilian Team, as a whole, did not have a centralized, consistent anti-doping system. Alves was fined and banned for three and one half months. Tony Andre Hansen of Norway was fined and banned for the use of Capsaicin on Camiro. The Tribunal found that it again was a Medication A rather than a Doping offence. As with Courtney Dye-King's case, because of Hansen's disqualification, the entire Norwegian

Olympic show jumping team was stripped of its Olympic bronze medals.<sup>19</sup> Ironically, Brazil's Rodrigo Pessoa was fined and banned suspended for a period of four after Rufus tested positive.<sup>20</sup> Recall that Pessoa had won the gold medal at the Games in Athens after Ireland's Waterford Crystal tested positive.

Christian Ahlmann of Germany explained that his horse Cöster suffered from chronic back pain and that Ahlmann had been treating Cöster by applying Equi-block. The Tribunal concluded that this was a Medication Class A offence and Ahlmann was fined and banned for four months.<sup>21</sup> However, in an unusual move, Deutsche Reiterliche Vereinigung (DRV), Germany's equestrian federation, appealed the decision to the Court of Arbitration for Sport as too lenient and took the case to the Court of Arbitration for Sport (CAS) asking for a more severe sanction. The CAS imposed a greater ban and fine, and cancelled all results, medals and prize monies since the Olympic Games. Finally, the CAS in *Ahlmann* suggested that there have been conflicting opinions over the use of Capsaicin and urged FEI to harmonize their rules and regulations.<sup>22</sup>

Alexander McIn, FEI Chairman said that the positives were "a serious blow to the sport. We are very well aware of the implications to Jumping and Equestrian sport in general..."<sup>23</sup> Even Princess Haya warned that there could be trouble as soon as the 2012 Olympic Games in London saying, "The IOC have heard from our stakeholders and wrote to us about the set-up and presentation of dressage. The popularity of dressage is abnormally low and there are complaints about judging and the make up of judging panels and committees... Anyone who thinks equestrian sports are secure for London is mistaken."<sup>24</sup>

### Clean Sport Commission

After the Beijing/Hong Kong Games, the FEI took a two-prong approach to address some of the issues of inadvertent and intentional doping. The first prong was to create of "The Stevens Commission" led by former London Metropolitan Police Commissioner to investigate allegations about the German Equestrian Team's use of illegal drugs and treatments on their horses. However, its charge was expanded to review and make recommendations for drug testing protocols and for overall security.<sup>25</sup>

The second prong was the "Commission on Medication and Doping" (Ljungqvist Commission) led by Arne Ljungqvist, MD, PhD, chair of the IOC Medical Commission and vice president of WADA. Princess Haya explained the rationale for creating the Ljungqvist Commission,

The confusion around what is medication and what is doping, the structures that exist in the FEI, the structures that exist at national federation level are all independent contributors to the situation that we find ourselves in now... And we need to come up with a holistic solution that suits everybody. We don't want to come away from this period of time into another situation where the same thing happens and people allocate blame or responsibility to other parties.<sup>26</sup>

FEI Competitor Guide To Doping And Medication Control (2006), <http://www.horsesport.org/imported-uncategorised-news/fei-competitor-guide-doping-and-medication-control-1> (last visited May 5, 2011).

11 John Wendt, *supra* note 3.

12 Eurodressage, Decision In The Positive Medication Case Involving Mythilus (2008), [www.eurodressage.com/equestrian/2008/09/23/decision-positive-medication-case-involving-mythilus](http://www.eurodressage.com/equestrian/2008/09/23/decision-positive-medication-case-involving-mythilus) (last visited Feb 2, 2011).

13 Federation Equestre Internationale, Rider, U.S. Olympic Dressage Team Disqualified (2008), [www.thehorse.com/ViewArticle.aspx?ID=12740](http://www.thehorse.com/ViewArticle.aspx?ID=12740) (last visited Feb 2, 2011).

14 Horse and Hound, Capsaicin To Be Classed As Doping, Not Medication (2008), [www.horseandhound.co.uk/news/397/273011.html](http://www.horseandhound.co.uk/news/397/273011.html) (last visited Feb 2, 2011).

15 Equine Ink, 2011 Capsaicin Causes Trouble for Olympic Horses (2008), [equineink.com/2008/08/27/capsaicin-causes-trouble-for-olympic-horses/](http://equineink.com/2008/08/27/capsaicin-causes-trouble-for-olympic-horses/).

16 Federation Equestre Internationale, Decision of the FEI Tribunal - Lantinus, 2008 (2009), [www.fei.org/Athletes\\_and\\_Horses/Medication\\_Control\\_and\\_Antidoping/Horses/Documents/22%20-%20lantinus%203%20-%20Tribunal%20Final%20Decision%20-%2017%20October%2008.pdf](http://www.fei.org/Athletes_and_Horses/Medication_Control_and_Antidoping/Horses/Documents/22%20-%20lantinus%203%20-%20Tribunal%20Final%20Decision%20-%2017%20October%2008.pdf).

17 Horsetalk.co.nz, quote/unquote - olympic equestrian comments in the media | horsetalk - international horse news (2008), [www.horsetalk.co.nz/news/2008/08/144.shtml](http://www.horsetalk.co.nz/news/2008/08/144.shtml) (last visited May 5, 2011).

18 Equestrian.com.my, Alves Banned For Olympic Doping Offence (2008), [www.equestrian.com.my/updates/55-alves-banned-for-olympic-doping-offence](http://www.equestrian.com.my/updates/55-alves-banned-for-olympic-doping-offence) (last visited Feb 2, 2011).

19 Equestrian.com.my, TONY Andre Hansen Disqualified And Norway Lose Olympic Bronze (2008), [www.equestrian.com.my/updates/152-tony-andre-hansen-disqualified-and-norway-lose-olympic-bronze](http://www.equestrian.com.my/updates/152-tony-andre-hansen-disqualified-and-norway-lose-olympic-bronze) (last visited Feb 2, 2011).

20 Nancy Jaffer, Update: Rodrigo Pessoa Court Decision (2008), [www.equisearch.com/equewire\\_news/nancy\\_jaffer/pessoa\\_decision\\_101508/](http://www.equisearch.com/equewire_news/nancy_jaffer/pessoa_decision_101508/) (last visited Feb 2, 2011).

21 Cöster - Tribunal Interim Decision - 3 October 08.pdf, [search.fei.org/Athletes\\_and\\_Horses/Medication\\_Control\\_and\\_Antidoping/Horses/Documents/20%20-%20COSTER%20-%20Tribunal%20Interim%20Decision%20-%203%20October%2008.pdf](http://search.fei.org/Athletes_and_Horses/Medication_Control_and_Antidoping/Horses/Documents/20%20-%20COSTER%20-%20Tribunal%20Interim%20Decision%20-%203%20October%2008.pdf) (last visited Feb 2, 2011).

22 CAS 2008/A/1700 Deutsche Reiterliche Vereinigung e.V. v/FEI & Christian Ahlmann, [www.tas-cas.org/d2wfiles/](http://www.tas-cas.org/d2wfiles/)

[document/3187/5048/0/Award%201700-1710%20Ahlmann.pdf](http://document/3187/5048/0/Award%201700-1710%20Ahlmann.pdf) (last visited Feb 1, 2011).

23 Horsetalk.co.nz, Ointment at Centre of Olympic Horse Drug Scandal (2008), [www.horsetalk.co.nz/news/2008/08/130.shtml](http://www.horsetalk.co.nz/news/2008/08/130.shtml) (last visited May 5, 2011).

24 Kate Green, Future of Olympic Equestrian Sport Under Threat (2008), [www.horseandhound.co.uk/news/397/266589.html](http://www.horseandhound.co.uk/news/397/266589.html) (last visited May 5, 2011).

25 Federation Equestre Internationale, Lord Stevens Commission Publishes Roadmap To Ensure Future of Equestrian Sport (2010), [www.horsesport.org/legal-activities/press-release/lord-stevens-commission-publishes-roadmap-ensure-future-equestrian-sp](http://www.horsesport.org/legal-activities/press-release/lord-stevens-commission-publishes-roadmap-ensure-future-equestrian-sp) (last visited May 5, 2011).

26 Horsetalk.co.nz, Co-operation key to cleaning up horse sport (2009), [www.horsetalk.co.nz/news/2009/07/023.shtml](http://www.horsetalk.co.nz/news/2009/07/023.shtml) (last visited May 5, 2011).

The Ljungqvist Commission was created in response to the problems at the 2008 Games and was charged with examining how equine anti-doping policies could be further harmonized with WADA norms and to ensure that horse welfare remains at the heart of the system. It represented a united effort of all the stakeholders including athletes, veterinarians, FEI, National Federations, the IOC and WADA. It was charged to continue the work started by the 2004 Doping and Medication Taskforce to distinguish the grey areas between therapeutic medication and doping and to clarify doping protocols in equestrian. The two Commissions working together became "The Clean Sport Commission."

In order to be transparent and to gain input from all stakeholders, the Ljungqvist Commission created Four Focus Groups. The Laboratory Working Group looked at an analysis of FEI samples and how these complied with FEI policy. The Legal Working Group looked at the existing Anti-Doping and Medication Control Rules and possible revisions. The List Working Group reviewed issues related to the Equine Prohibited Substances List, and the Communications and Education Working Group looked at establishing a communications and education strategy.<sup>27</sup> As with the World Anti-Doping Code, education is a key component in the fight against doping; it is "central to any programme (sic) targeted at removing doping from sport. Lasting prevention will be achieved through the education of athletes as well as the wider sporting community."<sup>28</sup>

The major recommendations coming out of the Clean Sport Commission were the new Equine Anti-Doping and Controlled Medication Regulations (EADCMR). The EADCMR were adopted and implemented in conformity with the undertakings of the FEI governing bodies in the spirit of the World Anti-Doping Code, the fundamental document in the war against doping. Within the EADCMR is the Prohibited Substances List, which now separates drugs into two lists; one for Banned Substances that can be never used, and another for Controlled Medication Substances made up of all known substances which are recognized as therapeutic and/or commonly used, but have the potential to enhance performance at certain levels.

John McEwen, Chairman of the FEI Veterinary Committee said, "This is very different from what we had before, where substances were defined by their effect on the horse. Now we shall name drugs and brand names - it will make life a lot easier."<sup>29</sup> The Prohibited Substance Database has approximately 1,200 substances including their definition, common usage and some of the most popular trade names.<sup>30</sup> As mentioned earlier, the Regulations were also expanded to be rider and include support personnel including veterinarians and grooms.<sup>31</sup> Again, to avoid possibilities of inadvertent doping, all competitors are now required to keep a log of all medications administered to their horses. Competitors are now able to download the medication log and keep it their FEI Passport or Horse Passport<sup>32</sup>

At the General Assembly in Copenhagen in November, 2009 the Clean Sport Commission's Recommendations including the EADCMR received overwhelming support.<sup>33</sup> However, there was substantial

debate<sup>34</sup> over the use limited of a small number of non-steroidal anti-inflammatory drugs, most notably phenylbutazone (bute) and Flunixin, as well as salicylic acid.<sup>35</sup> In light of the controversy the FEI delayed implementation for further debate.<sup>36</sup> Princess Haya stated,

The FEI has been criticised (sic) for not providing sufficient time for consultation on the substances that differentiate the new policy from the old and there has also been widespread unease about the late publication of the progressive list... In light of both these considerations, we felt it was only fair to delay implementation of the new list to allow everyone to have their say and let other veterinary experts look at the science behind this policy change.<sup>37</sup>

FEI Vice President Sven Holmberg led the FEI Congress on NSAID Usage and Medication in the Equine Athlete conducting extensive hearings and debates.<sup>38</sup> The FEI found that the scientific evidence was contradictory and that "this is a debate that cannot be viewed purely from a scientific perspective and that ethical values and legal issues also have to be taken into account."<sup>39</sup> However, in line with the "zero tolerance" policies the Committee recommended that NSAIDs could be used between, but not during competitions.<sup>40</sup> In November 2010 at the General Assembly in Chinese Taipei<sup>41</sup> the National Federations voted to adopt the FEI List Group and prohibited the use of NSAIDs in international competition.<sup>42</sup> The EADCMR now provides the basic framework for going forward. FEI General Counsel Lisa Lazarus said, "We're making it very transparent and very easy for riders to comply. And if they don't comply, they will be punished severely."<sup>43</sup>

#### Actions by National Federations in Ireland and Germany

As mentioned earlier, Ireland lost medals in two consecutive Olympic Games and the specter of the Games in London in 2012 loomed large. In 2009 Horse Sport Ireland (HSI) appointed Dr. Gordon Holmes, Chairman of the Parole Board and the Garda Complaints Board to chair a mission to examine the lax culture regarding anti-doping that had entered Horse Sport Ireland.<sup>44</sup> Holmes stated, "It is clear that there is a real sense within the sector that action is needed."<sup>45</sup> The Holmes Report recommended the establishment of a National Medication and Anti-Doping Testing Program; the introduction of a licensing system that is linked to certain educational course; and that HSI inspectors will be entitled to enter horse yards and training grounds to investigate any allegations of wrongdoing.<sup>46</sup> As a precursor to the FEI, all international riders are now required to keep a log of all medications administered to their horses. This would apply to not only to riders, but also veterinarians and grooms. Again, because of the scandals at the past two Olympic Games, as a preventive move, all Irish riders will have to supply the log to HSI and the Olympic Council of Ireland 60 days prior to competition. After the 60 day date, riders will be required to get permission the Team Veterinarian to give any substance to their horse.<sup>47</sup>

HSI went even further and signed an agreement with the Olympic Council of Ireland setting out a number of measures in anticipation of the London Games. In addition to the log book, every international

27 Federation Equestre Internationale, 2011 History of the Clean Sport Campaign (2010), <http://www.feicleansport.org/history.html>.

28 United Nations Educational, Scientific and Cultural Organization, Education Resources (2010), [www.unesco.org/new/en/social-and-human-sciences/themes/sport/anti-doping/education-resources/](http://www.unesco.org/new/en/social-and-human-sciences/themes/sport/anti-doping/education-resources/) (last visited Jan 28, 2011).

29 Charlotte White, Clearer FEI doping and medication rules for horses welcomed (2009), [www.horseandhound.co.uk/news/397/283962.html](http://www.horseandhound.co.uk/news/397/283962.html) (last visited May 5, 2011).

30 United States Eventing Association, 2011 New Online FEI Prohibited Substances Database Now Available (2010), [useventing.com/competitions.php?section=fei&id=2314](http://useventing.com/competitions.php?section=fei&id=2314) (last visited Mar 31, 2010).

31 Federation Equestre Internationale, 2011 FEI Equine Anti-Doping and Controlled Medication Regulations (2010), <http://www.feicleansport.org/Rules.pdf>.

32 Frank Venhaus, New Equine Anti-Doping & Controlled Medication Regulations come into force on 05 April 2010 (2010), <http://www.equestrian.org.au/?ID=22246> (last visited May 5, 2011).

33 Eurodressage, 2011 Overwhelming Support Of Clean Sport Campaign (2009), [www.eurodressage.com/equestrian/2009/11/21/overwhelming-support-clean-sport-campaign](http://www.eurodressage.com/equestrian/2009/11/21/overwhelming-support-clean-sport-campaign) (last visited May 5, 2011).

34 *Id.*  
35 Federation Equestre Internationale, *supra* note 31.

36 Horse Sport Ireland, 2011 FEI Delays Implementation of New Prohibited Substances List to 5 April 2010 (2009),

[www.horsesportireland.ie/general/fei-delays-implementation-of-new-prohibited-substances-list-to-5-april-2010.5170.html](http://www.horsesportireland.ie/general/fei-delays-implementation-of-new-prohibited-substances-list-to-5-april-2010.5170.html) (last visited May 5, 2011).

37 *Id.*

38 Horsetalk.co.nz, Anti-inflammatory debate about to begin (2010), <http://www.horsetalk.co.nz/news/2010/03/067.shtml> (last visited May 5, 2011).

39 Federation Equestre Internationale, FEI Congress Hailed as Invaluable Contribution to Debate on NSAIDs in Competition (2010), [www.fei.org/veterinary/press-releases/fei-congress-hailed-invaluable-contribution-debate-competition-use-nsaids](http://www.fei.org/veterinary/press-releases/fei-congress-hailed-invaluable-contribution-debate-competition-use-nsaids) (last visited May 5, 2011).

40 Laurie Dixon, Progressive drugs list well and truly buried (2010), [www.horsetalk.co.nz/news/2010/11/040.shtml](http://www.horsetalk.co.nz/news/2010/11/040.shtml) (last visited May 5, 2011).

41 Christa Leste'-Lasserre, 2011 FEI Debates Use of NSAIDs in Competing Horses (2010), [www.thehorse.com/ViewArticle.aspx?ID=16952&src=RA](http://www.thehorse.com/ViewArticle.aspx?ID=16952&src=RA) (last visited May 5, 2011).

42 Christa Leste'-Lasserre, FEI General Assembly: NSAID Use Definitely Prohibited (2010), [www.thehorse.com/ViewArticle.aspx?ID=17260](http://www.thehorse.com/ViewArticle.aspx?ID=17260) (last visited May 5, 2011).

43 Christa Leste'-Lasserre, 2011 Fair Play: World Equestrian Games (2010), [www.thehorse.com/ViewArticle.aspx?ID=17012](http://www.thehorse.com/ViewArticle.aspx?ID=17012) (last visited May 5, 2011).

44 Horse Sport Ireland, 2011 Horse Sport Ireland Launches Holmes Report (2009), <http://www.horsesportireland.ie/general/horse-sport-ireland-launches-holmes-report.846.html>.

45 *Id.*  
46 Joanne Fox, Call for fresh start on doping

rider must attend a new education course on FEI's medication and anti-doping control program. Finally, there is now a joint HIS/OCI steering group to oversee Irish equestrian sport before the London Games.<sup>48</sup>

Sport leadership in Ireland has taken a very strong stand on anti-doping well aware of their past problems. OCI President Pat Hickey said, "This Agreement should give everyone great confidence that, whatever problems we had in past Olympics in show jumping, these should not happen in the future. Once the World Equestrian Games are over in September, everything will be in place to ensure that participation by Ireland's equestrian team at the London Olympics will not be overshadowed by horse doping issues."<sup>49</sup>

HSI Chairman Joe Walsh put it more bluntly, "Nobody wants a repeat of what happened in the last two Olympics and ourselves and the OCI are determined that every possible measure will be in place<sup>50</sup>... The reputation of our country and our sector is at stake and it will continue to be our top priority."<sup>51</sup> The results of their efforts have been positive, as in 2009 a total of 107 horses ridden by Irish riders were tested and none tested positive.

Meanwhile in Germany there was an explosion in equine sport. Recall that the Stevens Commission was originally established to investigate allegations about the German Equestrian Team's use of illegal drugs and treatments on their horses.<sup>52</sup> Marco Kutscher, a show jumper, commented that his horse, Cornet Obolensky, had been treated with a metabolic enhancer, lactanase and arnica while competing at the 2008 Olympic Games.<sup>53</sup> And as mentioned earlier Christian Ahlmann's horse Cöster was disqualified as one of the Capsaicin Cases. Even their top rider, Olympic Gold Medalist Ludger Beerbaum admitted to "dubious practices."<sup>54</sup> Beerbaum, one of the most successful riders in German history said, "In the past I had the attitude that anything that could not be detected was allowed..."<sup>55</sup> In short, there was a cavalier attitude toward anti-doping regulation.

In an unprecedented move the German Equestrian Federation, Deutsche Reiterliche Vereinigung, (DRV) disbanded its national team. Federation president Breido zu Rantzau, said, "With this dissolving of the team we want to take step in the direction of credibility... We had to do something to wake them up."<sup>56</sup> The DRV revised its policies to one of the strictest in the world, both in and out-of-competition. Horses testing positive will now be suspended from competition for eight weeks, or six months if anabolic steroids were present, and their riders will be suspended for two years.<sup>57</sup>

### The 2010 World Equestrian Games

In equestrian sport the two biggest events are the Olympic Games and World Equestrian Games (WEG). In September, 2010 the WEG were held in Kentucky, the first time in history that the event was held outside of Europe. John Nicholson, executive director of the Kentucky Horse Park said, "In terms of equine sports, this is as big as the Olympics."<sup>58</sup> John Long, CEO of the United States Equestrian Federation highlighted the importance of this event, "Behind the Vancouver Olympics, this

will be the largest sporting event in North America this year...It will be unprecedented in terms of the number of hours on television for equestrian sport."<sup>59</sup> FEI could not afford another scandal.

As a preventive measure the FEI published an updated version of the Elective Testing List, containing significantly more substances than was previously offered at the Beijing 2008 Olympic Games. The FEI allowed team veterinarians to submit urine from competition horses to test for up to four Prohibited Substances allowing them to test prior to in-competition testing.

Many veterinarians were in fear of treating their horses with any medications for fear of testing positive. With this new transparent approach the FEI is trying to reduce that fear allowing for the proper treatment for the health of the horse.<sup>60</sup>

In addition to being the first time the WEG was held outside of Europe, these were the first Games after the EADCMR were adopted. FEI general counsel Lisa Lazarus stated, "We're going to be doing a significant amount of testing, and everybody knows that..."<sup>61</sup> John Long, addressed the issue directly, "Our collective sport cannot afford to make any more mistakes... So the level of scrutiny at the 2010 WEG will be higher than it's ever been."<sup>62</sup> Most importantly, remember that the main concern must be the welfare of the athletes, human and equestrian. Soenke Lauterbach, secretary general of the German Equestrian Federation expressed this well saying, "What is being done is to protect all those athletes who want to have sport on equal terms and fair competition, and to protect the welfare of the horse."<sup>63</sup>

The Games were an incredible success, especially regarding anti-doping efforts. There were 752 horses in competition. Under FEI Veterinary Regulations, samples from a minimum of 5% of competing horses are required. However, the FEI went far and beyond the minimum and collected a total of 140 samples were taken from eighty two horses.<sup>64</sup> All individual medal horses were tested, as well as one member of each medal winning team. Random samples were also taken throughout the 16-day event. No horse or human athletes tested positive.<sup>65</sup> Princess Haya stated,

This is a great success for everyone involved in equestrian sport and is the best possible endorsement of the FEI's Clean Sport Campaign... It also proves the value of the FEI's educational programme, (sic) as athletes and their supporters now have the knowledge to make a clear distinction between the use of routine, legitimate medication and deliberate doping to affect a horse's performance.<sup>66</sup>

Remember that it was only six years since the Olympic Games in Athens scandal. Considering the time frame, having zero violations at a world championship is fairly impressive.

### FEI Elections and Leadership

HRH Princess Haya Al Hussein was first elected as the 13<sup>th</sup> President of the FEI on May 2, 2006.<sup>67</sup> She competed in the 2000 Sydney Olympics and has an impressive list of humanitarian achievements. She is married to Sheikh Mohammed Bin Rashid Al Maktoum, the ruler of Dubai and she is the daughter of the late King Hussein of Jordan. She has sig-

- Tough report launched (2009), <http://www.farmersjournal.ie/site/farming-Call-for-fresh-start-on-doping-Tough-report-launched-8904.html> (last visited May 5, 2011).

47 *Id.*  
48 Horse Sport Ireland, OCI Signs Key Anti-Doping Agreement with Horse Sport Ireland (2010), [www.horsesportireland.ie/general/oci-signs-key-anti-doping-agreement-with-horse-sport-ireland.7742.html](http://www.horsesportireland.ie/general/oci-signs-key-anti-doping-agreement-with-horse-sport-ireland.7742.html) (last visited May 5, 2011).

49 *Id.*  
50 *Id.*  
51 Horse Sport Ireland, 2011 Olympic Council Of Ireland Is Briefed On Equestrian Sport's Anti-Doping Campaign (2010), [www.horsesportireland.ie/general/olympic-council-of-ireland-is-briefed-on-](http://www.horsesportireland.ie/general/olympic-council-of-ireland-is-briefed-on-)

[equestrian-sport%e2%80%99s-anti-doping-campaign.6754.html](http://www.horsesportireland.ie/general/olympic-council-of-ireland-is-briefed-on-equestrian-sport%e2%80%99s-anti-doping-campaign.6754.html).

52 Federation Equestre Internationale, *supra* note 39.

53 The Chronicle of the Horse, Investigations Into German Horse Drugging Scandal Continue (2009), [www.chronofhorse.com/article/investigations-german-horse-drugging-scandal-continue](http://www.chronofhorse.com/article/investigations-german-horse-drugging-scandal-continue) (last visited May 5, 2011).

54 Susan Houlton, German Equestrian Federation disbands national teams (2009), [www.dw-world.de/dw/article/0,,4290096,00.html](http://www.dw-world.de/dw/article/0,,4290096,00.html) (last visited May 5, 2011).

55 Dressage-News.com, Germany Suspends Dressage, Jumping and Eventing Teams Over Doping Scandal (2009), [www.dressage-news.com/?p=947](http://www.dressage-news.com/?p=947) (last vis-

ited Feb 2, 2011).

56 Robin Marshall, Horse doping scandal puts Germany's equestrian team in tatters (2009), [www.horsetalk.co.nz/news/2009/05/191.shtml](http://www.horsetalk.co.nz/news/2009/05/191.shtml) (last visited May 5, 2011).

57 Christa Leste<sup>3</sup>-Lasserre, 2011 German Competition Horse Medication Policies Revised (2010), [www.thehorse.com/ViewArticle.aspx?ID=15715](http://www.thehorse.com/ViewArticle.aspx?ID=15715) (last visited May 5, 2011).

58 Matt Frassica, World Equestrian Games has plenty of fans, just not necessarily in Louisville (2010), [pqasb.pqarchiver.com/courier\\_journal/access/2142726931.html?FMT=ABS&date=Sep+19%2C+2010](http://pqasb.pqarchiver.com/courier_journal/access/2142726931.html?FMT=ABS&date=Sep+19%2C+2010) (last visited Feb 2, 2011).

59 *Id.*

60 The Horse.com, 2011 FEI Releases Updated Elective Testing List (2010), [www.thehorse.com/ViewArticle.aspx?](http://www.thehorse.com/ViewArticle.aspx?)

ID=16971&src=RA (last visited May 5, 2011).

61 Leste<sup>3</sup>-Lasserre, *supra* note 57.

62 *Id.*

63 *Id.*

64 Horsetalk.co.nz, World Games horses pass doping tests (2010), [www.horsetalk.co.nz/news/2010/10/146.shtml](http://www.horsetalk.co.nz/news/2010/10/146.shtml) (last visited May 5, 2011).

65 Horsetalk.co.nz, Human WEG athletes get drugs all-clear (2010), [www.horsetalk.co.nz/news/2010/10/186.shtml](http://www.horsetalk.co.nz/news/2010/10/186.shtml) (last visited May 5, 2011).

66 Horsetalk.co.nz, *supra* note 64.

67 Eurodressage, 2011 Two stand against HRH Princess Haya in FEI Presidential Election (2010), [www.eurodressage.com/equestrian/2010/10/28/two-stand-against-hrh-princess-haya-fei-presidential-election](http://www.eurodressage.com/equestrian/2010/10/28/two-stand-against-hrh-princess-haya-fei-presidential-election) (last visited May 5, 2011).

nificantly raised the profile of the FEI Presidency and has personally donated about \$32 million toward the purchase and renovation of FEI headquarters which opened on May 6, 2011 and is named after her late father, HM King Hussein I. She is one of only three women to lead an international sports federation. She is also one of the few members of the International Olympic Committee and holds one on only 15 seats allocated to International Federations.

Princess Haya has made significant internal changes to the FEI. These include leading the anti-doping movement and increasing stakeholder involvement including full athlete representation, with voting rights, at FEI Executive Board level. She has encouraged financial reform, diversified the FEI's income and created new revenue streams with commercial partnerships<sup>68</sup> and introduced a broadband channel.<sup>69</sup>

However, her tenure has not always been calm. For example, she was involved in a dispute with the FEI Dressage Committee and that group resigned and a new task force was formed.<sup>70</sup> For the first time in FEI history an incumbent president was challenged. Her challengers were Henk Rottinghuis of the Netherlands and FEI Vice President Sven Holmberg.

Princess Haya proposed as part of her agenda, the development of an FEI Solidarity Program,<sup>71</sup> similar to the Olympic Solidarity model to encourage the development of equestrian sport in countries where the sport does not exist or is just developing. This would address one of the requirements of achieving and keeping a place at the Olympic Games, "universality" or that the sport has "global appeal." The universality argument, such as the number of countries where the sport is practiced and the number of medaled international competitions held each year, has been used in the past, most notably prohibited women ski jumpers from competing in the 2010 Vancouver Olympic Games.<sup>72</sup> There has been a perception that equine sport is limited to Europe, the United States and Canada.

Rottinghuis, a member of the FEI Audit and Compliance Committee, is a former Dutch equestrian official who has held senior positions in multi-national companies said that European equestrian officials asked him to run. He conducted a "100-Day Listening Program" and published his survey results.<sup>73</sup> Rottinghuis argued that the FEI's image has suffered; that the sport is not globalizing quickly enough;<sup>74</sup> and that there were too many factions within the FEI. He proposed broadening the equine welfare discussion beyond Clean Sport and also promised a new structure for the FEI Board.<sup>75</sup>

Holmberg was a Princess Haya's choice to serve as FEI first vice-president and is a highly respected judge and administrator at the highest levels of the sport. As with Princess Haya and Rottinghuis, Holmberg acknowledged the importance of equestrian sport's global reach. He published a twelve page manifesto, entitled "The FEI, as I see it."<sup>76</sup> He argued, too, that the image of the sport has suffered and that there was a need for more transparency in leadership. He proposed greater grassroots development and stated that,

The role and the powers of the President today must be "modern", (sic) there must be no element of dictatorship in it. The President should be an initiator of visions and strategy, and be a spokesman for

the organization, but not be able to determine policy singlehandedly.<sup>77</sup>

To win the presidency, a candidate must secure a two-thirds majority. Many predicted a close election.<sup>78</sup> To the surprise of many Princess Haya won on the first ballot in a landslide. She received 90 of 124 votes while Holmberg received 23 votes and Rottinghuis 11 votes. After the voting, she was asked what she sees for the future;

I think that while there are a number of areas where I had to act in order to fulfil (sic) the mandate that I was given, and I do accept that there were very harsh criticisms made and I took them entirely seriously. I learnt lessons along the way but going forward we really do look forward to a period of consolidation and calm and that really is also due to the fact that we have dealt with some very serious issues head on, we dealt with them in a positive manner, we faced our issues and I do think we buried them. From now on some of those very serious issues like Clean Sport, which was our answer to doping, will hopefully not come back and I do look forward to a period of calm and consolidation and look forward to bright days ahead.<sup>79</sup>

After the elections, Holmberg stepped down from his position as vice-president. John McEwen, the strong anti-doping advocate was re-elected as Chair of the Veterinary Committee and also named as a replacement for Holmberg as First Vice-President.

Secretary General Alex McLin suddenly resigned his position as CEO in April 2011 saying, "I have also enjoyed tackling the complex issues facing the FEI and attempting to find ways to improve its approach, its service to the sport and its stakeholders."<sup>80</sup> No reason was given for his resignation. Ingmar De Vos, current Secretary General of the Belgian Equestrian Federation and the European Equestrian Federation has been named to replace McLin as CEO and Secretary General. His selection can also be seen as an attempt to repair broken bridges between Princess Haya and the European Federations. De Vos stated, "The FEI has been through a period of profound change. It is a much better organization (sic) than it was four years ago. As Princess Haya said during her re-election campaign, we now have an opportunity to use this period of calm to build on our progress in a more deliberate manner."<sup>81</sup>

Another indication of the change within the FEI is the appointment of a Constitutional Task Force "to oversee the establishment of an optimal governance structure for the FEI."<sup>82</sup> For many years the FEI Bureau was seen as aloof and not listening to the needs of its members and member organizations. Chaired by Akaash Maharaj, Secretary General and CEO of Equine Canada, the Task Force is charged with gathering input from all stakeholders and present their findings and proposals for restructuring to the 2011 General Assembly in Rio de Janeiro in November 2011.

## Conclusion

The FEI has undergone tremendous changes in the past few years. It has acknowledged that there was a problem in equestrian sport and have begun the fight against doping with a two-prong approach - testing and

68 Equestrio Arabia, Princess Haya announces Programme for re-election as President of the FEI (2010), [www.equestrio.com/arabia/news/princess-haya-announces-programme-for-re-election-as-president-of-the-fei-33.html](http://www.equestrio.com/arabia/news/princess-haya-announces-programme-for-re-election-as-president-of-the-fei-33.html) (last visited May 5, 2011).

69 James Emmett, *Faster, Higher, Stronger*, SportsPro, 2010, at 48-54.

70 Cheryl Truman, Princess Haya awaits games (2008), [www.kentucky.com/2008/11/30/610721/princess-haya-awaits-games.html](http://www.kentucky.com/2008/11/30/610721/princess-haya-awaits-games.html) (last visited May 5, 2011).

71 Federation Equestre Internationale, FEI Presidential Candidates Debate Takes Centre Stage on Day Four of the FEI General Assembly (2010), [www.feiof.org/media/press-releases/fei-presidential-candidates-debate-takes-centre-stage-day-four-fei-general-asse](http://www.feiof.org/media/press-releases/fei-presidential-candidates-debate-takes-centre-stage-day-four-fei-general-asse) (last visited May 5).

72 The Canadian Press, IOC "technical merit keeping women" ski jumping out of games' (2008), [www.tsn.ca/olympics/story/?id=256507&clid=sublinko7&lpos=headlines\\_olympics](http://www.tsn.ca/olympics/story/?id=256507&clid=sublinko7&lpos=headlines_olympics) (last visited Feb 2, 2011). See also John Wendt, *The Road to Vancouver, Issues at the XXI Olympic Winter Games*, 28 Entertainment and Sports Lawyer 3-10 (2010).

73 Henk Rottinghuis, "100-day Listening Programme Survey": The Result (2010), <http://www.henkrottinghuis.org/fei-election/> (last visited May 5, 2011).

74 Katie Thomas, 2011 Princess Shakes Up Equestrian World (2010), [www.nytimes.com/2010/09/25/sports/25horses.html](http://www.nytimes.com/2010/09/25/sports/25horses.html) (last visited May 5, 2011).

75 Horsetalk.co.nz, Rottinghuis promises new FEI board structure in a year (2010), [www.horsetalk.co.nz/news/2010/10/](http://www.horsetalk.co.nz/news/2010/10/)

022.shtml (last visited May 5, 2011).

76 Thomas, *supra* note 74.

77 Federation Equestre Internationale, *supra* note 71

78 Horsetalk.co.nz, The race for the FEI presidency (2010), [www.horsetalk.co.nz/features/185-feirace.shtml](http://www.horsetalk.co.nz/features/185-feirace.shtml) (last visited May 5, 2011). See also Horsetalk.co.nz, Politics and the princess: the FEI race (2010), [www.horsetalk.co.nz/news/2010/10/221.shtml](http://www.horsetalk.co.nz/news/2010/10/221.shtml) (last visited May 5, 2011).

79 Federation Equestre Internationale, Quotes from FEI President's Press Conference (2010), [www.feiof.org/media/press-releases/quotes-fei-presidents-press-conference](http://www.feiof.org/media/press-releases/quotes-fei-presidents-press-conference) (last visited May 5, 2011).

80 Federation Equestre Internationale, FEI President Haya Offers Praise for Departing FEI CEO (2011), [www.horsesport.org/media/](http://www.horsesport.org/media/)

[press-releases/fei-president-princess-haya-offers-praise-departing-fei-ceo](http://www.horsesport.org/media/press-releases/fei-president-princess-haya-offers-praise-departing-fei-ceo) (last visited May 5, 2011).

81 *Id.*

82 Federation Equestre Internationale, FEI Constitutional Task Force to Identify Optimal Governance Structure (2011), [www.horsesport.org/media/press-releases/fei-constitutional-task-force-identify-optimal-governance-structure](http://www.horsesport.org/media/press-releases/fei-constitutional-task-force-identify-optimal-governance-structure) (last visited May 5, 2011).

83 Australian Olympic Committee, Teaching riders is top goal for anti-doping panel (2009), [corporate.olympics.com.au/news.cfm?ArticleID=10024](http://corporate.olympics.com.au/news.cfm?ArticleID=10024) (last visited May 5, 2011).

84 Federation Equestre Internationale, 2011 FEI Clean Sport (2010), [www.feicleansport.org/](http://www.feicleansport.org/) (last visited May 5, 2011).

education. They had to and continue to make dramatic moves. Former FEI Secretary-General Alex McLin said, "Our credibility is at stake... It's about the welfare of horses and it's about the perception of the sport."<sup>83</sup> And as Princess Haya stated,

The FEI must turn a new leaf in order to guarantee its community a clean and uncorrupt product. The Stevens Commission and the Ljunqvist Commission have both painted a picture that illustrates how negligent we have been in this area thus far and out governing body is completely committed to rectifying the problems we now face, for the benefit of our athletes, our community and our public.<sup>84</sup>

The FEI Clean Sport Initiative is attempting to solve some of those problems, including making the Equine Prohibited Substances Database available not only on-line, but also as a mobile application.<sup>85</sup> Not only does it include the database, but riders and support personnel can seek further advice and clarification if necessary. The FEI has provided the tools and information necessary to address the issue of doping and inappropriate medication to all parties.

The need to protect the integrity and cleanliness of equestrian sport, the health and well being of all the athletes, both equine and human

85 Federation Equestre Internationale, SmartPhones Apps (2010), [www.fei.org/media/smartphones-apps](http://www.fei.org/media/smartphones-apps) (last visited Feb 1, 2011).

86 Christa Leste'-Lasserre, FEI Athletes

Receive Anti-Doping Regulation Training (2010), [www.thehorse.com/ViewArticle.aspx?ID=16673](http://www.thehorse.com/ViewArticle.aspx?ID=16673) (last visited Feb 2, 2011).

should be paramount. The scandals at the Olympic Games in Athens and Beijing/Hong Kong were wake-up calls that something needed to be done in Horse Sport. Some athletes deliberately administered performance enhancing drugs or methods to their horses. Some violations were inadvertent. Many athletes competed in fear because of the confusing rules and regulations.

In addition to testing, the FEI has to continue to expand their education program. Education is essential to this effort. Most national equestrian organizations have now begun education conferences for their athletes and support personnel. Australia does this along with a yearly anti-doping newsletter. Germany now offers additional classes beginning at the junior levels. Soenke Lauterbach, secretary general of the German Equestrian Federation said, "We shouldn't just focus on the five-star shows... We have to also go to the one- and two-star shows, because that's where people learn the first steps. If we can teach them at that level, we can help them prevent a lot of honest mistakes."<sup>86</sup>

The success of the 2010 World Equestrian Games shows that the FEI has taken great strides. The actions taken by national federations in Ireland and Germany have been dramatic. The FEI Clean Sport Initiative with a dual prong approach of testing and education seems to have had a significant impact. However, this problem did not arise overnight and it will not disappear overnight. If there are any doping problems at the next Olympic Games in London 2012 or when the World Equestrian Games in return to Europe in Normandy in 2014, it could be disastrous. Hopefully, there will be brighter and calmer days ahead.

The International Sports Law Journal

# The Specificity of Sport: Sporting Exceptions in EU Law\*

by Robert C.R. Siekmann\*\*

*The classical and still and ever current central (legal) question in the debate on the position of sport in the European Union is whether sport is "special", whether it deserves specific treatment under European Law and to what extent and why. In other words should sport be exempted from the EC Treaty? It is the discussion on what is called in the jargon the "specificity of sport" and the "sporting exception".<sup>1</sup> In this article the general framework which the EU institutions developed regarding the specificity of sport, is dealt with. What are in fact the basics in this respect? Which sporting exceptions concerned have been accepted and which not and why? What is the result of a comparison of exceptions and justifications, what is the overall picture of the sport specificity practical application by the Commission as the EU day-to-day executive organ and the European Court of Justice as the EU supreme judicial organ? The cases and issues will be categorised according to whether they concern "internal market freedoms (movement of workers and provision of services) or EU competition law in sport organisational matters.*

## 1. Introduction

Not everybody knows that the European Union has a fairly extensive record in the field of sport. In 2005 the ASSER International Sports Law Centre published a book containing some 900 pages of selected legal and policy documents (resolutions of the European Parliament, decisions of the European Commission, memoranda, jurisprudence of the European Court of Justice, etc.) and another 900 pages were put on the Centre's website.<sup>2</sup> The EU has dealt with a wide range of subjects since the so-called Walrave case in 1974. The Book provides a detailed insight into what could be called the *acquis communautaire sportive* ("EU Sport Acquis") for the present and future (candidate) Member States. Apart from texts of a general policy character, specific subjects concern Boycott, Broadcasting, Community Aid and Sport Funding, Competition, Customs, Diplomas, Discrimination, Doping, Education and Youth,

Freedom to provide services and of movement of workers, Olympic Games, State Aid, Tax, Tobacco Advertising, Trade Marks, Vandalism and Violence.<sup>3</sup>

The classical and still and ever current central (legal) question in the debate on the position of sport in the European Union is whether sport is "special", whether it deserves specific treatment under European Law and to what extent and why. In other words should sport be exempted from the EC Treaty? It is the discussion on what is called in the jargon the "specificity of sport" and the "sporting exception".<sup>4</sup> In this article I will deal with the general framework which the EU institutions developed regarding the specificity of sport. What are in fact the basics in this respect? I will deal with the following items: 1. the initial position of sport in the European (EC and EU) Treaties; 2. The 1997 Declaration on Sport in the Treaty of Amsterdam; 3. The Helsinki Report on Sport and the 2000 Declaration on Sport in the Treaty of Nice, 4. *Close read-*

\* This article is an updated and expanded version of: Robert Siekmann, *Is Sport 'Special' in EU Law and Policy?*, in: Roger Blanpain (Ed.), "The Future of Sports law in the European Union - Beyond the EU Reform Treaty and the White Paper", Alphen aan den Rijn 2008, pp. 37-49.

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*Exception in European Union Law*, The Hague 2008.

2 Robert Siekmann and Janwillem Soek (Eds), "The European Union and Sport: Legal and Policy Documents", The Hague 2005.

3 The White Paper on Sport pays attention to additional marginal, "soft law" themes - also from a sports law perspective - like volunteering, social inclusion and integration, prevention of and fight against racism and violence, the environmental dimension of sport, supporters.

4 See in particular, Richard Parrish and Samuli Miettinen, *The Sporting Exception in European Union Law*, The Hague 2008.

1 See in particular, Richard Parrish and Samuli Miettinen, *The Sporting*

ing the references - general and specific - to the Declarations on Sport (Amsterdam, Nice) regarding the 'specificity of sport,' in the jurisprudence of the European Court of Justice and the decision-making practice of the Commission.<sup>5</sup> 5. The 2007 White Paper on Sport, 6. The specificity of sport in the White Paper, and finally 7. "Sport" in the Constitutional Treaty (Constitution for Europe) and the Reform (Lisbon) Treaty, and 8. Specificity of sport in the 2011 White Paper-plus. 9. An overview of the practice of application regarding the "sport specificity" concept in the European Commission's decision-making and the European Court of Justice's jurisprudence before and after the Lisbon Treaty, in which an explicit "sport provision" (Article 165 TFEU) is incorporated (for the first time in the history of the EC/EU basic treaties), is added. Which sporting exceptions concerned have been accepted and which not and why (cf. the *ratio*, objective justifications for the sporting measures and their proportionality)? How the test of proportionality precisely is executed by the ECJ and the Commission is not separately scrutinized in this article. Generally speaking, it may be observed that if and when a sporting measure is justified, but not proportional, the additional question is whether and if yes, which alternative, proportional measure(s) would be available. Pending cases will not be dealt with and nor will possible, potential issues be discussed. What is the result of a comparison of exceptions and justifications, what is the overall picture of the sport specificity practical application by the Commission as the EU day-to-day executive organ and the European Court of Justice as the EU supreme judicial organ? The cases and issues will be categorised according to whether they concern "internal market freedoms (movement of workers and provision of services) or EU competition law in sport organisational matters.

## 2. Sport not in European Treaties

In the European Treaties up to the Constitutional and Reform (Lisbon) Treaties there was not any general legal basis, no competence for the Communities/European Union to deal with sport, as it was the case for culture. So, there was no section on sport nor are there any provisions on sport in the Treaties. This at the same time implied that sport was not exempted from the Treaties. Since the Walrave case<sup>6</sup> it is clear that as far as sport is an economic activity European Law in principle is applicable to it. This is steady European jurisprudence. In their decisions the Commission and European Court of Justice have considered to what extent this is the case. Two of the basic freedoms of the Communities/EU are essential in this respect: the freedom of movement for workers and fair competition. I will not go further into that here.

## 3. Treaty of Amsterdam: 1997 Declaration on Sport

The Treaty of Amsterdam amended the Treaty on the European Union and the Treaties Establishing the European Communities. The Declaration on Sport is annexed to the Treaty of Amsterdam. It emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The EU institutions are therefore called on to listen to sports associations when important questions affecting sport are at issue. In this connection special consideration should be given to the particular characteristics of amateur sport, the Declaration states. In 1998 the European Commission published a staff working paper entitled 'The Development and Prospects for Community Action in the Field of Sport.' In this document the educational, health, social, cultural and recreational functions of sport are recognized. It is also stressed however that sport fulfils an important economic role in Europe and that a general exemption of sport from European Law could not be

allowed. The Amsterdam Declaration on Sport had no legal force; it clearly was a general policy statement. We will see hereafter how this kind of documents (see below also on the Nice Declaration) were made use of, were taken into account in particular in the decision-making of the European Commission and the jurisprudence of the European Court of Justice.

## 4. Treaty of Nice: 2000 Declaration on Sport

In Nice the Declaration on 'the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies' was adopted. This Declaration which is annexed to the Presidency Conclusions of the Nice European Council Meeting, was based on the so-called Helsinki Report on Sport (1999), which was a Report from the European Commission to the European Council (of Heads of State and Government) "with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework"<sup>7</sup>

In the Introduction of the Helsinki Report on Sport it is said that the report gives pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions. In section 4 of the Report on 'Clarifying the legal environment of sport' it is suggested that sport must be able to assimilate the new commercial framework in which it must develop, without at the same time losing its identity and autonomy, which underpin the functions it performs in the social, cultural, health and educational areas. The Report continues by stating that while the EC Treaty contains no specific provisions on sport, the Community must nevertheless ensure that the initiatives taken by the national State authorities or sporting organisations comply with Community law, including competition law, and respect in particular the principles of the internal market (freedom of movement for workers, freedom of establishment and freedom to provide services, etc.). In this respect, accompanying, coordination or interpretation measures at Community level might prove to be useful. They would be designed to strengthen the legal certainty of sporting activities and their social function at Community level. However, as Community powers currently stand, there can be no question of large-scale intervention or support programmes or even of the implementation of a Community sports policy. If it is advisable, as wished by the European Council and the European Parliament, to preserve the social function of sport, and therefore the current structures of the organisation of sport in Europe, there is a need for a new approach to questions of sport both at European level and in the Member States, in compliance with the Treaty, especially with the principle of subsidiarity, and the autonomy of sporting organisations, the Report continues. The Report proposes the acceptance of a new approach which involves preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment. In terms of the economic activity that it generates, the sporting sector is subject to the rules of the EC Treaty, like the other sectors of the economy. The application of the Treaty's competition rules to the sporting sector must take account of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results. The Report continues by stating that with a view to an improved definition of the legal environment, it is possible to give examples, without prejudice to the conclusions that the Commission could draw from the in-depth analysis of each case, of practices of sports organisations. Three types of practices are distinguished in the Report: 1. Practices which do not come under the competition rules, 2. Practices that are, in principle, prohibited by the competition rules, and 3. Practices likely to be exempted from the competition rules. In the Report's Conclusion it is observed that the system of promotion and relegation is one of the characteristics of European sport. In 1998 the Commission's DG Education and Culture under which sport comes, had published a consultation document regarding 'The European Model of Sport' in which the organisation and structure of sport in Europe is described. Basically the structure resembles a pyramid with a hierarchy, it was said. The clubs form the foundation of this pyramid. Regional federations form the next level, the clubs are usually members of these organisations. National federations, one for each discipline, represent

5 Cf., "Close reading" describes, in literary criticism, the careful, sustained interpretation of a brief passage of text. Such a reading places great emphasis on the particular over the general, paying close attention to individual words, syntax, and the order in which sentences and ideas unfold as they are read. It is now a fundamental method of modern criticism. Close reading is sometimes called *explication de texte*, which is the name for

the similar tradition of textual interpretation in French literary study. In the present, legal research context, "close reading" for example would imply an answer to the question whether the words "specificity of sport" are explicitly used in the decision-making practice the European Commission and the case-law of the Court.

6 ECJ, Case No. C-36/74 [1974] ECR I405.  
7 COM(1999) 644.

the next level. They represent their branch in the European or international federations. They form the top of the pyramid. In the Nice Declaration on Sport it is said that sporting organisations and the Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured. The European Council also stresses its support for the independence of sports organisations and the right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives. It is noted in the Nice Declaration on Sport that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport. While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy, the Declaration says.

#### Comment

The conclusion must be that it is essential for the Community to take account of the specific characteristics of sport. The Amsterdam Declaration refers to the “social significance of sport”, especially “particular characteristics of amateur sport”. The Helsinki Report: in its entitlement refers to “safeguarding current sports structures and maintaining the social function of sport within the Community framework” and then stresses *inter alia* “the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results”. And the Nice Declaration in its entitlement refers to “the specific characteristics of sport and its social function in Europe” (italics added, RS). This starting-point implies that in principle exemptions from Community law are possible. Apart from that, the rules and regulations of sports organisations without which a sport cannot exist or which are necessary for the organisation of sport or competitions may be completely beyond competition law. The rules which are inherent to sport are first and foremost the so-called ‘rules of the game.’ (*lex ludica*). Their purpose is not to distort competition, according to the above-mentioned DG X consultation document of 1998. In the Helsinki Report on Sport it is emphasized that the basic freedoms guaranteed by the EC Treaty, generally speaking do not conflict with the rules, regulations and measures taken by sports organisations, provided that these are objectively justified, non-discriminatory, necessary and proportionate.

### 5. The Declarations on Sport (Amsterdam, Nice) in the Jurisprudence of the European Court of Justice and Commission Decision-Making

Both Declarations on Sport (Amsterdam, Nice) are important policy statements by the Heads of State and Government of the EC/EU Member States (European Council), which however do not have a legally binding character (*soft law*). The question then is whether these texts which underline the specificity of sport in general terms, were used in concrete cases by the EC/EU when European law was applied to sport and how they were used. In other words, was account taken of these documents in the decisions of the Commission and the European Court of Justice? It is clear that general/specific references to the Declarations would add to their official status and relevance in a legal perspective.

In the Delière case<sup>8</sup>, the Court states that it is to be remembered at the outset that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC (with the Court’s explicit reference to the Walrave and Bosman cases). In the Bosman case - the

Court continues to argue - it had also recognised that sporting activities are of considerable social importance in the Community. That case-law - it is said - is also supported by the Declaration on Sport (Amsterdam), which emphasises the social significance of sport and calls on the bodies of the European Union to give special consideration to the particular characteristics of amateur sport. In particular, that Declaration is consistent with the above-mentioned case-law (Walrave, Bosman) in so far as it relates to situations in which sport constitutes an economic activity. This formula is literally repeated in the Lehtonen case<sup>9</sup> and Meca-Medina case (2004, First Instance)<sup>10</sup> It is additionally stated in Meca-Medina that the Court’s considerations on the nature of the IOC anti-doping rules are *echoed* (!) in the Community support plan to combat doping in sport (1999), according to which “doping symbolises the contrast between sport and the values it has traditionally stood for”, in the Commission’s working paper entitled “Development of and prospects for Community action in sport”, which states that “sport plays a morally elevating role in society” through “the values associated with fair play, solidarity, fair competition and team spirit” which it brings, and in the Helsinki Report on Sport, according to which “the rules inherent to sport are, first and foremost, the ‘rules of the game’ and “the aim of these rules is not to distort competition”.

It is interesting to observe that the Amsterdam and Nice Sport Declarations are used by the Court for the support of argument. It is even said that the Declaration of Amsterdam is consistent with case-law in so far as it relates to situations in which sport constitutes an economic activity. So, the basis for the argument already was laid down by the Court itself previously in Walrave and Bosman the ECJ decisions on which date are pre-Amsterdam and -Nice.. In the Court’s reasoning it looks like the Declarations “codified” the case-law and for that reason could be referred to by the Court again. The Court was not influenced by the Declarations, but the Declarations were “dictated” by the Court’s case-law.

The explicit reference to the Amsterdam Declaration on Sport and the Helsinki Report on Sport (cf., the Nice Declaration on Sport) however is not repeated in the appeal decision by the Court in Meca-Medina.<sup>11</sup> My possible explanation for this is that the appeal decision in Meca-Medina in fact rejected the traditional, extensive concept of the “sporting exception” which excluded so-called *purely* sporting rules like the Laws of The Game (*lex ludica*) and others from being tested against EU law, in advance. If this analysis would be correct, the references to the Sport Declarations in the Court’s previous sports jurisprudence are now part of history, outdated. Apart from that and however, the Amsterdam and Nice Declarations in fact now have been substituted by the “sport provision” in the Lisbon Treaty (see below in paragraph 8) which mentions “the specific nature of sport” to be taken account of by the EU when contributing to the development of the European dimension in sport. For the first time, reference to Article 165 TFEU is made in the Bernard (Olympique Lyonnais) case where it is said (in para. 40) that account must be taken of the *specific* characteristics of sport in general, and football in particular, and of their social and educational function; the relevance of those factors is also corroborated by them being mentioned in the second subparagraph of Article 165(1) TFEU. In the “White Paper plus”, it is said that in the Bernard case, in particular the Court mentioned two elements included in the Treaty as being constitutive of the EU’s action in the field of sport: the social and educational function of sport as well as its specific nature. These two aspects are interlinked, the social and educational values of sport being among the characteristics which make sport special and set it apart from other sectors of the economy.<sup>12</sup>

In Commission practice, explicit reference was made to the Nice

8 ECJ, Case No. C-51/96, [2000] ECR I-2549 paras. 41-42.

9 ECJ, Case No. C-176/96 [2000] ECR I-2681 paras. 32-33.

10 CFI, case No. T-313/02 [2004] ECR II-3291 paras. 37-38.

11 ECJ, Case No. C-519/04 P, OJ C 224/8, 2006.

12 Commission Staff Working Document

“Sport and free movement”, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Developing the European Dimension in Sport”, Brussels, 18.1.2011, SEC(2011) 66/2, p. 6.

Declaration in UEFA Champions League<sup>13</sup>. The Commission fully endorsed the *specificity of sport* (sic!), as expressed for example in the declaration of the European Council in Nice in December 2000. On that occasion the Council encouraged the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. The Commission understood that it is desirable to maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches, which could be reflected in/translate into better media rights. The same applied to the education of new players, as the players are a fundamental element of the whole venture. The Commission recognised that a cross-subsidisation of funds from richer to poorer may help achieve this. The Commission was therefore in favour of the financial solidarity principle, which was also endorsed by the European Council declaration on sport in Nice in December 2000. So, financial solidarity is one more specific characteristic to be added to the list.

Some other, particular characteristics were mentioned above under *Comment*, such as: current sport structures, the position of amateur sport, the principle of equal opportunities and uncertainty of results (balanced competition). We will see below in section 10 what will be the findings in this context on the basis of the practical application of the sport specificity principle in EU practice.

## 6. The 2007 White Paper on Sport<sup>14</sup>

On 11 July 2007 the European Commission adopted the White Paper on Sport which is its first comprehensive strategic initiative in the field of sport. On average, the Commission adopts only two or three white papers per year, and the fact that the communication on sport got this status is therefore an acknowledgement of the comprehensive nature, longer-term value and political weight of the document. The White Paper has to be seen in the overall context in which sport has been addressed at EU level. It is the culmination of a long process: the Amsterdam Declaration of 1997, the Nice Declaration of 2000, and then the agreement of the Intergovernmental Conference in 2004 to include sport in the Treaty (see hereafter in connection with the Constitutional and Reform (Lisbon) Treaties), coupled with the positive results of the European Year of Education through Sport 2004, all reflect the European framework that already existed for sport. This framework put the accent on the special characteristics of sport, and in particular its social and educational values.

The White Paper has focus on three domains: the societal role of sport, the economic importance of sport, and the organisation of sport. The Commission was well aware that some actors, especially those representing professional sports, expected it to go further in terms of regulatory measures and seeking exemptions for the sport sector from the application of EU law. It is important to point out that the White Paper respects the principle of subsidiarity, the autonomy of sport organisations and the current EU legal framework. When developing the concept of specificity of sport, the Commission could not go beyond the limits of existing EU competences. The White Paper takes full account of this European context for sport: the initiative does not weaken the application of EU law to sport, but it provides further clarity on the application of EU legal provisions in this sector. A comprehensive initiative on sport appeared to be appropriate at this particular point in time for several reasons. In general, the political landscape was favourable

to the launch of a broad EU initiative on sport. Several processes took place during the last year in parallel with the preparation of the White Paper, such as notably the debate on governance in European football, which resulted in the Independent European Sport Review (“Arnaut Report”)<sup>15</sup> and the European Parliament’s reports and resolution on the future of professional football in Europe and on the role of sport in education. The White Paper was driven by high expectations from sport stakeholders, who wished to see their concerns addressed in EU policy making, including the need to better promote sport and to achieve more legal certainty. Social and economic developments in and outside the field of sport have brought about new challenges for sport, some of which need European responses. The White Paper proposes a mix of instruments to address the role of sport in Europe, such as studies and surveys, platforms and networks, enhanced cooperation dialogue structures, recommendations, and mobilisation of EU programmes. It should be stressed that the emphasis is on “soft” measures, not on regulatory or legislative action, for which there is no specific EU competence.

The chapter of the White Paper on the organisation of sport addresses a number of aspects of the governance of sport and of the *specificity of sport*. First, it should be noted that the word ‘specificity’ as such does not appear in earlier official EU texts. In the Helsinki report of 1999 reference was to the need to ‘take account of the specific characteristics’ of sport, while in the Nice Declaration of 2000 reference was made to how the Community must take account of the functions which make sport “special”. The White Paper devotes a section to the issue of specificity, thus shedding light on the Commission’s position regarding this concept. Regarding the repeated requests by stakeholders for more legal “certainty”, it should be stressed that the White Paper text provides more legal clarity for European sport within the limits of the EU’s current competencies. For the first time ever the Commission takes stock of the European Court’s case law and Commission decisions in the area of sport. However, in the current absence of a specific legal competence for sport, a case-by-case approach remains the basis for the Commission’s control of the implementation of EU law in the sport sector, in line with the current Treaty provisions, and taking full account of the Nice Declaration - the Commission stated..

At its meeting in June 2007, the European Council gave a mandate to the Intergovernmental Conference which led to the signature of the Lisbon Treaty in December 2007. The Commission welcomed the fact that the mandate set out that the provisions on sport agreed in the 2004 Intergovernmental Conference (regarding the ‘Constitution for Europe’) would be inserted into the new Treaty. These provisions on sport, giving the Union “soft” supporting competences in this area, were inserted into the text of the then Article 149 of the EC Treaty, which also dealt with education, youth and vocational training (see below). It was the intention of the Member States to ratify the Reform (Lisbon) Treaty by mid 2009. This meant that it seemed likely that additional important developments would occur at EU level in the area of sport in the next few years. Ratification of the Reform (Lisbon) Treaty would give the EU the possibility to define a sport policy, to incorporate sport into the work of the Council of Ministers, and to create an EU Sport Programme.<sup>16</sup> The White Paper should thus be seen as an instrument to pave the way for the implementation of a possible future Treaty provision on sport. The White Paper would remain the basis for the Commission’s involvement in the sport sector until after the entry into force of the Reform (Lisbon) Treaty - the Commission stated in 2007.

13 Case 27398 Joint selling of the commercial rights of the UEFA Champions league, OJ 2003 L 291/25. Paras. 131 and 165.

14 A *green paper* released by the European Commission is a discussion document intended to stimulate debate and launch a process of consultation, at European level, on a particular topic. A green paper usually presents a range of ideas and is meant to invite interested individuals or organisations to contribute views and information. It may be followed by a *white paper*, an official set of proposals that is used as a vehicle for their development into law. In

preparing the White Paper on Sport (COM(2007) 391 final) the Commission had held numerous consultations with sport stakeholders on issues of common interest as well as an on-line consultation. Cf. also, Stephen Weatherill, “The White Paper on Sport as an Exercise in ‘Better Regulation’”, in: *The International Sports Law Journal (ISLJ)* 2009/1-2, pp. 3-8.

15 A publication of May 2006 by MR José Luis Arnaut, former Portuguese Foreign Minister, at the initiative of the UK Sports Minister and financed by UEFA. See also - in reply to the “Arnaut Report” - the

“Wathelet Report”: *Sport Governance and EU Legal Order: Present and Future*, by Prof. Melchior Wathelet, Universities of Louvain-la-Neuve and Liège (Belgium) and a former Member of the European Court of Justice, in: *The International Sports Law Journal (ISLJ)* 2007/3-4, pp. 3-9 and 10-11. The Wathelet Report was amongst others supported by Professor Stephen Weatherill, Jacques Delors Professor of European Community Law, University of Oxford, United Kingdom; Professor Roger Blanpain, Universities of Leuven, Belgium and Tilburg (The Netherlands), and co-

founder and first President of FIFPro; Professor Klaus Vieweg, Director of the German and International Sports Law Research Unit, University of Erlangen-Nuremberg, Germany; and Dr Richard Parrish, Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom. The report was distributed also in its original French language version throughout Europe by means of a press-release of the ASSER International Sports Law Centre (T.M.C. Asser Instituut, The Hague, The Netherlands; see: [www.sportslaw.nl/NEWS](http://www.sportslaw.nl/NEWS)).

## 7. The Specificity of Sport in the White Paper

Over the years, the EU has produced some colourful jargon to describe various concepts and operating principles, such as the principle of “subsidiarity”, whereby matters so far as possible are dealt with not at the Community level, but at the Member States’ level. The term “specificity of sport” has entered into common parlance in practice to refer to the special characteristics of sport recognised in the Nice Declaration on Sport (2000). In a separate paragraph the White Paper contains for the first time some guidance - but not an exhaustive one - on the meaning of the ‘specificity of sport,’ based on the case law of the European Court of Justice and the decisions of the European Commission in previous cases. Before setting out this guidance, it should be noted that the paragraph clearly states in its first sentence that ‘Sport activity is subject to the application of EU Law.’ Particularly, in so far as it constitutes an economic activity (cf., competition law and internal market provisions). According to the White Paper, 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 competition;
- 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.

The White Paper points out that the specificity of sport has been recognised and taken into account in various decisions of the European Court of Justice and the European Commission over the years. In *Bosman* for example, the European Court of Justice stated 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.” And the White Paper adds that, in line with the established case law, the specificity of sport will continue to be so recognised, but it cannot be construed so as to justify a general exemption of sport from the application of EU law. The White Paper then goes on to give some examples of organisational sporting rules that are not likely to offend EU competition law, provided that their anticompetitive effects, if any, are inherent and proportionate to the legitimate objectives pursued (see in more detail below in section 9 on the “Practical application of the “sport specificity” concept in Commission practice and ECJ jurisprudence”): “rules of the game” (rules fixing the length of matches or the number of players on the field); rules concerning the selection criteria for sports competitions; rules on ‘at home’ and ‘away from home’ matches; rules preventing multiple ownership in club competitions; rules concerning the composition of national teams; rules against doping; and rules concerning transfer periods.

The White Paper adds that, in determining whether a certain sporting rule is compatible with EU Competition Law, an assessment can only be made on a case-by-case basis, as confirmed by the European Court of Justice in the *Meca-Medina* case. In that case, the Court dismissed the notion of “purely sporting rules” as irrelevant for the question of the applicability of EU competition rules to the sport sector. The Court recognised that the specificity of sport must be taken into account in the sense that the restrictive effects of competition inherent in the organisation and proper conduct of competitive sport are not in breach of the EU competition rules, where these effects are proportionate to

the legitimate genuine sporting interest pursued. In other words, the proportionality test requires that each case is assessed on its own merits according to its own particular features or characteristics. Thus, it is not possible to formulate general guidelines on the application of EU Competition Law to the sports sector.

## 8. Sport in the Constitutional and Reform (Lisbon) Treaties

What exactly did the provisions on sport in the Constitution for Europe entail? In the first place it must be established that the pertinent Article 282 was part of Part III of this Treaty concerning Internal Policies and Action, more especially, Chapter V of Part III, concerning ‘Areas where the Union may take coordinating, complementary or supporting action’; in other words, it shall have competence to carry out such type of actions in relation to the actions of the Member States. In this context, Article 282 was part of Section 4 concerning ‘Education, Youth, Sport and Vocational Training.’ Article 282 was therefore ‘soft law’ by nature and this was reflected by its paragraph 4 which determined that ‘in order to contribute to the achievement of the objectives referred to in this Article (a) European laws or framework laws shall establish incentive actions, excluding any harmonization of the laws and regulations of the Member States’ and ‘(b) The Council, on a proposal from the Commission, shall adopt recommendations.’ Although therefore regulations (European laws) and directives (framework laws) could be adopted in the field of sport, this could only be the case for the purpose of establishing ‘incentive actions’ and moreover with the exclusion of the harmonisation of national legislation. It must further be remarked that, as appeared from paragraph 3 of Article 282, the EU and the Member States should foster cooperation with third countries (non-Member States) and the competent international organisations in the field of sport, especially the Council of Europe.

Apart from and next to the legal instruments available, what were the objectives of the EU in the field of sport according to the Constitutional Treaty? Paragraph 1, second sentence, of Article 282 indicated that ‘the Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function.’ Paragraph 2 added that “the Union action shall be aimed at ... (g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sport, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.”

The sport provisions in Article III-282 ‘codified’ in fact the philosophy and phraseology of the Sport Declarations of Nice and Amsterdam, referring to the social and educational functions of sport and taking account of its specific nature. Promoting “fairness” and “openness” in sporting competitions as such is a newly introduced element in this context. Are “fairness” and “openness” new principles of EU sports law and what precisely is meant by them? In fact there is not available any substantial preparatory work (*travaux préparatoires*) from negotiating Lisbon regarding the “sport provision”.<sup>17</sup> In the EP-commissioned Study on *Lisbon Treaty and EU Sports Policy* (September 2010)<sup>18</sup>, the possible impact of the words “fairness” and “openness” in relation to a number of ongoing issues in European sport is discussed: collective sale of sports rights; local training of players (FIFA 6+5 and UEFA home grown players rules); status and transfer of players; anti-doping rules; player release rule (national team sports); licensing, financial fair play and salary capping; players’ agents; sports betting; multiple club ownership; participation of EU non-nationals in individual national championships; the rights of third-country nationals; national territorial tying; selection criteria; composition of national teams; the protection of sports associations from competition. According to the White Paper, with reference to the Helsinki Report on Sport and the Nice Declaration, one of the basic elements of the so-called European Sports Model is “a system of open competitions based on the principle of promotion/relegation”.

In Article 149 of the Reform Treaty (Title XI: Education, vocational training, youth and sport’ and Article 165 of the Lisbon Treaty (TFEU)) the foregoing is repeated again:

*‘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.’ (Para. 1)*

<sup>16</sup> The Lisbon Treaty (TEU and TFEU) went into force on 1 December 2009.

<sup>17</sup> See, Stephen Weatherill, “Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?”, in: *The International Sports Law Journal* (ISLJ) 2010/3-4 pp. 11 and 14-17.

<sup>18</sup> The Study was executed by the T.M.C. Asser Instituut, The Hague, The Netherlands, and Edge Hill and Loughborough Universities, United Kingdom.

‘Community 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.’ (Para. 2)

‘The Community 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.’ (Para. 3)

## 9. Sport Specificity in the 2011 “White Paper Plus”

The so-called White Paper-plus contains the following statement on the “specificity of sport”:

“The specific nature of sport, a *legal* concept established by the Court of Justice of the European Union which has already been taken into account by the EU institutions in various circumstances and which was addressed in detail in the White Paper on Sport and the accompanying Staff Working Document, is now recognised by Article 165 TFEU. It encompasses all the characteristics that make sport special, such as for instance the interdependence between competing adversaries or the pyramid structure of open competitions. The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.).

Sporting rules normally concern the organisation and proper conduct of competitive sport. They are under the responsibility of sport organisations and must be compatible with EU law. In order to assess the compatibility of sporting rules with EU law, the Commission considers the legitimacy of the objectives pursued by the rules, whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether they are proportionate to them.

Legitimate objectives pursued by sport organisations may relate, for example, to the fairness of sporting competitions, the uncertainty of results, the protection of athletes’ health, the promotion of the recruitment and training of young athletes, financial stability of sport clubs/teams or a uniform and consistent exercise of a given sport (the “rules of the game”).” (italics added; RS)<sup>19</sup>

## 10. The Practical Application of the “Sport Specificity” Concept in Commission Practice and ECJ Jurisprudence

### 10.1. The application of internal market freedoms (movement and services) to sport<sup>20</sup>

The European Court of Justice has taken a number of important decisions in this area:

In *Walrave & Koch*<sup>21</sup> and *Donà v Mantero*<sup>22</sup>, the European Court of Justice (ECJ) stated clearly that regulations based on nationality which limit the mobility of sportsmen are not in conformity with the principle of free movement of workers.

In its *Walrave*, *Donà* and *Bosman*<sup>23</sup> rulings, the ECJ recognised an exception to the principle of free movement of sportsmen for reasons which are not of an economic nature. The ECJ has since the early 1970s acknowledged that rules which restrict the nationality of players in national teams are to be considered as “pure sporting” rules and thus do not fall under (then) Articles 39 and 49 EC. In *Walrave* the ECJ stated that the rule of the International Cycling Union (Union Cycliste Internationale, UCI) requiring that the pacemaker must be of the same nationality as the stayer in “world cycling championships behind motorcycles” was in compliance with EC law.

In its *Bosman* ruling the ECJ stated: “Having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty, as in the case of the activities of professional or semi-profes-

sional footballers, where they are in gainful employment or provide a remunerated service”. In its interpretation of the principle of free movement for sportsmen, the Court formulated two types of prohibition. Firstly, the Court prohibited all discrimination based on nationality and declared nationality quotas in sport clubs not in conformity with article 39. Secondly, in order to ensure the full effectiveness of the principle of free movement of sportsmen (after the expiry of a contract) the Court also condemned obstacles to free movement. One consequence was the end of allowances for a transfer at the end of a contract.

The transfer system of players is an example of the specificity of sport. While no comparable phenomenon exists in other economic areas, transfers of players between clubs play an important role in the functioning of team sports, and, in particular, professional team sports. Transfer rules aim to protect the integrity of sporting competition and to avoid problems such as money laundering, but they must be in compliance with EU law. In its *Bosman* ruling, the Court of Justice unequivocally stated that “nationals of a Member State have, in particular, the right, which they derive directly from the Treaty, to leave their country of origin, to enter the territory of another Member State and reside there in order to pursue an economic activity. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to free movement therefore constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned.” Restrictive transfer rules may also constitute an infringement of EU competition law. The *Bosman* ruling stated that professional football is an economic activity and therefore subject to EU law.

The judgement of the Court in the *Bernard* case<sup>24</sup>, is of particular interest as it is the first ruling covering a sport-related case adopted after the entry into force of the Lisbon Treaty. The ruling provides further insight into the Court’s interpretation of the issue of free movement of professional sportspeople. The focus of the ruling concerns limitations to the rules on free movement of workers laid down in Article 45 TFEU, arising from training compensation schemes. The *Olympique Lyonnais* ruling confirms most of the elements and the legal reasoning developed by the Court in the *Bosman* ruling, at a distance of 15 years.

According to the Court, Article 45 TFEU does not rule out schemes which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of the training period, a young player signs a professional contract with a club in another Member State, on condition that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it. In the *Bernard* ruling, the Court confirmed an important point raised in the *Bosman* ruling, namely that the recruitment and training of young players is to be considered a legitimate objective of general interest. The Court also provided additional guidance for assessing whether training compensation schemes can be considered as suitable to attain this objective: according to the Court, such schemes must be related to the actual cost of training. This was not the case of the scheme discussed in the main proceedings, since it linked the payment to potential damages suffered by the clubs and was thus unrelated to the actual training costs. The Court offered another important element in order to assess whether training compensation schemes are inherent and proportionate to their legitimate objective: when carrying out this assessment, account should be taken of the costs borne by the clubs in training both future professional players and those who will never play professionally. The Court affirmed hereby the principle that training costs may be calculated on the basis of the so-called “player factor”, i.e. the number of players that need to be trained in order to produce a professional player.

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19 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Developing the European Dimension in Sport”, Brussels 18.1.2011, COM(2011) 12 final, pp. 10-11.

20 See Accompanying document to the White Paper on Sport, pp. 43-44, 47-48.

21 Case 36/74 of 12 December 1974.

22 Case 13/76 of 14 July 1976.

23 Case C-415/93 of 15 December 1995.

24 *Olympique Lyonnais*, case C-325/08, delivered on 16 March 2010.

ers is to be considered a legitimate objective of general interest. The Court also provided additional guidance for assessing whether training compensation schemes can be considered as suitable to attain this objective: according to the Court, such schemes must be related to the actual cost of training. This was not the case of the scheme discussed in the main proceedings, since it linked the payment to potential damages suffered by the clubs and was thus unrelated to the actual training costs. The Court offered another important element in order to assess whether training compensation schemes are inherent and proportionate to their legitimate objective: when carrying out this assessment, account should be taken of the costs borne by the clubs in training both future professional players and those who will never play professionally. The Court affirmed hereby the principle that training costs may be calculated on the basis of the so-called “player factor”, i.e. the number of players that need to be trained in order to produce a professional player.

When considering the autonomy of a federation to organize its competitions, two particular cases are relevant. In its *Deliège*<sup>25</sup> ruling, the Court stressed that selection criteria in judo based on a limit to the number of national participants in an international competition does not constitute a restriction on the freedom to provide services, as such a limitation may ensure certain important characteristics of sporting competitions and pursues a sporting interest only.

Furthermore, in 2000 in its *Lehtonen*<sup>26</sup> ruling, the Court considered that the setting of deadlines for transfers of players may meet the objective of ensuring the equity of sporting competitions (transfers late in the season may upset the competitive balance and damage the regularity of the competition). In order to be justified, rules of this type defined by sporting organisations may not go beyond what is necessary to achieve the legitimate aim pursued. In this case the proper functioning of the championship as a whole was ‘inherent’ to the sports organisation and the “transfer window” which prevented basketball players from joining another club during the season could be linked to the integrity of the competition. The *Lehtonen* case implied that certain restrictions on labour mobility may be justified in order to ensure certain important characteristics of sporting competition such as transfer windows.

Limited and proportionate restrictions to the principle of free movement, in line with Treaty provisions and ECJ rulings, can thus be accepted as regards:

- The right to select national athletes for national team competitions (Walrave);
- The acceptability of training compensation schemes for young players (Bernard);
- The need to limit the number of participants in a competition (*Deliège*);
- The setting of deadlines for transfers of players in team sports (*Lehtonen*).

## 10.2. The application of EU competition law to the organisation of sport<sup>27</sup>

### 10.2.1. ECJ case law

#### Anti-doping rules (*Meca Medina*)

The economic importance of sport has grown dramatically in recent years and continues to grow. As a result, the Commission has had to deal with an increasing number of cases in the area of antitrust related to the sport sector and has resolved these cases either formally through decisions or informally.

The material provisions of the EC Treaty are [*now: Articles 101 and 102 TFEU, RS*]

- Article 81 which forbids agreements between undertakings and decisions by associations of undertakings that prevent, restrict or distort competition in the common market, subject to some narrowly defined exceptions; and
- Article 82 which prohibits the abuse by one or more undertakings of a dominant position within the common market.

It has long been established by the case-law of the Community Courts and the decisional practice of the Commission that economic activities in the context of sport fall within the scope of EC law, including EC

competition rules and internal market freedoms. This has recently been confirmed specifically with regard to the anti-trust rules, Articles 81 and 82 of the EC Treaty, by the *Meca Medina* ruling of the European Court of Justice (ECJ).<sup>28</sup> This judgment is of paramount importance for the application of EC competition law to the sport sector since this is the first time the ECJ has ever pronounced on the application of Articles 81 and 82 to organisational sporting rules. In prior judgments the cases were decided solely on the basis of other provisions of the EC Treaty, most notably those on the freedom of movement for workers and the freedom to provide services. The very existence of an authoritative interpretation of the anti-trust provisions of the Treaty in the context of organisational sporting rules by the ECJ represents a significant contribution to legal certainty in this area.

The Community Courts and the Commission have consistently taken into consideration the particular characteristics of sport setting it apart from other economic activities that are frequently referred to as the “specificity of sport”. Although no such legal concept has been developed or formally recognized by the Community Courts, it has become apparent that the following distinctive features may be of relevance when assessing the compliance of organisational sporting rules with Community law:

Sport events are a product of the contest between a number of clubs/teams or at least two athletes. This *interdependence between competing adversaries* is a feature specific to sport and one which distinguishes it from other industry or service sectors.

If sport events are to be of interest to the spectator, they must involve *uncertainty as to the result*. There must therefore be a certain degree of equality in competitions. This sets the sport sector apart from other industry or service sectors, where competition between firms serves the purpose of eliminating inefficient firms from the market. Sport teams, clubs and athletes have a direct interest not only in there being other teams, clubs and athletes, but also in their economic viability as competitors.

The organisational level of sport in Europe is characterised by a monopolistic *pyramid structure*. Traditionally, there is a single national sport association per sport and Member State, which operates under the umbrella of a single European association and a single worldwide association. The pyramid structure results from the fact that the organisation of national championships and the selection of national athletes and national teams for international competitions often require the existence of one umbrella federation. The Community Courts and the Commission have both recognized the importance of the freedom of internal organization of sport associations.

Sport fulfils important *educational, public health, social, cultural and recreational functions*. The preservation of some of these essential social and cultural benefits of sport which contribute to stimulating production and economic development is supported through arrangements which provide for a redistribution of financial resources from professional to amateur levels of sport (principle of solidarity).

Controversial discussions in the past have never called into question the recognition of these unique characteristics of sport. Rather, they centered on the question of the precise impact of the specificity of sport on the application of EC competition law. It was argued by some that so-called “purely sporting rules” automatically fall outside the scope of EC anti-trust rules and cannot, by definition, be in breach of those provisions.

The ECJ has unequivocally rejected this approach in *Meca Medina* and held that the qualification of a rule as “purely sporting” is not sufficient to remove the athlete or the sport association adopting the rule in question from the scope of EC competition rules. The Court insisted, on the contrary, that whenever the sporting activity in question constitutes an economic activity and thus falls within the scope of the EC Treaty, the conditions for engaging in it then are subject to obligations

25 Case C-51/96 and C-191/97 of 11 April 2000.

26 Case C-117/96 of 13 April 2004.

27 See: Commission Staff Working Document “The EU and sport: background and context”, Accompanying

document to the White Paper on Sport, Brussels, 11.7.2007, SEC(2007) 935, pp. 35-37, 38-40, 49 and 55.

28 Case T-313/02, ECR 2004 II-3291, and Case C-519/04, ECR 2006 I-6991.

resulting from the various provisions of the Treaty including the competition rules. The Court spelled out the need to determine, on a case-by-case basis and irrespective of the nature of the rule, whether the specific requirements of Articles 81 EC or 82 EC are met. It further clarified that the anti-doping rules at issue were capable of producing adverse effects on competition because of a potentially unwarranted exclusion of athletes from sporting events.

In the light of *Meca-Medina*, it appears that a considerable number of organisational sporting rules, namely all those that determine the conditions for professional athletes, teams or clubs to engage in sporting activity as an economic activity, are subject to scrutiny under the anti-trust provisions of the Treaty.

The landmark *Meca Medina* ruling has therefore substantially enhanced legal certainty by clearly pronouncing that there exists no such thing as a category of “purely sporting rules” that would be excluded straightaway from the scope of EC competition law.

This is not to say, however, that the ECJ has decided not to take into account the specific features of sport referred to above when assessing the compatibility of organisational sporting rules with EC competition law. Rather, it has ruled that this cannot be done by way of declaring certain categories of rules a priori exempt from the application of the competition rules of the Treaty. In other words, the recognition of the specificity of sport cannot entail the categorical inapplicability of the EC competition provisions to organisational sporting rules but it has to be included as an element of legal significance within the context of analyzing the conformity of such rules with EC competition law.

The second aspect of the *Meca Medina* ruling contributing to increased legal certainty, apart from clarifying under which conditions EC competition law is applicable to sporting rules, is the establishment of a methodological framework for the examination of the compatibility of sporting rules with Articles 81 EC and 82 EC [now: Articles 101 and 102 TFEU; RS]

The ECJ spelled out that not every sporting rule that is based on an agreement of undertakings or on a decision of an association of undertakings which implies a restriction of the freedom of action is prohibited by Article 81(1). In assessing the compatibility with this provision account must be taken of the *overall context* in which the rule was adopted or the decision was taken or produces its effects, and more specifically, of its *objectives*; and whether the restrictive effects are *inherent* in the pursuit of the objectives; and are *proportionate* to them.

In applying those principles to the case at hand, the ECJ found that the objective of the challenged anti-doping rules was to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The restrictions caused by the anti-doping rules, in particular as a result of the penalties, were considered by the ECJ to be “*inherent in the organisation and proper conduct of competitive sport*”. The ECJ also carried out a proportionality test examining, with a positive result, whether the rules were limited to what is necessary as regards (i) the threshold for the banned substance in question and (ii) the severity of the penalties.

This demonstrates that the instruments of EC competition law provide sufficient flexibility in order to duly take into account the specificity of sport and illustrates how the distinctive features of sport play an essential role in analyzing the admissibility of organisational sporting rules under EC competition law. Where these features form the basis of a legitimate sporting objective, a rule pursuing that objective is not in breach of EC competition law provided that restrictions contained in the rule are inherent in the pursuit of that objective and are proportionate to it. It needs to be underscored that the *Meca Medina* ruling excludes the possibility of a pre-determined list of sporting rules that are in compliance with or in breach of EC competition law. Apart from the refusal by the ECJ to recognise purely sporting rules as automatically falling outside the scope of the Treaty competition rules or automatically compliant with them it is the requirement of a proportionality test that prevents any general categorisation. That test implies the need to take account of the individual features of each case. Even for the same kind of rule (e.g. licensing rules for sport clubs) conditions may and do vary greatly from sport to sport and from Member State to

Member State (e.g. depending on the national legal obligations relating to financial management and transparency there may or may not be a need to include licensing requirements of a particular type in the statutes of a sport association). In many if not most cases there are many conceivable shapes and forms of any particular type of rule. This, as well as the interrelation with other rules, the assessment of which is often indispensable to judge the proportionality of a certain regulation as a whole, renders it virtually impossible to comment on the compatibility of certain types of rules with EC competition law in general terms.

Nevertheless, the body of existing case law of Community Courts, relating to the application of Treaty provisions other than the competition rules, as well as the decision-making practice of the Commission concerning Articles 81 EC and 82 EC can assist in identifying the types of rules that may normally be considered not to infringe EC competition rules. These decisions will have to be reviewed in the light of the *Meca Medina* judgment but they remain relevant inasmuch as they identify objectives that may be recognized as legitimate within the context of carrying out the examination outlined above. Bearing in mind the proviso that a specific assessment based on the circumstances of each individual case involving, most notably, a proportionality test, is indispensable and that therefore one can only express varying degrees of likelihood of compliance with EC competition law, the following distinction can be made on the basis of existing case law and decisional practice:

#### Players' agents (Piau case)

As regards the compatibility of federations' rules with EU competition law, even if the restrictions they impose on these sport-related professions are not likely to be considered inherent in the pursuit of a legitimate sporting objective, they may nevertheless be justified under Article 81(3) or Article 82 EC (now: Articles 101 and 102 TFEU). The aim of a football agent is to introduce a player for a fee to a club or clubs to each other with a view of employment. In the Piau case the Court of First Instance considered that this activity clearly does not pursue a purely sporting interest. The CFI questioned the legitimacy of FIFA's right to regulate the profession of football agents - which would normally be the prerogative of public authorities -, a profession which is not specific to sport and which is of unequivocally economic nature. However, the CFI acknowledged that the players' agent profession needs to be supervised by some entity. It has recognised as legitimate the objective for raising professional standards for players' agents by introducing a qualitative (as opposed to quantitative) selection in the quasi total absence of any national laws or self-regulation in that respect.<sup>29</sup>

The Piau case does *not* represent a sporting exception as is explicitly stated in the CFI ruling (para. 105): “... the applicant's argument that the ‘specific nature of sport’ may not relied on to justify a derogation from the rules on competition must be rejected as irrelevant. The [Commission's] contested decision is not based on such an exception and envisages the exercise of the occupation of players' agent as an economic activity, without claiming that it should be accepted as falling within the scope of the specific nature of sport, which in fact it does not.”

According to the Accompanying Document to the White Paper<sup>30</sup> the Piau case concerned a sporting rule adopted in relation to an activity ancillary to sport (football agents) and not relating to the sporting activity itself (football). It may be questioned whether this distinction is reasonable from the perspective of (international) sports law taken as a coherent, comprehensive legal branch of law (cf., the very existence of FIFA Players' Agents Rules; who would and could deny that the agents are members of the football family?!).<sup>31</sup> So, the Piau case in fact was the first time the ECJ has ever pronounced on the application of articles 81 and 82 EC (now: Articles 101 and 102 TFEU) to organisational sporting rules.

29 CFI and upheld in appeal by the ECJ: Cases T-193/02 and C-171/05P, ECR 2005 II-209 and ECR 2006 I-37 respectively. See also, Roberto Branco Martins, “The Laurent Piau Case of the ECJ on the Status of Players' Agents”, in: Simon Gardiner, Richard Parrish and Robert C.R. Siekmann (Eds), *EU, Sport, Law*

and *Polic - Regulation, Re-regulation and Representation*, The Hague 2009, pp. 247-258, and previously published in 1-2 The International Sports Law Journal (ISLJ) (2007) pp. 43-51.

30 At p. 35, n. 99.

31 Robert C.R. Siekmann, “What is Sports Law? A Reappraisal of Content and

### 10.2.2. Commission decision-making practice

#### Sports media rights

The Commission has taken decisions in three cases involving the joint selling of rights to broadcast games played by football clubs on the basis of Article 81 EC, namely *UEFA Champions League*<sup>32</sup>, *German Bundesliga*<sup>33</sup> and *FA Premier League*<sup>34</sup>. The Commission's consistent policy has been that joint selling constitutes a horizontal restriction of competition under Article 81(1) EC. At the same time, the Commission also acknowledges that joint selling creates certain efficiencies and may, under certain circumstances, fulfil the conditions of Article 81(3) EC and therefore not constitute a violation of Article 81 EC. The Commission remedied the negative effects of joint selling by requiring, e.g., the selling of rights in several individual rights packages following an open and transparent tendering process. Moreover, the duration of rights contracts should not exceed three years and unsold rights would fall back for individual exploitation by the clubs. The abovementioned decisions had the effect of opening up media rights markets to broadcasters and new media service providers by making several different rights packages available while safeguarding the social and cultural aspects of football. This prevented the concentration of all available rights in the hands of a single media operator and ensured that a maximum amount of rights was made available to sports fans. The question if and under which conditions joint selling can be justified on the basis of Article 81(3) has to be examined in the light of the specific circumstances of each individual case.

The Declaration of the Nice European Council of 7-9 December 2000 on the specific characteristics of sport and its social function in Europe mentions (point 15) that the sale of television broadcasting rights is one of the greatest sources of income today for certain sports. The European Council stated that moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, would be beneficial to the principle of solidarity between all levels and areas of sport. The joint selling of media rights for sporting competitions may facilitate the redistribution of revenues based on the principle of mutual support and based on the principle that these revenues should be redistributed to all those involved in sport: amateurs, volunteers, young people in training centres, sports teachers etc. However, it is important to note that a system of joint selling does not automatically lead to an equitable redistribution of the revenues. It is the primary responsibility of the national league associations, sport associations and clubs concerned to agree on a form of redistribution that is in line with the principle of solidarity expressed in the Declaration of Nice European Council. It should be noted that financial solidarity can also be achieved on the basis of individual selling of sports media rights, provided that it is accompanied by a robust solidarity mechanism.

“At home and away from home” rule (Mouscron case)

The French city of Lille had lodged a complaint against UEFA under Article 82 EC as regards a rule for UEFA competitions to the effect that each club must play its home match at its own ground. The Belgian football club Excelsior Mouscron had thus been refused to switch its home match in the 1997/98 UEFA Cup against FC Metz from Mouscron to Lille. The Commission rejected the complaint as it considered the “home and away from home” rule as well as the exceptions contained therein to constitute a sporting rule that did not fall within the scope of Articles 81 and 82 EC. The Commission found that the organisation

of football on a national territorial basis was not called into question by Community law. The Commission considered the rule indispensable for the organisation of national and international competitions in view of ensuring equality of chances between clubs. The Commission also found that the rule did not go beyond what was necessary. The Commission noted that the exceptions had to be applied in an objective and non-discriminatory manner in order to escape Articles 81 and 82 EC. The Commission considered that Lille was active in the market for the renting of stadiums. The Commission also considered whether UEFA was dominant in the market for organising European club competitions in football although the question was left open.<sup>35</sup>

Multiple ownership of sport clubs/teams (ENIC case)

*ENIC*, a company that owned stakes in six professional football clubs in various Member States had lodged a complaint against a rule adopted by UEFA in 1998, which stated that no two clubs or more participating in a UEFA club competition may be directly or indirectly controlled by the same entity or managed by the same person. The Commission rejected the complaint concluding that there was no restriction of Article 81(1) EC because the objective of the rule was not to distort competition, but to guarantee the integrity of the competitions organised by UEFA. It concluded that the rule “aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competitions..” The Commission also found that the rule did not go beyond what was necessary to ensure its legitimate aim: i.e., to protect the uncertainty of the results in the interest of the public.<sup>36</sup>

Ticketing

In 1998 Football World Cup<sup>37</sup> the European Commission stated that ensuring effective safety at football matches is essential and may, in particular circumstances, justify the implementation of special ticket sales arrangements by tournament organisers. Nevertheless, in order to determine whether and, if so to what extent, security considerations may justify ticketing arrangements which would otherwise be deemed to infringe Community law (Article 82 EC Treaty), each set of arrangements must be considered on their individual merits in the light of an objective assessment what is necessary to achieve reasonable security objectives such as the segregation of rival groups of supporters by way of ticket allocation distributed by UEFA member associations among their own supporters and related to seats located at opposite ends of the stadium, non-transferability of tickets, etc. In 1998 Football World Cup no explicit reference was made to the concept of sport specificity.

Access to major sporting events on television

The “Television without Frontiers” Directive<sup>38</sup> recognised the specificity of sport<sup>39</sup>. in the media context and its importance for (television) viewers. In Article 3a (now, see below: 14) it provided for a possibility for the Member States to take measures to ensure in respect of events regarded as being of major importance to society (sport events being one of the foremost examples), that a significant part of the public is not deprived of the possibility of following such events on free television. The national lists, once notified to the Commission, are verified for their compatibility with Community law and published in the Official Journal. The new Article 3j (in the final version: 15) of the Audiovisual Media Services Directive<sup>40</sup> enhances access of viewers to events of high interest for society (including sport events): broadcasters exercising exclusive rights to such events have to grant other broadcasters the right to use extracts for the purpose of short news reports (based on the right to information of European citizens).

Summary: sporting exceptions

On the basis of a close-reading of the full texts of the relevant Court case-law and Commission decision-making practice, the sporting exceptions and their justification(s) may be summarized as follows:

**discrimination of EU non-nationals in national representative teams / justification:** the formation of national teams is a question of purely sporting interest only (see: the particular nature and context of international representative matches) and as such has nothing to do with

Terminology”, in: *The International Sports Law Journal* 2011/3-4 (forthcoming).

32 Case 37398, OJ 2003 L 291/25.

33 Case 37214, OJ 2005 L 134/46.

34 Case 38173, OJ 2008 C 7/18.

35 Case 36851; IP/99/965 of 9 December 1999.

36 Case 37806 of 25 June 2002.

37 Case 36888, OJ 2000 L 5/55.

38 Council Directive No. 89/552/EEC of 3 October 1989.

39 N.B. The term is explicitly used by the Commission in this context in the

Accompanying Document to the White Paper on Sport, at p. 53, paragraph 4.8. Media.

40 Council Directive No. 2010/13/EU, OJ No. L 95 of 15 April 2010, and OJ L 263 of 6 October 2010 (corrigendum). See also, the recent Judgments of the General Court of Justice of the EU of 17 February 2011 in *UEFA v European Commission concerning the inclusion of World Cup matches in the national lists of Belgium and the United Kingdom* (Cases T-55/08, 68/08 and 385/07).

economic activity (Walrave para. 8/operative part 2 (“dictum”); Donà para.14/operative part I; Bosman 123);

**training compensation schemes for young players (“joueurs espoirs”)** / justification: in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate; the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (Bernard/Olympique Lyonnais para. 39 with reference to Bosman para. 106; and Bernard para. 41/see also the “dictum” of the Bernard case);

**limitation of the number of participants in a competition (other than national teams)** / justification: such a limitation is inherent in the organisation of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted; the adoption of one system for selecting participants rather than another must be based on a large number of considerations unconnected with the personal situation of any athlete, such as the nature. The organization and the financing of the sport concerned (Deliège paras 64-65 and 68 / “dictum”);

**transfer deadlines in team sports** / justification: the objective of ensuring the regularity of sporting competitions; late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole (Lehtonen paras. 53-54);

**anti-doping rules** / justification: the general objective of the rules is to combat doping in order for competitive sport to be conducted fairly and it includes the need to safeguard equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport; a restriction of competition is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes;

**supervision of the players’ agents profession** / “sport specificity” is not applicable (no sporting exception). (Piau para. 105 CFI);

**sports media rights** / justification: the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, is beneficial to the principle of solidarity between all levels and areas of sport.

**“at home and away from home” rule** / justification: this rule must be assessed within the context of the national geographical organization of football in Europe; the rule which stipulates that every club must play its home match at its own ground and not in its opponent’s country, is needed to ensure equality between clubs (Mouscron);

**no multiple ownership of sport clubs** / justification: the main purpose of the rule is to protect the integrity of the competition and to avoid conflicts of interests that may arise from the fact that more than one club controlled by the same owner or managed by the same person play in the same competition; it aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competition between the participants, as consumers may suspect that teams with a common owner will not genuinely compete; without the rule, the proper functioning of the market where the clubs develop their economic activities would be under threat, since the public’s perception that the underlying sporting competition is fair and honest is an essential precondition to keep its interest and marketability; if sporting competitions were not credible and consumers did not have the perception that the games played represent honest sporting competition between the participants, the competitions would be devaluated with the inevitable consequence over time of lower consumer confidence, interest and marketability; without a solid sporting foundation, clubs would be less capable of extracting value from ancillary activities and investment in clubs would lose value.<sup>41</sup> (paras 28, 32 ENIC);

**ticketing arrangements** / justification: spectators’ safety and security at football matches;

**free access to sporting events of major importance to society on television** / justification: right of information of European citizens.

## 11. Summary and Conclusion

The classical and still current central (legal) question in the debate on the position of sport in the European Union is whether sport is ‘special,’ whether it deserves specific treatment under European Law and to what extent and why. In other words, should sport be exempted from the EC Treaty? The “specificity of sport” is the legal concept (and method or instrument of appreciation or assessment) that is applied by the European Commission and the European Court of Justice to tackle this question on a case-by-case basis, in order to determine whether the sporting rules and regulations concerned are acceptable in EU law. Do they have justifiable objectives? Next to that, the proportionality test requires that each case is assessed on its own merits according to its own particular features or characteristics. The concept of “sport specificity” may be distinguished in sport specificity *lato sensu* and sport specificity *stricto sensu*. Sport specificity *lato sensu* concerns the external, societal context of sport, the “extra-sportive” role and function of sport, in particular professional sport, as a policy instrument in the society at large. Sport specificity *stricto sensu* applies to how sport is regulated and organised. It is the internal, purely sporting side of the coin. *Lato sensu*, the importance of the social (cultural, recreational, health) and educational functions of sport was stressed in the Court’s case-law and basic documents like the Amsterdam and Nice Declarations and is codified in the “sport article” 165 of the Lisbon Treaty. Sport is said to play a morally elevating role in society through its traditional values of fair play, solidarity, fair competition and team spirit. Additionally, the Audiovisual Media Services Directive recognises the specificity of sport with regard to securing free television access to sporting events of major importance (Olympic Games, Football World Cup and European Championship, etc. and major national events like, for example, Wimbledon and the Tour de France) to society. This in fact is a sporting exception which may be implemented by Member States on the basis of the Directive. It in fact is a recognition of the “breaking news” value and societal relevance of major sporting events which give them an exceptional status. However, in this case the sport industry is not unique, “special” in comparison with other industrial sectors. *Stricto sensu*, the organisation of sport on a national basis, the principle of a single federation per sport, the pyramid structure of open competitions, separate competitions for men and women, voluntariness, the position of amateur sport, the interdependence between competing adversaries, the principle of equal opportunities and uncertainty of results (competitive balance), financial solidarity (especially, professional football), national teams of “(EU-)nationals”, compensation schemes for young players (football), limitation of the number of participants in a competition (other than national teams), transfer deadlines in team sports, anti-doping rules, “at home and away from home” rule (football), no multiple ownership in sport clubs, ticketing arrangements for safety reasons, are particular characteristics of sport(s) itself - at least from an EU law perspective. The most specific, most purely sporting rules are the Laws of the Game for each individual sport (*lex ludica*). The Laws of the Game are in fact the very core of sports law and apply worldwide. By their very nature they are not contrary to EU competition law if EU competition law would apply, since the “playing field” is “level” for competitors, in individual and team sports, in every aspect. In football the playing field is symmetrical, divided into two completely equal halves, the duration of a game is divided into two equal halves of each 45 minutes, opposing teams change sides (halves) after lemon time, competitions are based on a system of home and away matches for all teams equally.

The applicability of the concept of sport specificity was explicitly not accepted by the ECJ in the Piau case (players’ agents) and of course in Bosman and Donà either (transfer system, nationality clauses in professional club football). There is a number of other issues regarding which the sport specificity option was not even considered in principle,

<sup>41</sup> Should two clubs under joint control or ownership meet at a certain stage of the competition, the public’s perception of the authenticity of the result would be jeopardised; in the present case, for exam-

ple, ENIC’s business interests in the field of the provision of betting services could be seen by some as an obstacle to the development of fair competition on the pitch (para. 35 ENIC).

because that would have been totally out of order. Of course, these cases are still part of (European) sports law, but in a more marginal position one might say. This case-law (or Commission practice) is not about testing sporting rules against EU law, but about determining whether (category 1) EU law is also applicable to a particular sporting issue, or (category 2) whether particular sports-related national legislation or decision-making is in conformity with EU law, or (category 3) whether particular sporting rules or practices of a completely non-sport specific character are acceptable under EU law. These cases and issues are really “off the field of play”! Examples are: (category 1) equal treatment claus-

<sup>42</sup> Cases C-438/00, C-265/03, and C-152/08.

<sup>43</sup> Press releases IP/99/434 of 30 June 1999, and IP/01/1523 of 30 October 2001.

<sup>44</sup> Case C-49/07.

es for non-EU nationals in agreements with third countries (Kolpak, Simutenkov, Kahveci)<sup>42</sup>; (category 2) ECJ rulings with regard to gambling and/or betting services; (category 3) FIA case<sup>43</sup>: in this case the Commission dealt with a conflict of interest situation arising from the fact that a sport association was not only the regulator but also the commercial exploiter of a sport. FIA rules prohibited drivers and race teams that held a FIA licence from participating in non-FIA authorized events. Circuit owners were prohibited from using the circuits for races which could compete with Formula One. Another similar case is MOTOE.<sup>44</sup> MOTOE is a non-profit-making association governed by private law, whose object is the organization of motorcycling competitions in Greece. MOTOE's activities consisted not only in taking part in administrative decisions authorising the organization of motorcycling events, but also in organizing such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts.

## Sport and Nationality

# “Accelerated” Naturalisation for National Representative Purposes and Discrimination Issues in Individual and Team Competitions under EU Law

by Robert C.R. Siekmann\*

*Sport and nationality is a complex issue with diverse manifestations. The first main question which will be dealt in this paper is how so-called national teams that represent a country in international (“inter-state”) competition (Olympic Games, world and regional championships, and other representative sporting events) are composed - on the basis of the legal nationality of their members, or on the basis of a special “sporting nationality” according to which additional or other criteria are applicable whether a sportsperson is allowed to participate in the national team. The same question arises with regard to individual athletes who represent a country in international competition. This question will be discussed in particular in the context of the problems that have been created by what may be called accelerated (quick) naturalization. The second main question is how “sporting nationality” is regulated outside the scope of national representation, that is at the level of national club team and individual competition. May sportspersons from abroad participate in the club competitions in other countries of which they do not possess the legal nationality, in particular under EU law? In this paper we will discuss topical discrimination issues: the discrimination of non-team sportspersons in individual national championships; and: the discrimination of professional football players: the FIFA 6+5 and UEFA home grown players rules.*

## 1. Introduction

Nationality is both in international and national law an important connecting factor for the attribution of rights and duties to individual persons and States. Under international law States have for example the right to grant diplomatic protection to persons who possess their nationality. Under national law the obligation to fulfil military service and the rights to become a member of parliament or to have high political functions are frequently linked to the possession of the nationality of the country concerned. However there is no standard list of rights and duties which normally are linked to the nationality of a State under national

and international law. National States are in principle autonomous in their decision which rights and duties will be connected to the possession of nationality, whereas under international law the consequences of the possession of a nationality are also a subject of discussion. Nationality can be defined as “the legal bond between a person and a State”. This definition is, *inter alia*, given in Article 2(a) of the European Convention on Nationality (1997). Article 2(a) immediately adds the words “and does not indicate the person’s ethnic origin”. In other words, nationality is a legal concept and not a sociological or ethnical concept. The nationality of a country in this legal sense is acquired or lost on the basis of a nationality statute. A person possesses a nationality if he or she possesses this nationality by virtue of the general nationality statute or other relevant legislation, rules of implementation, case law and legal practice.<sup>1</sup>

Sport and nationality (or: nationality in sport) is a complex issue with diverse manifestations. The first main question which will be dealt in this article is how so-called national teams that represent a country in international (“inter-state”) competition (Olympic Games, world and regional championships, and other representative sporting events) are composed - on the basis of the legal nationality of their members, or on the basis of a special “sporting nationality” according to which additional or other criteria are applicable whether a sportsperson is allowed to participate in the national team. The same question arises with regard to individual athletes who represent a country in international competition. Are there nationality statutes etc. which also have specific “sporting nationality” provisions (provisions for representative sporting purposes)? Or does the determination of “sporting nationality” completely belong to the jurisdiction of organized sport, in which case the international sports federations in principle still could refer to the general legal nationality (“passport nationality”) of teams and sportspersons, or could have their own different rules and regulations to provide for the eligibility of sportspersons for international competition.

The first question will be discussed in particular in the context of the problems that have been created by what may be called *accelerated* (quick) naturalization. Changes in nationality were becoming increasingly frequent in sports, for a number of reasons stemming in particular from certain countries’ desire to assert themselves on the international scene, and/or the athletes’ desire to benefit from the best possible material conditions. The rules for obtaining nationality vary considerably from one country to another, which has created sometimes appalling inequality of treatment from one athlete to another. International sports authorities have been overwhelmed by this once marginal phenomenon which

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<sup>1</sup> Gerard-René de Groot, “Remarks on the Relationship Between the General Legal Nationality of a Person and his ‘Sporting Nationality’”, *The International Sports Law Journal* (ISLJ) 2006/1-2, p. 3. This

contribution is an elaborated version of a paper that was presented at the Scientific Conference on Nationality in Sports: Issues and Problems, organized by the International Center for Sports Studies (CIES) of the University of Neuchâtel, at the Olympic Museum in Lausanne (Switzerland), 10-11 November 2005, see: *La nationalité dans le sport: Enjeux et problèmes*, Edité par Denis Oswald, Editions CIES, Neuchâtel Suisse, 2006.

had suddenly become a major issue in a number of sports. They have reacted “case by case” to attend to the most urgent cases first, while trying to maintain some level of sportsmanlike fairness. However, the time had come to find comprehensive, uniform solutions that would be valid for the long term.<sup>2</sup> In The Netherlands the *Kalou* case (2006) is the landmark case on this issue.<sup>3</sup>

The second main question is how “sporting nationality” is regulated outside the scope of national representation, that is at the level of national club team and individual competition. May sportspersons from abroad participate in the club competitions in other countries of which they do not possess the legal nationality?

Discrimination on grounds of nationality is prohibited under EU law, which establishes the right for any citizen of the Union to move and reside freely in the territory of the Member States. EU law also aims to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Equal treatment also concerns citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member States (“non-EU nationals”).

The composition of national representative teams is inherent in the organization of competitions opposing national teams. Rules concerning the composition of national teams, in particular rules that exclude non-national sportspersons, whether EU or non-EU nationals, from national teams, have been considered as rules that do not infringe EU law free movement provisions.

In this article we will also discuss topical discrimination issues in particular under EU law:

- the discrimination of *sportspersons* (“EU non-nationals”) in individual national championships;
- the discrimination of *professional football players* (“EU non-nationals”): 6+5 and home grown players rules.

## 2. The “accelerated” naturalization for national representation issue

When international law refers to nationality, this reference has to be understood as a reference to the general legal nationality of a State acquired on the basis of a ground for acquisition provided by the statute on nationality of the State concerned. This is for example the case where Article 15 of the Universal Declaration of Human Rights states that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. Next to this general legal nationality which indicates the formal legal bond between a person and a State, States or International Organisations may - for special purposes - introduce a so-called “functional nationality” or “autonomous nationality”. If for certain purposes a functional nationality is introduced, the grounds for acquisition and loss of this specific nationality have to be defined in detail. In De Groot’s opinion, the question had to be answered whether the development of a functional, autonomous sporting nationality was desirable. In principle, a negative answer to this question was advisable. The regulations of the grounds for acquisition and loss of a functional nationality is a very complicated task, if one does not want to use simply the place of birth as the only ground for acquisition of the functional nationality without any ground for loss

of the functional nationality in question. Even the fiction that one is deemed to have the nationality of the country where one has ordinary residence needs considerable further elaboration, because of the fact that the definition of residence differs from country to country. However, De Groot continues, there was an attractive alternative for the development of a functional nationality, which would come quite close to a separate *sporting nationality*, but was in fact not an independent notion, and which did not require to regulate the grounds for acquisition and loss in detail. One might for the determination whether a person qualifies to represent a certain country in international sporting competitions use as a basic requirement the possession of the general legal nationality of the State concerned, but add - insofar as it was desirable - additional requirements which would guarantee that the nationality is the manifestation of a genuine link between the sportsperson and the State concerned. The essential question then was of course which additional requirement(s) should be added and in which cases these additional requirement(s) should be fulfilled. The reason to add - in certain cases - (an) additional requirement(s) next to the condition of the possession of the nationality of the country concerned, before a person qualifies to represent a country in international sporting competition, was in order to ensure that a real, *genuine link* exists between the sportsperson concerned and the country he or she wishes to represent. However, one had to realize that the general legal nationality normally is already a manifestation of such a genuine link. With other words: normally the general legal nationality was only attributed, if a genuine link existed between the sportsperson concerned and the State in question. De Groot observes that in the international community of states an enormous variety of grounds for acquisition and grounds for loss of nationality exists. An indirect consequence of this fact for sports was an unequal competition for States which respect to excellent sporting (wo)men and shocking inequalities between athletes. There were also equalities caused by the different attitudes of States in respect of quick naturalization. De Groot was of the opinion that in all cases where a genuine link was lacking, an additional residence requirement would be reasonable. The next question was of course how long the additional residence requirement should be. He submitted that the required period of habitual residence should be shorter than the lowest residence requirement for regular naturalization, which was three years. It was therefore - in his opinion - attractive to require a habitual residence of two years of continuous residence immediately before naturalisation. If at the moment of naturalization this condition was not fulfilled, the naturalized sportsperson would only be eligible to represent his new country, after he would have resided two years in the country (the residence period directly before the naturalisation and after the naturalization were to be added up). A period of two years should not be required, if the naturalized sportsperson had in the past a continuous and uninterrupted residence of five years in the country concerned. Such an uninterrupted period of residence in the past guaranteed the existence of a genuine link between the sportsperson and the country of the newly acquired nationality. Under such circumstances there was no need any more to require an uninterrupted habitual residence of two years before and/or after the moment of naturalization. This additional rule of five years residence was realistic in view of the fact that young athletes frequently received part of their sporting education and made part of their sporting career in another country than the one where they grew up. The introduction of an additional residence requirement would prevent that sportspersons qualified to represent a country in international competition without having a genuine link with the country concerned.<sup>4</sup>

### Comment

At the time of the Lausanne Conference on Nationality in Sports the issue of “accelerated” (or quick) naturalization was highly topical and over the past few years had only become more important. The core of the problem was the extreme diversity of the legislation concerning the acquisition of “regular” nationality in the world community of states. The conditions and required residency periods for naturalization differ greatly per country. In one country, a candidate national must have resided in that country’s territory for at least three years in order to be eligible for naturalization, while in another country this may be five years, and in yet another country ten years. States have further estab-

2 The theme of “accelerated” or quick naturalization of sportspersons for national representative purposes was the core issue at the Scientific Conference on Nationality in Sports, see note 1 *supra*. The importance of this Conference was amply illustrated by the participation in the concluding panel of IOC President Jacques Rogge, high representatives of four international sports federations (i.e. basketball, ice-hockey, skating and skiing) and of the 800 meters world record holder I Wilson Kipketer.

3 On 4 April 2006 the sixth Asser International Sports Law Lecture on *Nationaliteit en Sport: publiekrecht v sportrecht* [Nationality and Sport: Public

Law v Sports Law] was organized with reference to the *Kalou* case. Speakers were, amongst others, Prof. Dr Gerard-René de Groot, Professor of comparative law and private international law, University of Maastricht, The Netherlands, and Mr Jelle Kroes, Everaert Immigration Lawyers, Amsterdam.

4 Gerard-René de Groot, *op.cit. supra*, pp. 3-4, 8. The expression “genuine link” refers implicitly to the *Nottebohm* decision of the International Court of Justice, where the words “genuine connection” are used explicitly (ICJ Reports 1955, 4 (23)).

lished quite diverse additional requirements as to the necessary degree of the candidate's local societal integration. On the other hand, however, the legislation in some countries permits that a foreigner is naturalized almost instantly for reasons of general, national interest. Traditionally, the sports community in principle followed the "regular" public law rules concerning nationality. However, already in the past considerable obstacles were put into place by, for example, the international basketball federation FIBA to prevent accelerated naturalization, or rather, to avoid its consequences by applying residency requirements in respect of the receiving country. A well-known example was the FIFA rule that once a player had played for a particular country in a officially binding, non-friendly international match (European Championship, World Championship: qualifiers and tournament matches) that player can never play for another country again, regardless of possible naturalisation or even the possession of dual nationality. Another measure was the "waiting period": during, for example, two years following his/her naturalization, the athlete may not qualify for his/her new country. The general starting point is the doctrine of the genuine link between a person and a country as developed by the International Court of Justice at The Hague in one of its classic public international law judgment, the *Nottebohm* case. In this way, what has become known as a "sporting nationality" has developed in addition to "regular" nationality, whereby the sporting nationality is decisive for the question of whether the athlete may represent a particular country in international matches, championships and competitions such as the Olympic Games and the Football World Championship. In sporting terms, like for example in club football the genuine link doctrine is a matter of the sportsperson's national identity and the local society having the possibility of identification with him or her from the perspective of (inter)national representation.

The world of organized sport found itself forced to tighten the rules further. Rules concerning the "sporting nationality" were in fact as divergent between the various international sports federations as they are between the different national public laws concerning "regular" nationality. Top sport nowadays equals commerce and is a matter of national prestige. This gave rise to national sports federations and national public authorities doing a one-two in association football terms.<sup>5</sup> If, for example, a wealthy country was able to naturalize one of the world's top long distance runners from a poorer country by just giving him a passport, that country would suddenly have won a place on the map. And if the foreign athlete was the No. 4 of his country and in fact the No. 4 also of the world, because the first three of his country had won gold, silver and bronze at the last Olympics and World Championship, he or she also for purely sporting reasons would have an excellent argument to move abroad. Individual sports such as athletics were perfectly suited for this type of "coup". However, in team sports, situations like these could not be ruled out either! Moreover, the long distance runner would also see his/her financial situation and his or her family conditions improve considerably as compared to if he/she had continued to run for his/her country of origin. This also indicated the conflict of interests between the possibilities for further development of the top athlete, who after all had to make a living from his/her sport, i.e. the interests of the "market" on the one hand, and the way in which sport is organized worldwide, namely based on territorial nationality, that is state borders, on the other hand. This had resulted in the "commercialization of the passport". Naturalization was the perfect tool for this type of "muscle drain" at the level of national sports representation (cf. "brain drain" in connection with scientists).

5 The "one-two" is an explosive combination that consists of two passes between two players. The first pass is a pass in the length or width of the playing field and the second pass is a first-time return pass; the player who has played the first ball will run into the "depth" of the field (that is, in the direction of the opposing team's goal) and will receive the ball behind his opponent's back. A well-done "one-two" creates confusion in the opposing team's

defence and is an effective instrument against a tight defence, in particular when the first passer comes from far at full speed (see: Rob Siekmann, *Voetbalwoordenboek* [Football Dictionary], with a Foreword by Jan Mulder, Utrecht 1978, p. 42), see also: Rob Siekmann, *Moderne voetbaltheorie* [Modern Football Theory], Utrecht 1980, pp. 61-62.

6 Gerard-René de Groot, *op.cit. supra*, p. 4.

Of course organized sport had to defend itself against the phenomenon of accelerated naturalization. In order to create a level playing field, it made sense to harmonize or unify the rules concerning sporting nationality and to seek a common denominator with refinements where necessary per type of sport (either individual or a team sport) and branch of sport, etc. Here clearly was a task for the international sports law community. This did however require a prior investigation into all the underlying facts and circumstances. For example, one could not blame an individual athlete who was one of the world's top runners for trying to seek domicile elsewhere when only three athletes per country may be delegated to the Olympics and he/she was outrun in the national qualifiers by three fellow countrymen simply because his/her country belonged to the world's top in long distance running. Every athlete after all seeks to attain the highest possible level. It is therefore recommended that these rigid rules for participation are made more flexible by issuing additional "wild cards" based on the world ranking or some other effective system. So, no "wild cards" to admit the less best, the sub-optimal athletes to the Olympics on order to have as many countries as possible represented, but rather not excluding beforehand those who in fact belong also to the top elite in a particular (individual or team) sport (notwithstanding the Olympic value of "participating [as opposed to winning] comes first", since winners wish to participate also themselves: *citius, altius, fortius* (Olympic motto, Pierre de Coubertin, 1894)).

De Groot had proposed a residence/waiting period of two years which is shorter than the minimum in the international community of states (three years). Why? He does not provide us with any explicit reasoning for his proposal. Probably, the period should be shorter because sport may be considered a "subculture" of society? However, from the sport's perspective, that might be a reason just to intensify what is in fact a disciplinary sanction. The criterium of "residence" also might or even must be translated more concretely for the sporting context, such as permanent club membership, regular participation in the national championship and international non-representative and club competitions and matches.

In the residence/waiting period a sportsperson should not only be a formal resident of the country concerned and live in fact elsewhere for most of the time - otherwise than staying abroad for the participation in sporting events (like tennis players do much more than the average athlete).

The naturalisation issue in fact consists of two phenomena which might be solved at the same time from a sporting perspective: a. quick naturalisation (the inequality of length between residence periods according to the regular nationality legislation), b. special, accelerated naturalisation for sporting purposes (see for example the *Kalou* case). Any residence period chosen by an international federation would at the same time also solve the problem of countries the regular residence of which under public law is relatively or even extremely long. It would mean that in such cases a sportsperson might acquire the sporting nationality of the country concerned earlier than his general legal one. The issue of statelessness on one hand and multiple (double etc.) nationality and its consequences for sporting representative purposes might also be solved in this perspective, residence being the decisive criterion again. De Groot makes the additional statement that these persons should be eligible as representatives of their country of residence as a consequence of the Geneva Convention relating to the status of refugees (1951), respectively of the New York Convention relating to the status of stateless persons (1954).<sup>6</sup>

Why not systematically link (a) the residence/waiting period for regular naturalisation with (b) the additional residence/waiting period to get "sporting" nationality, for example: (a) 4 years plus (b) 0 year; (a) 3 years plus (b) 1 year; (a) 2 years plus (b) 2 years; (a) 1 year plus (b) 3 years; (a) 0 years plus (b) 4 years.? Or, alternatively, a system of "transfer windows" might be introduced, which would mean that a sportsperson would qualify for representing a new country only if he or she would have acquired the new nationality in any case before the start of a new Olympiad or before the beginning of a new campaign of qualifying matches for the final tournament (Football World Cup), in both cases a period of four years (etc.).

The Olympic Movement (IOC) has an omni-sport character but the

only events are Olympic Games (global, Winter/Summer; continental/ regional, such as for example the Asian Games), whereas the international federations like the world football governing body FIFA are single sport organisations (regional and World Championships).

Rules 41-45 of the Olympic Charter concern the eligibility code for participation in the Olympic Games. The Bye-law to Rule 42 on the nationality of competitors reads in full as follows: "2. A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF [International Federation], and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country. The period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstances of each case." The Bye-law reads in full as follows with regard to the issue of double/multiple nationality: "1. A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below [see *supra*] that apply to persons who have changed their nationality or acquired a new nationality."

The articles in the Regulations Governing the Application of the Statutes of FIFA read in full as follows regarding nationality issues:

#### VII. ELIGIBILITY TO PLAY FOR REPRESENTATIVE TEAMS

##### 15 Principle

1. Any person holding a permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the Association of that country.
2. With the exception of the conditions specified in article 18 below, any Player who has already participated in a match (either in full or in part) in an official competition of any category or any type of football for one Association may not play an international match for a representative team of another Association.

##### 16 Nationality entitling players to represent more than one Association

1. A Player who, under the terms of art. 15, is eligible to represent more than one Association on account of his nationality, may play in an international match for one of these Associations only if, in addition to having the relevant nationality, he fulfils at least one of the following conditions:
  - a He was born on the territory of the relevant Association;
  - b His biological mother or biological father was born on the territory of the relevant Association;
  - c His grandmother or grandfather was born on the territory of the relevant Association;
  - d He has lived continuously on the territory of the relevant Association for at least two years.
 [...]

##### 17 Acquisition of a new nationality

Any Player who refers to art. 15 par. 1 to assume a new nationality and who has not played international football in accordance with art. 15 par. 2 shall be eligible to play for the new representative team only if he fulfils one of the following conditions:

- a He was born on the territory of the relevant Association;
- b His biological mother or biological father was born on the territory of the relevant Association;
- c His grandmother or grandfather was born on the territory of the relevant Association;
- d He has lived continuously for at least five years after reaching the age of 18 on the territory of the relevant Association.

##### 18 Change of Association

1. If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several rep-

resentative teams due to nationality, he may, only once, request to change the Association for which he is eligible to play international matches to the Association of another country of which he holds nationality, subject to the following conditions:

- a He has not played a match (either in full or in part) in an official competition at "A" international level for his current Association, and at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the representative team for which he wishes to play.
  - b He is not permitted to play for his new Association in any competition in which he has already played for his previous Association.
2. If a Player who has been fielded by his Association in an international match in accordance with art. 15 par. 2 permanently loses the nationality of that country without his consent or against his will due to a decision by a government authority, he may request permission to play for another Association whose nationality he already has or has acquired.
 

[...]"

According to the Olympic Charter the "waiting" period is not dependent on residence; the applicable criterion is a purely sporting one (last representation of his/her former country), whereas according to the FIFA Statutes the "waiting" period is a real residential one (two years in case of multiple nationality; five years in case of naturalization).

#### *Kalou case*

In 2005, in The Netherlands the gifted Ivory Coast footballer Salomon Kalou who then was a striker for the Rotterdam professional football club Feyenoord applied for accelerated naturalization with a view to the upcoming Football World Championship in Germany in 2006. Amongst others, Johan Cruyff, national coach Marco van Basten and the Minister for Sports supported his application which was, however, rejected by the Minister for Aliens Policy and Integration. Kalou subsequently started proceedings against the State of the Netherlands before the administrative courts, on which occasion Van Basten promised Salomon Kalou a place in the line-up for the 2006 World Cup for which the Dutch team had meanwhile qualified. In The Netherlands the situation was such that based on the Netherlands Nationality Act (Article 10) the directions for application of this Act include special rules which also apply for top athletes. According to this so-called *topsportersregeling* [elite sportspersons' regulations] the making of an exception is justified when it turned out that accelerated naturalization would serve "a Dutch cultural interest" which also included a Dutch sporting interest which could happen in case of representing The Netherlands by participating in international sporting tournaments and matches. There was also a detailed Circular from the Ministry of Health, Welfare and Sports, of 9 April 1999, to the national sports organisations concerning this matter. In these guidelines the (minimum) sporting performance level for being eligible for accelerated naturalization was determined. Preferably, the sportsperson concerned should also be role model for young athletes or for fair play campaigns and the like. He or she must add "surplus (excess) value" to a specific sport or sport in general. During the proceedings, the expert witness in nationality law Professor De Groot (Maastricht University) indicated the manifest applicability of the top athletes regulations which permit accelerated naturalization by derogation from the standard requirements. The court ordered the Minister to re-evaluate her decision and improve the reasoning underlying it, following which the Minister appealed to the Council of State as the highest administrative law judicial instance. The outcome there was identical. The Minister did not, however, amend her position.

#### *Comment*

The *Kalou* case is a clear example of the application of exceptional public legislation for the purposes of "sporting" naturalisation. Apart from that, it should be observed that never before had a national team coach of the Dutch Football Association (KNVB) attempted opportunistically to reinforce the national team by means of accelerated naturalization.

This author is a principled opponent of such practices, in casu, by receiving Dutch nationality, Salomon Kalou would have also acquired a direct ticket to play, as an EU national, without any impediment in the English Premier League, which obviously was his particular aim at the time - the Premier League being the most prestigious and best paying football competition in the world.<sup>7</sup> Moreover, Kalou by opting to play for the Ivory Coast might still have performed at the 2006 World Championship in Germany, and even appear together with his older brother Bonaventure Kalou, who was an ex-Feyenoord player and at the time playing for Paris Saint-Germain in France. In addition, fate had ironically ruled that The Netherlands and the Ivory Coast were to be in the same group during the pool stage of the World Championship and would therefore have to play each other! From the perspective of the spirit of sport (fair play) as an ethical consideration, another consideration is that Salomon Kalou missed out on the entire qualification process for the World Championship and that his participation would be at the expense of another player who possibly did contribute to some degree to the Dutch team's qualification for the 2006 World Cup.

### 3. Sport and discrimination in EU law

#### The discrimination of sportspersons ("EU non-nationals") in individual national championships

In November 2008, the present author was informed about the following concrete case which fits in this context. The European swimming association LEN was confronted by the following case. The Belgian national swimming association made it impossible by way of its Statutes that a Dutch swimmer (with Dutch nationality) living in Belgium would participate in the Belgian national championship. There turned out to be in Europe different regulations: in Scandinavian countries there were much more possibilities. A Swedish swimmer might participate in the Finnish national championship and become champion of Finland. In The Netherlands a foreigner might participate in the national championship, but could not swim a Dutch record. The question was what the legal position under EU law is.

Some Member States and sports organisations have signalled to the European Commission their preoccupations with the situation of competitions involving individual sportspersons and leading to the conferment of National Championship titles. On cultural grounds, they were of the opinion that the conferment of such titles should be reserved for nationals of the Member State within which the competition takes place. A more technical concern was linked to the fact that in some cases, results in a national championship serve as a basis for the qualification of nationals to international competitions or for the composition of national teams. The legality of residence clauses also would need to be examined, as some sports organisations were concerned that some sportspersons could take part in different national championships.<sup>8</sup> In the White Paper on Sport, the European Commission stated that membership of sports clubs and participation in competitions were relevant factors to promote the integration of residents into the society of the host country. As regards access to individual competitions for non-nationals, the Commission intended to launch a study to analyse all aspects of this complex issue.<sup>9</sup> In 2009 the Commission launched a study to assess the implications of the Treaty provisions on non-discrimina-

tion on grounds of nationality in individual sports. The study was finalized in December 2010.<sup>10</sup>

The Commission will issue guidance on how to reconcile the Treaty provisions on nationality with the organisation of competitions in individual sports on a national basis.<sup>11</sup>

The Study's Executive Summary reads as follows:

"Non-discrimination is a general principle of EU law. One of the best known rules derived from this principle is the EU prohibition against nationality discrimination. The rule against discrimination on the basis of nationality is reflected in Treaty articles which prohibit nationality discrimination in all situations which fall within the scope of the EU Treaties. These rights are also granted to non-nationals who are protected by EU law. EU law currently grants freedom of movement rights of equal treatment to EU citizens but also to certain third country nationals such as non-EU family members of EU citizens and third country nationals who derive rights from international agreements between the EU and their non-EU member state. Equal treatment requires the abolition of both direct discrimination and rules which, whilst not framed in terms of nationality, in fact lead to unequal treatment.

Thus, nationality should not, as a matter of EU law, be a valid way to distinguish between domestic citizens and non-nationals. Yet sports within Europe generally remain organised on the basis of nationality. Under the 'European model of sport', national sports governing bodies are responsible for the organisation of sport within the national territory. As a consequence, sport is often inherently based on nationality. This creates tensions between the requirement to treat all EU citizens without regard to their nationality, and the pre-existing structures based on nationality and national territories by which many European sports are organised.

Even where rules are not expressly based on nationality, they may be prohibited under EU law. Restrictions to freedom of movement are considered discriminatory where nationals and non-nationals are governed by identical rules but where these indirectly favour nationals over non-nationals. For example, since residency requirements are more likely to be satisfied by nationals than by non-nationals, the Court has held that these are indirectly discriminatory, and therefore unlawful, unless justified and proportionate. Furthermore, EU law requires not only equal treatment of non-nationals but in fact prohibits all unjustified rules which hinder or render less attractive the exercise of free movement rights. Thus, when sports rules restrict the freedom of movement of non-nationals, they must be justified.

The Court of Justice of the European Union has in its case law sought to strike a balance between protecting EU citizens' rights to free movement and non-discrimination, and the specific characteristics of sport and the autonomy of sports governing bodies to organise sporting competitions. It has accepted that nationality rules in national team sports are matters of 'purely sporting interest' which have 'nothing to do with economic activity' and are therefore outside the scope of EU law. It has in later cases considered that some rules are 'inherent to the organisation and proper functioning of sport' and therefore do not in law constitute restrictions of EU free movement rights even where the situation is otherwise within the scope of the EU treaty. Where the Court has found that a sporting practice has restricted freedom of movement rights, it has carefully considered the justifications put forward to examine whether such rules are both justified and proportionate. In so doing the Court of Justice has accepted a number of sports-specific justifications such as the need to educate and train young players and the need to ensure the regularity of competitions. It may even be argued that the Court might accept justifications for nationality rules in sport which would not be acceptable in the context of other activities, thereby recognising that the specific characteristics of sport require specific treatment within EU law.

Despite such guidance from the Court of Justice, it has maintained that neither sporting activities nor nationality discrimination in sport can be categorically excluded from the scope of EU law. Although the Lisbon Treaty has conferred a supporting, coordinating and supplementing competence to the EU in the field of sport, its references to "openness and fairness" as guiding principles suggest that no significant

7 Cf., for example the Wolds Series in the United States of America as the top of the world competition in professional basketball.

8 Accompanying Document to the White Paper on Sport, *op.cit. supra*, p. 45.

9 White Paper on Sport, Brussels 2007, COM(2007) 391 final, pp. 14 and 16.

10 Study on the Equal Treatment of Non-Nationals in Individual Sports Competitions, Report committed by the European Commission, T.M.C. Asser Instituut, Edge Hill University and Leiden University, The Hague, December 2010. The Study's findings were presented by Prof. Stefaan van den

Boogaert, Europa Institute, Faculty of Law, University of Leiden, The Netherlands, at the EU Sport Forum in Budapest, Hungary, on 21-22 February 2011. He is the author of "Practical Regulation of the Mobility of Sportsmen in the EU Post *Bosman*", European Monographs Vol. 48, The Hague 2005.

11 "Developing the European Dimension in Sport", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 12 final, Brussels 2011, p. 13.



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exemption will be forthcoming solely on the basis of Article 165 of the Treaty on the Functioning of the European Union. In its recent case law, the Court has confirmed that issues regarding the compatibility of sporting practices with EU law must be resolved on a case by case basis. Although sports governing may wish that the EU institutions should provide legally certain guidance as to whether various such practices are considered acceptable, it is difficult to extrapolate firm guidance applicable to all sporting practices from the body of cases which has thus far been decided. When guidance issued in the past has been contrary to EU law, the mere fact that it has been issued by an EU institution has not protected sporting practices from being declared unlawful by the Court of Justice of the European Union.

Although the full legal framework applicable to sport has not yet been definitively settled, a presumption now exists that the general EU law rules apply to sport just as to any other activity within the scope of EU law unless a limited exemption can be identified. Within the general framework, it is clear that non-nationals are entitled to equal treatment and that restrictions to their freedom of movement between Member States must be justified and proportionate. According to settled case law, free movement rights include rights to equal treatment and unrestricted access to leisure activities such as sport even where the sport is not organised on a professional basis. Since citizens and their family members enjoy equal treatment in Member States other than their state of origin, they also enjoy as a matter of EU law equal access to both amateur and professional sport regardless of whether the citizen is also enjoying rights as a worker or a provider of services. Thus, non-nationals protected by EU law have a legal right to access sport in Member States other than their state of nationality. Even if the Court's exemption for nationality rules in national team sports were to be extended to individual sports by analogy, such rules would need to be carefully reasoned and limited to their proper function in order to escape censure. Other methods of analysis also require a proportionate justification in order to ensure that restrictions to non-nationals' free movement rights escape censure under EU law.

This study examines restrictions to the access of non-nationals to individual sporting competitions in the EU Member States. Its national experts have compiled data on the rules in all Member States as regards twenty-six Olympic sports in which competitors are individuals rather than teams. These include the triathlon, modern pentathlon, tennis, table tennis, badminton, rowing, canoe/kayak, athletics, aquatics, archery, boxing, judo, shooting, weightlifting, wrestling, taekwondo, equestrian sports, gymnastics, skating, luge, biathlon, bobsleigh, cycling, skiing, fencing and sailing. The data includes both rules that distinguish on the basis of nationality and rules which, whilst based on criteria other than nationality, hinder or make less attractive the freedom of movement of non-nationals.

Any rules which hinder or make less attractive the exercise of non-nationals' freedom of movement rights must be justified under EU law. This study therefore also seeks to comprehensively list the justifications put forward by sports governing bodies for those rules. However, although national experts have requested information on both the rules themselves and any justifications for those rules, relatively few justifications were put forward to explain restrictive sports rules. This raises the inference that the many substantially unjustified restrictions to the access of non-nationals to sporting competitions are unlawful under EU law. There are also instances of justifications which are difficult to accept in the context of the established legal framework and which therefore as a matter of law seem unlikely to survive a legal challenge. For example, it is not settled law that access to domestic competitions can be restricted on the basis of nationality solely because the competition is organised by the national governing body.

An examination of the rules of specific sports organisations by country also demonstrates that a single sport can be subject to very different rules across the EU Member States. This suggests that some national rules are more restrictive than necessary. In some cases, the difference arises because even some Olympic sports have no national governing bodies in certain Member States. Although this study was limited to the twenty-six identified individual Olympic sports, a further investigation beyond Olympic sports may reveal a significant additional number of

these situations. In cases where sports did have domestic governing bodies in all EU Member States, the national rules governing access to sports were also not always uniform. Even where such sports had European-level governing bodies, their rules often left domestic governing bodies with significant margins of discretion regarding the access of non-nationals to domestic competitions. The diversity of rules regarding access may suggest that some of those rules are more restrictive than is necessary. For example, if one governing body does not require a long period of prior residence, it may be more difficult for another governing body within the same sport to demonstrate that its longer residence requirement is proportionate and thus acceptable under EU law.

After identifying the rules governing access of non-nationals to individual competitions in the selected sports, the study then maps rules and those justifications which have been offered against the general framework of EU free movement rules in an effort to determine whether the rules could, if challenged, be declared lawful by the Court of Justice of the European Union. Four categories of sporting rules emerge from this analysis. The first category of rules which do not fall within the scope of the Treaties and are thus not subject to EU law includes 'purely sporting' rules. The second category involves rules that do not in law constitute restrictions to free movement such as those rules which are inherent to the organisation and proper functioning of sport'. The third category involves rules which, whilst constituting restrictions, may be justified and proportionate. Finally, the study observes that some rules cannot be considered justified or proportionate and would therefore be unlikely to survive a legal challenge in their current form.

'Purely sporting' rules are outside the scope of EU law. EU law does 'not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only'. However, such rules must be 'limited to their proper objective'. It may be difficult to demonstrate that the exclusion of all non-nationals from all sporting competitions constitutes a 'purely sporting' rule. Furthermore, since the Court has clarified that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down', the exclusion of a specific restriction does not imply the exclusion of all restrictions within that sport. The most likely candidates as 'purely sporting' rules may include rules regarding the distribution of national representative honours and nationality rules in national team sports. It may even be argued that the distribution of medals has so marginal an economic dimension that it could fall within this category of rules.

Some sporting rules do not in law constitute restrictions to freedom of movement. Since they are not restrictions, they may not always need detailed justification. Some rules have been considered inherent in the organisation and proper functioning of sport by the Court of Justice. These could include rules limiting the number of participants in a judo tournament. Other hindrances to free movement may be so 'uncertain and indirect' that they are not in law considered restrictions and therefore do not require justification. In some cases, the Court has distinguished between non-discriminatory rules which hinder access and must be justified, and non-discriminatory rules which affect issues other than access and which therefore do not require justification. Any rule which as a matter of EU law does not require justification is likely to offer a wide margin of appreciation to sports governing bodies.

However, rules which constitute restrictions to freedom of movement must be justified and proportionate. These include all rules restricting access to sporting competitions as well as any rules involving the unequal treatment of non-nationals. Several sport-specific justifications, such as the need to ensure the regularity of competitions and the need to educate and train young players, have in principle been accepted by the Court of Justice. However, it remains doubtful whether directly discriminatory rules can be justified other than by reference to Treaty grounds of public policy, public security and public health. In such cases, it may be difficult to find a justification which the Court will be prepared to accept. Furthermore, all restrictions must be proportionate: they must be suitable for achieving the lawful aims but also the least

restrictive measures which will achieve those aims. Thus, rules established by national bodies which are more restrictive than the rules of other national bodies within the same sport may be difficult to justify since the existence of less restrictive measures in other domestic systems implies that less restrictive measures can achieve those aims.

The final category of rules identified by the study includes those restrictions which are not justified and proportionate and therefore breach EU law. Prominent past examples of these include the 3+2 rule, which restricted the access of non-nationals to professional football and was declared unlawful in the Bosman case. Even if the Court could be argued to offer a wide margin of appreciation to sporting rules in some cases, there is also a body of modern case law that demonstrates careful examination of the proportionality of such rules. The onus will be on governing bodies to demonstrate the justifications and proportionality of restrictions. In the absence such evidence, which in the context of this study was often not forthcoming despite direct requests addressed to sports governing bodies, restrictions on the access of non-nationals will be contrary to EU law.

It is clear that the principles of fairness and openness which are reinforced by Article 165 of the Lisbon Treaty have not yet been uniformly implemented by sports governing bodies within the European Union. There are many sports where the access of non-nationals is restricted by reference to nationality even in cases where no element of national representation can be identified. In some sports, access even at an amateur level is restricted by rules such as residence requirements that restrict the equal access of non-nationals. Organising bodies have not always clearly articulated the reasons for restricting the access of non-nationals, and where reasons have been articulated, they are not always in compliance with EU law. The diversity of practices also suggests that some practices within the same sport are more restrictive than others, and that the more restrictive practices may not be proportionate and are therefore not justified under EU law.

There are several ways to ensure the greater compliance of sporting rules with EU law. It may be that many sports bodies lack the expertise and specialist knowledge required in order to ensure that their practices comply with EU law and in particular that non-nationals are able to access sport where appropriate. In such cases, sports bodies, Member State administrations and non-nationals themselves would mutually benefit from the exchange of good practices and from training specifically targeted at ensuring awareness of and compliance with EU law. However, where national associations fail to make adjustments required by EU law and where Member States fail to protect the rights of non-nationals to access sports, it may be necessary for the Commission to consider more direct approaches such as infringement proceedings. Infringement proceedings and domestic legal challenges which result in preliminary references to the Court of Justice of the European Union would also offer opportunities to clarify the legal framework in those areas where sports governing bodies are legitimately concerned about a lack of legal certainty. Whilst the Court of Justice remains committed to a case-by-case analysis, a greater body of case law would provide a greater degree of certainty, in particular, where the Commission has already investigated practices and raised doubts about their restrictive effects, it may be necessary for the Court of Justice be given an opportunity to directly consider such issues. The resulting legal certainty will assist sports governing bodies to develop practices that both protect the specific features of sport whilst complying with the rights of non-nationals under EU law<sup>12</sup>.

12 In The Hague, On 5 June 2008 the ASSER international Sports Law Centre organized a seminar on "6+5 and home-grown players rule: solutions for the protection of club identity and the quality of national representative teams?" The speakers were: Dr Ruben Conzelmann, the author of "Modelle für eine Förderung der inländischen Nachwuchssportler zur Stärkung der Nationalmannschaften, Beiträge zum Sportrecht Band 30, Berlin 2008." (see also, "Models for the Promotion of

Home Grown Players for the Protection of National Representative Teams", in: The International Sports Law Journal (ISLJ) 2008/3-4 pp. 26-30), and Dr Stefaan van den Bogaert, (then) Senior Lecturer in EU Law, Faculty of Law, University of Maastricht, The Netherlands.

13 Cf., Mikhail Prokopets, "Limits on Foreign Professional Players Competing in the Russian Federation: Problems and Prospects", in: The International Sports Law Journal (ISLJ) 2009/3-4, pp. 33-37.

The Study's recommendations are summarized as follows:

"On the basis of the EU Treaty provisions on citizenship, non-discrimination on grounds of nationality and freedom of movement, the relevant secondary legislation and the case law of the Court of Justice of the EU in this respect, the following suggestions are made:

1. As far as access of foreign athletes to national competitions is concerned, it is recommended as a rule under EU law to encourage and allow the participation of foreign athletes (EU citizens and also third-country nationals to the extent that they may benefit from EU rights) as much as possible, while taking into account the constraints imposed by the organization of a specific sporting event and respecting the need to ensure the training of young players and the regularity of the competition.
2. *As far as participation of foreign athletes in national championships is concerned, it is in general recommended under EU law that these athletes be allowed to compete in the national championship of a given sporting discipline, provided that they do not exert a direct and substantial influence on the outcome of the competition. In sports which involve direct eliminations, it is accepted in principle that foreigners may be excluded from participation in the national championship, as they exert too direct and substantial an influence on the outcome of the tournament.*
3. As far as the award of national titles is concerned, under EU law winning the national title may remain the exclusive prerogative of nationals of a given country. This can be classified as a rule which comes under the scope of the EU Treaty, but does not form a restriction to freedom of movement as it is inherent to the organisation and proper functioning of national titles and proportionate and therefore does not violate EU law.
4. As far as the award of medals in championships and the setting of national records is concerned, this is likely to be a matter of purely sporting interest which does not come under the scope of application of the EU Treaty.
5. The European Commission is invited to enter into a constructive dialogue with national federations who still apply unacceptable discriminatory measures on grounds of nationality, so as to have these measures removed. If necessary, the Commission may have to undertake enforcement action so as to preserve the equal treatment rights of athletes".

#### Comment

As far as the participation by EU non-nationals in individual national championships is concerned, it should be observed that, where results in a national championship - or other national qualifier - serve (or co-serve) as a basis for the qualification of nationals to international competitions or for the composition of national teams (the national championship - or other national qualifier - being a "qualifier" for the participation in Olympic Games, continental (regional) and World Championships), direct eliminations sports could and even should lose their "open" character (direct eliminations sports - contact/combat sports and also others, non-contact sports - are characterized by a knock-out competition structure; the Olympic sport disciplines of this type are the following: badminton, boxing, fencing, judo, table tennis, taekwondo, tennis, and wrestling). Such a rule would prevent the threat of distortion of "pure" sporting competition. However, for example, in the marathon discipline, individual sport without direct eliminations, it is possible and acceptable to organize parallel competitions at once - as an international qualifier for nationals as well as an "open" national championship for all participants, nationals and non-nationals.

#### The discrimination of professional football players ("EU non-nationals")<sup>12</sup>

#### FIFA 6 + 5 rule<sup>13</sup>

Until the mid-1990s, nationality clauses (nationality quotas) were an established part of the top-class sport system in Europe. Both top national associations as well as their respective central organisations regularly stipulated that each club could only sign or let a certain number of sports-people of foreign nationality play. Since the 1960s, in the course

of setting up national professional leagues, numerous European football associations created regulations one after another that limited the possibility of signing players with foreign nationality. However, as early as 1976 the European Court of Justice cast doubt on the admissibility of completely excluding foreign players from league matches in the *Donà* ruling.<sup>14</sup> For this reason, the national regulatory frameworks of the associations either placed numerical limits on the number of foreign footballers that could be employed by clubs, or else there was a maximum number of foreign players permitted to take part in matches. For example, the regulations of the German Football Association (DFB) placed such limitations on the first and second divisions of the German league. Accordingly, a first or second division club was only granted the licence required to participate in competition if it had a minimum of 12 licensed players under contract. Of these twelve, a maximum of three foreigners was permitted. However, members of other EU states and other foreign players who had been entitled to play for a German club continuously for the past five years (of which at least three had to have been as a junior player) did not count as foreigners; these players were known as so-called “football Germans”. According to these German regulations, a number of statutes of other national sports associations recognised a concept of nationality in terms of sports law, so that clubs could in theory sign on players from other EU states without limit. However, this was also limited by the so-called “3+2 rule”, which stipulated that a maximum of two players from other EU member states or so-called “football Germans” could be used concurrently with three foreigners. In 1991, The European football governing body UEFA had adopted this “3+2 rule” permitting each national association to limit to three the number of foreign players whom a club was allowed to field in any first division match in their national championships, plus two players who had played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior (the junior requirement in fact being of a “home grown” type, see below).

In the 1995 *Bosman* ruling<sup>15</sup>, the European Court of Justice declared that such nationality clauses within association rules in professional league football - in contrast to national teams - were contrary to Community law because they breached the fundamental freedoms of the EC treaty, especially freedom of movement for workers (Art. 48 EC Treaty). Starting from the 1996/1997 season, a number of national football associations (DFB, Premier League, Primera Division, Serie A, Ligue 1) decided on this basis to implement the new framework decided on by the European Court of Justice for nationality clauses. With immediate effect, nationals of the 52 member associations of UEFA could be signed on and fielded without restriction of number. The limitations of the “3+2 rule” were therefore largely lifted by all European national football associations. For non-EU players restrictions on the part of the football associations continue to exist widely.<sup>16</sup> The *Bosman* ruling not only prohibited domestic football leagues in EU member states, but also UEFA, from imposing quotas on foreign players to the extent that they discriminated against nationals of EU states. Also, UEFA had a rule that prohibited teams in its club competitions from naming more than three “foreign” players in their match day squads.

It is clear that since the *Bosman* ruling the number of foreigners within European football leagues has risen significantly, and this has had problematical consequences, in particular, for the competition situation among clubs and the promotion of local junior players. It has also led to the call for a renewed minimum quota (“6+5 rule”) for the deployment of native players for league games. The FIFA Congress, at its meeting in Sydney (Australia) on 29 and 30 May 2008, decided to fully support the objectives of the 6+5 rule as laid down at the Congress and voted in favour of a resolution on 6+5. The 6+5 rule provides that at the beginning of each match, each club must field at least six players eligible to play for the national team of the country of the club. There is no restriction, howev-

er, on the number of non-eligible players under contract with the club, nor on substitutes to avoid non-sportive constraints on the coaches (potentially 3+8 at the end of the match). The objective of this rule is to restore the national identity of football clubs who have increasingly resorted to fielding foreign players in their squad. It is also intended to reduce the increasing gap between the big and small football clubs. The foundations of football are harmony and balance between national team football and club football. The clubs’ loss of national identity is endangering the former and has led to increasing inequality among the latter, thereby widening the financial and sporting gap between the two, reducing the competitiveness of club competitions and increasing the predictability of their results. The objective of the 6+5 rule is safeguarding (1) the education and training of young players, (2) training clubs, and (3) the values of effort and motivation in football, particularly for young players, is a fundamental element of protecting national teams and restoring sporting and financial balance to club football. The universal development of football over the last century would not continue if there were increasing inequalities between continents, countries and protagonists in football. The declared aims of the 6+5 rule are: - to guarantee equality in sporting and financial terms between clubs; - the promotion of junior players; - to improve the quality of national teams, and - to strengthen the regional and national identification of clubs and a corresponding link with the public. The objective was to have an incremental implementation starting at the beginning of the 2010-2011 season to give clubs time to adjust their teams over a period of several years: 4+7 for 2010-2011, 5+6 for 2011-2012, and 6+5 for 2012-2013.

According to the 6+5 rule, a football club must begin a game with at least six players entitled to play for the national team of the country where the club concerned is located. This means that a maximum of five players may be used at the beginning of the match who are not entitled to play for the national team of the league association concerned. The decisive criterion in applying the 6+5 rule is thus entitlement to play in the relevant national team. This is determined in Articles 15 et seq. of the implementation rules of the FIFA statutes (eligibility to play for representative teams; see above). The nationality of players is thus not always the decisive criterion for deciding whether a player is entitled to play in a national team. On the contrary, in cases of later change of nationality or the acquisition of a new nationality by a national player, this will not generally imply a right to play for the other national team. According to the INEA (Institute for European Affairs)’s Expert Opinion regarding the Compatibility of the ‘6+5 Rule’ with European Community Law (24 October 2008)<sup>17</sup>, this aspect of the mechanism of the 6+5 rule, which is clearly different from a nationality clause, should be particularly emphasized. The idea of the “foreign footballer” or the “native footballer” in the meaning of the 6+5 rule is consequently not the same as the concept of a foreigner for purposes of nationality. Besides this difference in approach of the 6+5 rule compared to foreigner clauses, a further key characteristic of the concept calls for emphasis: the limitation of the 6+5 rule only applies to the use of the players, not the composition of the squad. This means that there are no restrictions; - on the number of players not entitled to play whom a club can sign on, nor - for substitutions during the match, meaning that in the course of a game the balance could change to 3+8, the UNTEA’s Expert Opinion argues.

The 6+5 rule has on numerous occasions been described as illegal by the European Union. On 28 November 2008, following the informal Sports Ministers’ meeting in Biarritz (France) Commissioners Jan Figel’ and Vladimír Špidla + stated that their position was clear: FIFA’s 6+5 rule is based on direct discrimination on the grounds of nationality, and is thus against one of the fundamental principles of EU law.

There is as yet no binding agreement as to how the 6+5 rule will actually be formulated. FIFA expressly favours a flexible rule allowing for exceptions and transitional periods for individual member associations. This makes it clear that so far, there has not been a fixed proposal, rather, there is currently still a concept in principle for discussion.

#### Comment

The FIFA 6+5 rule for club competition implies a linkage to the FIFA eligibility rules for national representative teams that partially deviate from public nationality (naturalisation) law. One of the consequences

14 Case 13/74 *Donà* (1976) ECR 1333, para. 14.

15 Case C-415/93 [1995] ECR I-4921.

16 Cf., Roberto Branco Martins, “The Kolpak Case: Bosman Times Ten? Football Fears the Arrival of Bosman, Bosmanovic and Osman”, in: 1-2 The International Sports Law Journal (ISLJ)

(2004) pp. 26-37, also in: Simon Gardiner, Richard Parrish, Robert C.R. Siekmann (Eds), “EU, Sport, Law and Policy - Regulation, Re-regulation and Representation, The Hague 2009, pp. 227-246.”

17 At p. 27.

thereof is that a player possessing the passport of an EU Member State is not allowed to participate in club competition, if at the same time he is not eligible to represent that country internationally at a representative level. This would come down to the discrimination of local nationals ("self-discrimination"). Under the 6+5 rule EU non-nationals remain discriminated, since there are no players possessing a foreign passport may play for whatever national representative team. The 6+5 rule, being linked to the FIFA eligibility rules, does not even take into account the fact that a foreign player may have played for years in another EU country, which fact was even taken into account under the "classic" nationality clauses (quotas) like the 3+2 rule. The 6+5 rule makes the building up of the status of a "football German" etc. on the basis of "genuine link" impossible. Generally speaking, the 6+5 rule is a post-Bosman variable of the pre-Bosman 3+2 rule. It is true that the conditions of the 3+2 rule were stricter than the 6+5 rule (3+2 amounts to five foreigners and 6+5 also means five foreigners, however the "2" of the 3+2 rule needed to prove their "genuine (sporting) link" with the country in question.

#### *UEFA home grown players' rule*

One of the biggest challenges facing European football is that, since the European Court of Justice's Bosman ruling of 1995 and the rapid growth of television revenue, the richest clubs have been able to stockpile (or 'hoard') the best players, making it easier for them to dominate both national and European competitions.

At the same time, clubs have fewer incentives to train their own players or give a genuine chance to young players from their region. This trend is exacerbated by the increasingly unreliable financial compensation for training young players who leave early, and the ability of many European clubs to 'poach' young players from the age of 16 from across the European Union.

UEFA's rule aims to encourage the local training of young players, and increase the openness and fairness of European competitions. It also aims to counter the trend for hoarding players, and to try to re-establish a 'local' identity at clubs.

The UEFA Executive Committee adopted the *locally trained* or *home grown* players' rule on 2 February 2005 and they received the support of the national associations at the governing body's Congress in Tallinn on 21 April 2005.

From 2008/09, clubs in the UEFA Champions League and UEFA Europa League required a minimum of eight home grown players in a squad limited to 25. These rules are also in force in several national leagues across Europe.

UEFA introduced the rule in three phases:

Season 2006/07: minimum of four home grown players in 25-man squad

Season 2007/08: minimum of six home grown players in 25-man squad

Season 2008/09: minimum of eight home grown players in 25-man squad

Clubs have no obligation to put a certain number of home grown players on the field of play, or on the match sheet. They are entirely free in their team and match day squad selection.

UEFA defines locally-trained or home grown players as those who, regardless of their nationality, 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. Up to half of the locally-trained players must be from the club itself ("club-trained"), with the others being either from the club itself or from other clubs in the same association ("association-trained").

In May 2008, the European Commission published an independent study on the 'home-grown players' rule adopted by UEFA.<sup>18</sup> It stated that this rule requires clubs participating in the Champions League and the UEFA Cup to have a minimum number of 'home-grown players'

in their squads. Compared with the '6+5' plan proposed by 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 of workers while promoting the training of young European players. The Commission also notes that the measures are designed to support the promotion and protection of quality training for young footballers in the EU. This study had been announced in the White Paper on Sport in July 2007.

Vladimir Špidla, Member of the European Commission responsible for employment, social affairs and equal opportunities, declared that 'Compared with the intentions announced by FIFA to impose the so-called '6+5' rule, which is directly discriminatory and therefore incompatible with EU law, the 'home-grown players' rule proposed by UEFA seems to me to be proportionate and to comply with the principle of free movement of workers'.

Ján Figel, European Commissioner in charge of education, training, culture and youth, stated that 'Measures which require the top European clubs to preserve quality training structures seem to me to be necessary. The UEFA rules thus avoid the risk of professional football clubs abandoning training structures.'

According to Action 9 of the Pierre de Coubertin Action Plan, part of the White Paper on Sport, 'Rules requiring that teams include a certain quota of 'home-grown players' could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as enhancing and protecting the training and development of talented young players'. This approach received the support of the European Parliament in its Resolution on the White Paper on Sport.

'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 national association for at least three years between the age of 15 and 21. The UEFA rule does not contain any nationality conditions. It also applies in the same way to all players and all clubs participating in competitions organised by UEFA.

Although it was difficult at the moment to state with any certainty that the 'home-grown players' rule will lead to indirect discrimination on the basis of nationality, the potential risk of this cannot be discounted, as young players attending a training centre at a club in a Member State tend to be from that Member State rather than from other EU countries.

Nevertheless, the objectives underlying UEFA's 'home-grown players' rule, namely promoting training for young players and consolidating the balance of competitions, seemed to be legitimate objectives of general interest, as they are inherent to sporting activity.

Since the rules adopted by UEFA would be implemented gradually in successive stages (to include four 'home-grown players' out of 25 for the 2006/07 season and eight out of 25 as from the 2008/09 season), their practical effects would not be totally clear for a number of years.

Therefore, in order to be able to assess the implications of the UEFA rule in terms of the principle of free movement of workers, the Commission would closely monitor its implementation and undertake a further analysis of its consequences by 2012.<sup>19</sup>

In the so-called follow-up "White paper plus" of 18 January 2011, the European Commission stated that *indirect discrimination* occurs when rules apply criteria of differentiation other than nationality but lead, in fact, to the same results as direct discrimination. In this case, only rules that are necessary, proportionate to the achievement of legitimate objectives, and do not discriminate directly on the basis of nationality, may be compatible with Article 45 TFEU. For instance, rules such as UEFA's 'home-grown players' which aim to encourage the recruitment and training of young players and ensure the balance of competitions, can be compatible with EU free movement provisions (i) in so far as they are able to achieve efficiently those legitimate objectives, (ii) if there are no other measures available which can be less discriminating and (iii) if the rules in question do not go beyond what is necessary to the attainment of their objectives. The Commission would nevertheless monitor the application of these rules closely on a case by case basis in order to verify that the criteria are met.

18 . Study on training of young sportsmen/women in Europe / Home-grown players rule, April 2008; see Part II regarding, in particular the home grown

players'rule (ineum Consulting/Taj Société d'Avocats).  
19 . See, Press release IP/08/807 of 28 May 2008.

On 28 May 2008 the Commission had published an independent study carried out on its behalf to examine the effects of UEFA's rules setting a minimum number of "home-grown players" for clubs participating in its football competitions. On the basis of the results of the study, the Commissioners responsible for free movement of workers and for sport considered that the approach followed by UEFA in adopting these rules complied prima facie with the principle of free movement of workers while promoting the training of young European athletes.

'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. The UEFA rule does not contain any conditions based on nationality. It applies in the same way to all players and all clubs participating in competitions organised by UEFA. Its aim is to encourage clubs to establish efficient training centres with a view to ensuring the creation and maintenance of high-level talent pools of future professional players.

The objectives underlying UEFA's home-grown players rules, namely promoting the recruitment and training of young players and ensuring the balance of competitions, can be considered legitimate objectives of general interest. The provisions of the rules appear to be inherent in and proportionate to the achievement of such objectives. However, since the rules risk having indirect discriminatory effects and since their implementation has been gradual over several years, the Commission would carry out further analysis on the rules in 2012.

It should be noted that UEFA's home-grown players rules have not been examined from the angle of EU competition law. Similar schemes aimed at establishing quotas of locally trained players for clubs participating in team sports competitions had been brought to the attention of the Commission since the adoption of UEFA's rules. Each scheme needed to be examined taking into account the specific provisions of the scheme itself, the characteristic of the sport discipline concerned and the general context in which the scheme is proposed.

Rules leading to direct discrimination on grounds of nationality are not compatible with EU law. The same is true for rules based on criteria directly linked to nationality. For example, rules establishing quotas of players in clubs based on eligibility to play for the national team of the country where the club is located, when the main criterion for such eligibility is nationality, are not compatible with EU law.<sup>20</sup>

#### 4. Summary and conclusion

Nationality law in sport (or sport(s) nationality law) consists of a public and private part. The public part concerns specific exceptions of accelerated or quick naturalisation for sporting reasons in the "national interest". The private rules of the international sports organisations (eligibility rules for the participation in Olympic Games and world/regional international championships) in general refer to and apply public nationality legislation. However, in order to counter accelerated naturalisation, those rules have also created a level playing field" for all by introducing a residence or waiting period of a purely sporting (IOC) or a non-sporting (for example, FIFA) character which in fact amounts to a specific "sporting nationality" deviating from the public/passport nationality rules. If the waiting period is based on the last representation of the former country (IOC) as a starting point, the public international law doctrine of a "genuine link" in nationality matters in fact is reflected in sports law, i.e. the existence of a genuine connection between the sportsperson concerned and his or her local club and/or national association.

Discrimination on grounds of nationality is prohibited under EU law. Sporting rules concerning the composition of national representative teams, in particular rules that exclude non-national sportspersons, whether EU or non-nationals, from national team, have been considered as rules that do not infringe EU law free movement provisions. A (still or forever theoretical) alternative model for the composition of

national representative teams could be that such teams would represent the national football associations not on the basis of the players possessing local ("passport") nationality, but on the basis of a selection of the players that participate and have participated - for a minimum period of time to be determined - in the national championship competitions. This would result in what could be called "national FA teams" of a non-discriminatory character. Again, such an alternative could be considered as an example of "genuine link" of a purely sporting character

As far as participation of foreign athletes ("EU non-nationals") is concerned it is in general recommended under EU law that these athletes be allowed to compete in the national championship of a given sporting discipline, provided that they do not exert a direct and substantial influence on the outcome of the individual competition. In sports which involve direct eliminations (knock-out completion structure), it is accepted in principle that foreigners may be excluded from participation in the national championship, as they exert too direct and substantial an influence on the outcome of the tournament. This of course is not the case with regard to non-direct elimination sports of a timing (for example, swimming) or jury type (for example, gymnastics) character. In addition, it should be observed that, where results in a national championship serve (or co-serve) as a basis for the qualification to international representative competitions or for the composition of national teams, direct eliminations sports could and even should lose their "open" character.

In the Bosman ruling the European Court of Justice prohibited any discrimination based on nationality and declared nationality quotas in sports clubs ("nationality clauses") not in conformity with the principles of free movement for sportsmen. The FIFA 6+5 rule for club competition is of a pre-Bosman type. It implies a linkage to the FIFA eligibility rules for national representative teams that partially deviate from public nationality (naturalisation) law. Since the FIFA eligibility rule is not of a "genuine sporting link" character in sporting terms, the 6+5 rule is either. The 6+5 rule implicitly refers to the EU law discrimination exception for the composition of national representative teams and seemingly embodies the intention to expand the working of that exception also into the realm of club football. However, sporting rules establishing quotas of players in clubs based on eligibility to play for the national team of the country where the club is located, when the main criterion for such eligibility is nationality, are not compatible with EU law.

Finally, the UEFA locally trained or home grown players' rule is of a purely sporting "genuine link" character, since it is based on the location (whereabouts) of the education and training of young football players. The rule is accepted by the European Commission for the time being and will be re-evaluated in 2012. The rule may be and already is easily circumvented by contracting talented players from abroad sufficiently early in order that they be trained for at least three years between the age of 15 and 21 by the club and in the country concerned.

From the perspective of the EU law and policy concept of "sport specificity" the following observations can be made. The exception recommended for the participation of EU non-nationals in national championships abroad in direct eliminations (knock-out competition) sports, is a very clear example of sport specificity. Without the acceptance of such an exception, it would be impossible to fairly organise national championships that are at the same time "qualifiers" for international representative championships (Olympic Games, world and regional championships). The justifications (education and training of young players, protection of national teams, sporting and financial balance in club competitions) brought forward by FIFA for introducing the 6+5 rule, are not sufficient grounds for setting aside the non-discrimination and free movement principles of EU law, whereas the home grown players rule which is based on similar considerations (training of young players and promotion of balanced competition), but - other than the 6+5 rule - is in itself of a genuine, purely sporting link character, is for the time being an acceptable form of "indirect discrimination" in the European Commission's view. In this context, it is relevant to note that the argument of the education and training of young players was accepted by the European Court of Justice in their jurisprudence (Bosman and Olympique Lyonnais/Bernard cases) in relation to the justification of the training compensation system in professional football (which is in fact an exception to the abolition of the transfer system).

<sup>20</sup> Commission Staff Working Document "Sport and Free Movement", Accompanying document to the Communication from the Commission to the European Parliament, the Council,

the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", SEC(2011) 66/2.

For “non-EU nationals” restrictions on the part of the football associations continue to exist widely. Once admitted under national immigration laws and the pertinent competition regulations of those football associations, players from third countries must enjoy equal treatment if and when they are citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member State concerned. Rules that limit the opportunities of professional sportsmen from such third countries to take part in certain matches (as part of their professional activity), in comparison with sportspersons who are EU citizens, involve discrimination and run counter to the equal treatment clauses in the agree-

ments. This means that players who are nationals of a country which has concluded such an agreement with the EU cannot be excluded on the basis of their nationality from a team sent out on the field. Such clauses do not, however, amount to the conferral of a right of free movement within the EU. Because of the considerable differences between EU Member States’ immigration laws and the competition regulations of the national football associations as to the admittance of “non-EU nationals”, there is not a situation of “level playing field” (fair competition) between them regarding the recruitment of third country players.

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## Ambush Marketing

# An Analysis of Its Threat to Sports Rights Holders and the Efficacy of Past, Present and Proposed Anti-Infringement Programmes

by Jules Tyrone Marcus\*

### Summary

1. The first chapter of the presentation will outline the scope of the project and lay the foundation of the global sports business industry. Chapter 2 introduces the concept of sports sponsorship as a central feature of the commerce of sport and a major income stream for event organisers, who have a vested interest in protecting their sponsors’ investments. Additionally, the chapter will outline who owns sports rights and why ambush marketing is a threat to these rights owners. Chapter 3 addresses the theme of event bidding and will highlight that the demand for protective legislation has virtually become an automatic element in bidding to host major sports events, which themselves carry high commercial stakes. In Chapter 4, there will be an analysis of whether the implementation of special legislation to protect against ambushes of sporting events is necessary and justifiable. Furthermore, there will be an assessment of the legality of such legislation generally, with a view to discerning the enforceability of relevant provisions.
2. Chapter 5 follows with an examination of the legal landscape of two of the major upcoming sporting spectacles, namely, the 2010 FIFA<sup>1</sup> World Cup in South Africa and the 2012 Summer Olympics in London, England. The discussion herein will concentrate on the legal framework being established to regulate ambush marketing in those countries in anticipation of the approaching events. Key issues raised in Chapter 4 will be applied to the South African and English experiences. Chapter 6 juxtaposes the wide-ranging opinions held in judicial and academic circles as they relate not only to what activities constitute ambush marketing, but also to the lawfulness of these so-called “guerilla” marketing practices.
3. Chapter 7 closes this presentation, wherein it will be submitted that the fight against ambush marketing has had limited success in spite of the growing emphasis on using pro-active measures to safeguard commercial interests attached to major sporting events. It will also be contended that the use of statutory intervention as an anti-infringe-

ment weapon is both necessary and reasonably justifiable, but has often been accompanied by overzealous implementation, disproportionate restrictions and unclear legislative provisions. Specific recommendations will be made to address the concerns summarised in this closing chapter.

### Chapter One - Introduction

#### A. Background: The Booming Business of Sport

“...an estimated three billion people watched the spectacular opening ceremony of the 2008 Beijing Olympic Summer Games; and the TV rights to English FA Premier League for the three seasons, 2007-2010, have been sold by auction for a staggering GBP 1.7 billion.”<sup>2</sup>

1.1 The global sporting industry has witnessed tremendous growth over the last two decades as it relates to spectator interest, participation and television viewership. However, it is probably in the realm of sports business that the most phenomenal growth has taken place. As confirmed by Blackshaw’s observations above, sport as “big business” is an accepted reality, bringing with it tremendous income-earning potential and at the same time vulnerability to attack from commercial predators. Sports governing bodies, especially at the international level, have depended on sponsorship, media rights, merchandising and ticket sales as their main sources of revenue. In mid-December 2009, Richard Carrion<sup>3</sup> indicated that the International Olympic Committee (IOC) expected to amass over \$2 billion for the United States (US) television rights for the 2014 and 2016 Winter and Summer Olympics.<sup>4</sup> England 2018 FIFA World Cup bid chief executive, Andy Anson, also recently confirmed that the £15.5 million fundraising target set by the Bid Committee was close to realisation.<sup>5</sup> These types of figures are now commonplace in sports marketing circles and confirm the magnitude of sports business globally.

1.2 Ambush marketing has the practical effect of compromising this very potential for sports event organisers to generate revenue, especially through sponsors’ contributions. London Organising Committee of the Olympic Games (LOCOG) Brand Protection Manager, Alex Kelham, succinctly observes that ambush marketing “fundamentally undermines the key principle of sponsorship” which is exclusivity<sup>6</sup>. When exclusivity is compromised the magnetic appeal of sports sponsorship loses much of its effect and the ramifications can be telling. Legal commentators like Lewis and Taylor add that “by offering sponsors exclusivity, a rights owner can sell fewer but higher value exclusive packages and thereby raise more sponsorship income overall.”<sup>7</sup> Few will dispute the valuable role played by sponsors in funding and delivering world-class sporting events. Likewise, not many would contest that rights owners who seek to produce

\* The De Montfort University, Leicester LLM: Sports Law And Practice Project.

1 Federation Internationale de Football Association, the world governing body for football.

2 “Sport, Mediation and Arbitration” -Ian Blackshaw at page 3.

3 The International Olympic Committee negotiator for US television rights.

4 www.sports-city.org/news\_details.php?news\_id=10347&cidCategory=33,

December16, 2009 accessed on December 24, 2009.

5 www.sports-city.org/news\_details.php?news\_id=10377&cidCategory=1, December18, 2009 accessed on December 28, 2009.

6 “Rights holder protection: how to combat the practice of ambush marketing” - C5 Online Sports Law & Business Conference, April 29, 2009.

7 Sport: Law and Practice” -Adam Lewis and Jonathan Taylor (second edition) at paragraph G 5.31.

stellar sporting spectacles, face the reality of ambush marketing with much chagrin.

## B. Aim And Scope of This Paper

- 1.3 It is the goal of this paper to examine the practice of ambush marketing and to assess the threat that it poses to sports rights owners. The paper will analyse the legality of ambush marketing, and explore what tools are available to event organisers and their commercial partners to prohibit and/or regulate the practice. The efficacy of these protective measures will also be addressed as will and comparative jurisprudential analyses will be made across various jurisdictions.
- 1.4 The treatise will focus primarily on sporting events during the last 25 years, from 1984 to 2009, with a brief look at major events in the upcoming decade as well. It will be discovered during this presentation that 1984 was a turning point in the evolution of sports business, especially in the Olympic Movement. Since then, sponsorship, marketing and brand enhancement in sport have undergone a significant transformation. Where convenient, this study will be a chronological one assessed in three phases, while on other occasions the breakdown will be according to event or jurisdiction. The time periods to be considered are as follows:
  1. Phase 1: 1984-1999
  2. Phase 2: 2000-2009
  3. Phase 3: 2010-2019
- 1.5 Due to their sheer magnitude, the Olympic Games and the FIFA World Cup will dominate this paper. However, other events like the International Rugby Board's (IRB) World Cup, the International Cricket Council's (ICC) World Cup and the Commonwealth Games<sup>8</sup> have grown in stature, popularity and commercial viability and as such they will receive due attention.
- 1.6 The hosting of the aforementioned events in today's commercial environment brings with it a complex matrix of rights that must be clearly articulated and carefully navigated. The breadth of the sports business industry has made it incumbent upon stakeholders to understand the rights landscape in which they find themselves.<sup>9</sup> Verow refers to this landscape as "the complete pattern and picture of the relevant rights that surround a major event, team, league or personality."<sup>10</sup> His admonition to comprehend the full spectrum of commercial rights is opportune, as a failure to do so can create a contractual conundrum that in the past has led to many disputes. It is therefore prudent to understand not only what rights are at stake in the business of sport, but also who the true rights owners are.
- 1.7 In the next chapter, the concepts of sponsorship and sports rights will be introduced as will the substantive theme of ambush marketing.

## Chapter Two - Defining Sponsorship, Sports Rights and Ambush Marketing

### A. Introducing Sponsorship

"For many brand owners such as Coca-Cola, Shell, Gillette and Vodafone-sports sponsorship has been pivotal in their marketing communication campaigns and provided these very different brand owners with a global brand communication platform."<sup>11</sup>

- 2.1 Kolah's description of sports sponsorship as "pivotal" is apposite. The practice of sponsoring events, teams and individuals has cemented its place as a trump card in many marketing campaigns today. Although the recent Tiger Woods' debacle has been a sobering reminder of the need for morality clauses in endorsement agreements and perhaps "reputational risk" insurance policies<sup>12</sup> as proposed by Stern<sup>13</sup>, the appeal of sports sponsorship is still very strong.
- 2.2 The European Sponsorship Association (ESA) views sponsorship "as a cost-effective marketing tool"<sup>14</sup> adding that "it represents an average 17% of all marketing expenditure."<sup>15</sup> In early 2009, the ESA went as far challenging taxpayers to "understand the power of sports sponsorship"<sup>16</sup> even in the context of a global economic downturn. Moore agrees that sports sponsorship "can be a highly lucrative investment,"<sup>17</sup> therefore confirming the indubitable primacy given to sponsorship as a revenue stream.

- 2.3 The magnetism of this marketing tool has been attributed to multiple factors including its provision of a "clutter free platform"<sup>18</sup> where competitor traffic is markedly reduced. The myriad avenues through which sponsors can associate with valuable sports properties is equally attractive, ranging from naming rights deals to broadcast, team and individual sponsorship. Innovative sponsors, like Sony Ericsson, are also taking advantage of new media platforms and social networking opportunities to enhance brand awareness.<sup>19</sup> Ericsson's parent company, Sony, has a US\$300million tier-one sponsorship agreement with FIFA<sup>20</sup>, which goes a far way in promoting its own image and reputation among consumers. For FIFA, such investments are worthy of strong legal protection if the value of future football-associated rights is to remain high.

### B. Sports Rights

"The first and most fundamental point is that English law does not recognise the existence of proprietary rights in a sports event per se."<sup>21</sup>

- 2.4 *Prima facie*, this principle appears unorthodox. Becker observes that in British Commonwealth countries like the United Kingdom, Australia, New Zealand, Canada and South Africa, plus in other nations like Germany, Switzerland, Sweden and Japan, an independent proprietary right in an event is not recognised.<sup>22</sup> The Australian authority of *Victoria Park Racing*<sup>23</sup> has been identified as the leading source from which the abovementioned legal proposition is gleaned. Latham CJ propounded that "a 'spectacle' cannot be 'owned' in any sense of the word."<sup>24</sup> The plaintiff, who operated a race course, sought to prevent proprietors of neighbouring property from broadcasting races to third parties, but its attempt to invoke a quasi-property right failed. The *Sport and General Press* decision ("*Our Dogs*" case)<sup>25</sup> was cited in *Victoria Park* as establishing that a plaintiff would have to rely on contractual rights if he desired to exclude another from taking photographs at an event he organised. The Court of Appeal agreed with Justice Horridge that the plaintiffs had "no right of property" and therefore no cause of action.<sup>26</sup>
- 2.5 Notwithstanding this, it is also accepted that in practical terms, sports rights do exist. Legal commentators hold the view that these rights are derived from a combination of principles arising from property, contract, tort and intellectual property law.<sup>27</sup> Real property law offers rights of access to the event venue, whether that venue is owned by the event organiser or a venue hire agreement has been signed. Contract law allows the event organiser, through ticketing conditions, to control the volume and conduct of attendants. This would have been the preferred route for the plaintiffs in *Our Dogs*. The law of tort covers the wide spectrum of civil wrongs and involuntary obligations<sup>28</sup> that offers remedies against breaches. Intellectual property law, especially trade mark law, creates an avenue for the

8 Organised by the Commonwealth Games Association (CGA).

9 "Sports Business: Law, Practice and Precedents." (second edition)-Richard Verow, Clive Lawrence, Peter Mc Cormick at paragraph 6.2.

10 *Ibid*.

11 "Sponsorship: Strategies for Maximising the Return on Investment"-Executive Summary, Ardi Kolah.

12 "Companies could insure themselves against sponsor scandals"-[http://www.sportscity.org/news\\_details.php?news\\_id=10378&idCategory=1](http://www.sportscity.org/news_details.php?news_id=10378&idCategory=1), December 18, 2009 accessed on December 28, 2009.

13 DeWitt Stern, US insurance broker, *ibid*.

14 "Sponsorship Returns Good Business Value"-ESA Press Release-9 March 2009.

15 *Ibid*.

16 [www.sportbusiness.com/news/169169/european-sponsorship-association-defends-sports-sponsorship](http://www.sportbusiness.com/news/169169/european-sponsorship-association-defends-sports-sponsorship), created by Kevin Mc Cullagh on April 8, 2009, accessed on April 9, 2009.

17 "Sports Law and Litigation" (second edition)-Craig Moore, at page 55.

18 "Sport: Law and Practice"-Adam Lewis and Jonathan Taylor (first edition) at paragraph D 5.6.

19 "Sony Ericsson turns to new media for World Cup"-[http://www.sportscity.org/news\\_details.php?news\\_id=10382&idCategory=33](http://www.sportscity.org/news_details.php?news_id=10382&idCategory=33), December 18, 2009 accessed on December 28, 2009.

20 *Ibid*.

21 "Sport: Law and Practice"-Adam Lewis and Jonathan Taylor (second edition) at paragraph G 1.2.

22 The Essential Legal Guide to Events"-David Becker, Chapter 1 at page 7

23 *Victoria Park Racing v. Taylor*(1937) 58 CLR 479, HC of A.

24 Latham CJ at page 497.

25 [1917] 2 KB 125 (CA).

26 *Ibid* at page 127.

27 Lewis and Taylor, *supra*, at paragraph G 1.3 and Becker, *supra*, at page 7.

event owner to protect and exploit intellectual property rights, including logos, mascots and event marks in general.

- 2.6 It is therefore submitted that although the establishment of sports rights under English law is somewhat complex, there are nevertheless valuable rights to be owned in today's sporting context. Similarly, the question of the *bona fide* owner of these rights is sometimes a vexed one. Kobel's view that the entities "who created the reputation and who can claim rights over the values associated with the Olympic Games or the World Cup"<sup>29</sup> are the IOC and FIFA reflects the reality and practice of rights ownership. Ultimately, this matter has been decided in favour of event organisers, who are usually influential sports governing bodies controlling their respective sports on the national and international levels. Hence, today's major sports rights holders include the said IOC and FIFA in addition to UEFA<sup>30</sup>, the ICC, the IRB and the IAAF<sup>31</sup>.
- 2.7 The rights associated with the events organised by the above entities carry unquestionable value financially. The corollary of owning valuable rights is the desire and need to safeguard them from anything that may diminish their worth. Ambush marketing is seen as one of the biggest threats to lucrative sports rights.

### C. Defining Ambush Marketing

*"Ambush marketing is an amorphous concept"*<sup>32</sup>

- 2.8 The plethora of definitions for 'ambush marketing' lends credence to Johnson's concise analysis. Burton and Chadwick state that it "is a form of strategic marketing which is designed to capitalize upon the awareness, attention, goodwill, and other benefits generated by having an association with an event or property without an official or direct connection to that event or property."<sup>33</sup> The use of the term 'strategic' in this definition suggests planning and forethought on the ambusher's part. Welsh defines it as "a name given to competitive assaults on ill-conceived and poorly implemented sponsorships."<sup>34</sup> This definition addresses the conduct of both parties. The actions of the ambusher represent an assault on sponsors. At the same time, sponsors are seen as leaving lacunae in their marketing strategy making them partially blameworthy for the ambushes to which they are subject. Lewis and Taylor concur noting that the "activity is often carefully planned to take advantage of real or apparent loopholes in the legal protection available..."<sup>35</sup> A Swiss economic report<sup>36</sup> describes ambush marketing as "the behavior of an advertising party not authorised by the event organizer which consciously tries to establish a link to the event in order to take advantage without having made a contribution to it."<sup>37</sup> This report portrays the ambusher's conduct as calculated and aimed at achieving free commercial gain. The IOC says that ambush marketing is "any attempt by an individual or an entity to create an unauthorized or false association (whether or not commercial) with the Olympic Games, the Olympic Movement, the IOC, the National Olympic Committee of the Host Country or the Organizing Committee of Olympic Games ("OCOG") thereby interfering with the legitimate contractual rights of official marketing partners of the Olympic Games"<sup>38</sup> The IOC's broad definition reflects an understandable pre-occupation with protecting commercial interests.
- 2.9 These definitions and others have a common thread: unauthorised association. In fact, "ambush by association" is one of two distinct

categories of ambush marketing. Becker notes that ambush marketing by association occurs "where ambushers attempt to associate themselves to the event in some way" while ambush marketing by intrusion happens "where ambushers attempt to piggy-back on spectator and media exposure in relation to the event."<sup>39</sup> Becker's distinction presents only a negligible difference between association and intrusion ambush. Morgan's analysis is more helpful as he defines association ambush as occurring "where the advertiser misleads the public into thinking that the ambusher is an authorised partner..." whereas intrusion ambush seeks unauthorised brand exposure "in the vicinity of an event."<sup>40</sup> In Morgan's assessment, association ambush attempts to deceive and therefore has common features with the tort of passing off. Intrusion ambush, though not limited to this, has as a central feature activity that occurs close to the event venue.

- 2.10 Ambush by association is a common occurrence when an entity sponsors the broadcast of the event, although it is not an official event partner. This occurred in 1984 when Kodak sponsored the ABC television broadcasts of the Los Angeles Olympics, although the worldwide sponsor was Fuji.<sup>41</sup> In like manner, fans mistook Sony to be an official sponsor of the 1991 World Rugby football Cup because of its television sponsorship of that event<sup>42</sup>. Ambush by intrusion was evident at the 1996 Atlanta Olympics where Nike, a non-sponsor, bought billboards in and around the Games' venues.<sup>43</sup> Reebok was the official footwear sponsor of those Games. Nike also ambushed the 1999 Rugby World Cup by placing a huge Nike banner over a car park near the Millennium Stadium in Cardiff, Wales.<sup>44</sup>
- 2.11 Notably not everyone sees ambush marketing as negative, wrong or illegal. Also called "parasitic marketing" or "guerilla marketing," some see the practice as creative, innovative and clever. Such feedback was given when Great Britain's Linford Christie appeared for a media interview in conspicuous Puma contact lenses at the 1996 Atlanta Olympics. Again, Reebok was the victim of a strategic ambush from a rival footwear manufacturer.
- 2.12 Morgan highlights the viewpoint of the opponents of the practice, noting that the "major argument against ambush marketing is that it reduces the commercial appeal of events which are ambushed."<sup>45</sup> This is understandable from the viewpoint of sponsors who have paid for and expect exclusivity in their product or service category. For sponsors, ambush marketing damages the commercial relationship between themselves and the event organiser. The prospect of being ambushed causes sponsors to question the prudence of large investments if others can get commercial leverage without paying. This pursuit of free rights of association exploded in the 1980's.

### D. Ambush Marketing: Its Origin and Its Threat

- 2.13 The term "ambush marketing" was reputedly coined by Jerry Welsh while he was working at American Express.<sup>46</sup> He holds the view that the "roots of Ambush Marketing can be found in several phenomena typical of modern sponsorships."<sup>47</sup> Among these phenomena are escalating prices for exclusive sponsorships and increasing levels of marketing competition.<sup>48</sup> Johnson observes that "the rise of ambush marketing is directly related to the media attention given to sports events."<sup>49</sup> Indeed, it was a sport event, the 1984 Los Angeles Olympics, that was the catalyst for the ambush marketing movement. The commercial environment at that time was relaxed

28 Clerk & Lindsell on Torts (19th edition), Chapter 1 at paragraphs 1-02 and 1-03.

29 "International Report on Question B: Ambush Marketing- Too Smart to be Good? Should Certain Ambush Marketing Practices be Declared Illegal and If Yes, Which Ones and under What Conditions?"-Pierre Kobel at p.7.

30 Union des Associations Européennes de Football, the governing body for European football.

31 International Association of Athletics Federations, the world governing body for athletics.

32 "Phillip Johnson-International Sports

Law Review, supra at page 24.

33 "Ambush Marketing in Sport: An Assessment of Implications and Management Strategies"-Nicholas Burton and Simon Chadwick.

34 Definition used by Jerry Welsh as quoted in "Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event"-Phillip Johnson at page 6, paragraph 1-14.

35 Lewis and Taylor, supra, at paragraph G 1.21.

36 Report from the State Secretariat of Economic Affairs.

37 "Switzerland: new legislative steps against

ambush marketing"-Daniel Hufschmid-International Sports Law Review 3 (Aug) 77-78.

38 IOC Requirements on Brand Protection and Ticket Touting.

39 "The Essential Legal Guide to Events"-David Becker, page 14, paragraph 1.5.5.

40 "Ambush Marketing: New Zealand is in search of events to host"-Owen J Morgan, European Intellectual Property Review 2008, Volume 30 (11) at page 454-462.

41 "Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event"-Phillip Johnson at page 8, paragraph 1-18.

42 "Sports Law" (3rd edition) Simon Gardiner, John O'Leary, Mark James and Roger Welch, at page 458.

43 Johnson, supra, at note 41.

44 Becker, supra, at paragraph 1.5.5.

45 Morgan, supra, at note 40.

46 Phillip Johnson, supra, note 41 at page 6, paragraph 1-14.

47 "Ambush Marketing: What it is, what it isn't"-Jerry Welsh-http://www.poolonline.com/achive/issue19/iss19feas.html [accessed on April 9, 2009].

48 *Ibid*.

49 Johnson, supra at paragraph 1-16.

- enabling almost any interested entity to associate itself with the Olympics. In fact, the 1976 Montreal Summer Olympics reportedly had 628 sponsors attached to it.<sup>50</sup>
- 2.14 Former IOC head, Juan Antonio Samaranch, is credited with changing the face of the Olympic Games by conceptualising 'global sponsorship and broadcasting rights.'<sup>51</sup> Additionally, President of the Los Angeles Games Organizing Committee, Peter Ueberroth, together with Samaranch introduced the concept of exclusivity into the sponsorship framework. With sponsor exclusivity now a reality, competitors who were not accorded sponsorship rights had to find alternative means of associating with the Olympics. It is in this context that ambush marketing was conceived.<sup>52</sup>
- 2.15 Whitehead raises a concern shared by others<sup>53</sup> that if "a sponsor perceives that it is not getting value because of dilution of its visibility due to excessive ambush marketing it will undoubtedly consider not sponsoring the event in question in future."<sup>54</sup> Herein resides a core problem with the practice. Kobel, however, expresses the view that any loss in sports revenues due to ambush marketing is only hypothetical since the "sponsorship attribution process usually consists in a competitive bid system resulting in optimized prices and revenues."<sup>55</sup> Even if he were statistically correct, that provides little reassurance to those entities whose marketing tactics often involve voluminous monetary investments over lengthy periods.
- 2.16 With such high stakes, many financial and legal consequences stand to follow. Evidently, the line between what is lawful and what is not can easily get blurred in the context of competing interests and juridical complexities. Indeed, difficult questions have been raised regarding which activities are illicit and which ones comply with legal requirements. It appears that the answer to some of those questions depends on the country in which the ambushing activity occurs. This matter will be more closely examined in Chapter 6.
- 2.17 Whatever the legal status of ambush marketing may be, nations hopeful of hosting sporting events must be pro-active. The next chapter, with an emphasis on Olympic bidding, will look at the background to a host nation being awarded a major sporting event and how event organisers plan in advance to regulate or eliminate ambush marketing.

### Chapter Three - The Bidding Process and the Call to Implement Protective Legislation

#### A. The Appeal of Major Event Bidding

*"The world of major sporting events continues to evolve at a very fast pace. One of the most significant changes witnessed over recent months has been the recognition by many cities around the world that major events can be a new and important 'route to market.' In other words they see the global appeal that major events offer as an important part of a city's strategy to raise its profile on the world stage."*<sup>56</sup>

- 3.1 Mann's contextual framework for major event bidding is helpful. Governments worldwide have come to appreciate the benefits associated with event hosting, both within and outside the sports sector. Mann adds that "place branding" is essential for countries seeking to increase their share in the tourism, commerce and finance markets.<sup>57</sup> It is this commercial element that has changed the veneer of modern sport and that has made bidding for major events a worthy pursuit. Brands matched with major sporting are commercially vogue because of their economic and marketing potential. Protecting these brands must occur even before the right to host the event is won.

50 Burton and Chadwick, *supra*, note 33.

51 "Look out! It's an ambush!"-Phillip Johnson-International Sports Law Review 2/3.

52 *Ibid.*

53 Including David Becker, *supra*, at page 14.

54 Whitehead, Mark-"Ambushing the Ambushers"-Sports Law Administration and Practice, April 2000 at page 8.

55 Pierre Kobel, *supra*, note 29.

56 "The benefits of bidding"-Peter Mann,

founding director, pmplegacy (Source:www.pmplegacy.com).

57 *Ibid.*

58 "Sports Law" (3rd edition)-Simon

Gardiner, Mark James, Roger Welsh et al, at page 458.

59 Kelham, *supra*, op.cit. 3.

60 International Paralympic Committee.

61 Kelham, *supra*.

62 "Beijing introduces Ambush Marketing law for 2008 Olympics"-International Sports Law Journal 2003/1 p.29.

- 3.2 It is axiomatic that the Olympic Games and the FIFA World Cup are the two most high profile sporting spectacles. It is also now common practice for bidding nations to give the IOC and FIFA undertakings that brand protection will play a central role in hosting the Olympics and the World Cup respectively. Divergence only occurs in the methods used for such protection. Recent trends suggest, though, that legislative intervention has become the regular prelude to event hosting and that various factors influence the anti-infringement measures.

#### B. Policies Underpinning the Fight against Ambush Marketing

- 3.3 Gardiner identifies a simple and understandable motivation behind ambush marketing protective measures noting that "sponsors do not get value for the considerable sums they have expended on the particular sponsorship" often making them irate.<sup>58</sup> The starting point, then, is the protection of sponsors' investments, an economics-based factor.
- 3.4 Such motivation cannot be trivialised in light of the vast contributions in cash and kind made by sports sponsors. The loyalty shown by event organisers to their commercial partners is premised on the understanding that these stakeholders' investments are critical to the future of successful sports administration, management and governance. Kelham identifies the centrality of strong contractual relationships which straddle various echelons of the commercial ladder.<sup>59</sup> In the Olympic context, she highlights the interrelationship between the IOC, IPC<sup>60</sup> and the host city as it relates to observing both the Olympic Charter and the extensive provisions of the Host City Contract<sup>61</sup>.
- 3.5 Social and cultural considerations can overlap with the commercial ones depending on the status of host nation. This was prevalent during Cricket World Cup, West Indies 2007, hosted by nine Caribbean countries. The efforts to have both a safe and commercially 'clean' event ultimately led to a sporting spectacle robbed of atmosphere and vitality. Confused cricket fans at warm-up matches were compelled to remove T-shirts with non-sponsor branding in order to protect the commercial rights of event partners such as Hero Honda, LG and Pepsi. This was reminiscent of the Germany 2006 World Cup Bavaria beer ambush where supporters of the Dutch team were directed to remove their orange lederhosen which displayed Bavaria branding. The removal was commanded because the official beer of that World Cup was Budweiser.
- 3.6 What distinguished the Caribbean experience, though, was its inexperience as a hosting region which resulted in some timidity in imposing cultural motivations on the economic ones. That region is inherently festive, a feature that has characterised the way cricket is played and the atmosphere created by the crowds. The generally held view after the event was that ICC policy was given primacy over spectator passion raising questions about whether the enactment of sport-specific legislation, generally, is done in a vacuum, oblivious to other interests and third party concerns.
- 3.7 Indeed, the passing of the legislation in the Caribbean gave effect to many of the objectives stated in the policy considerations for the implementation of the ICC Cricket World Cup West Indies 2007 Bill, 2006 including the protection of commercial rights, the control of ambush marketing and the protection of CWC marks, indicia and images. It appears, then, that there are times when it is appropriate for host nations to insist that the overall 'good of the game' must entail a multifaceted approach.
- 3.8 Equally, the role of political motivation cannot be underestimated as the award of the 2008 Summer Olympics to Beijing, China indicated. Blackshaw noted the "mixed reaction" to China "in light of a poor human rights record"<sup>62</sup> but also commended the IOC for preferring engagement to ostracism. The socio-economic success of the Games appears to have justified a political gamble taken by the IOC.
- 3.9 The surprising Beijing choice was compounded by China's poor brand protection record which led the BP Council<sup>63</sup> to ask "what happens when the world's biggest opportunity for merchandising revenue meets the world's counterfeiting capital?"<sup>64</sup> There was noth-

ing in China's history of IP protection to inspire confidence that it would protect the Olympic brand. Yet, it was an opportune time for China to prove detractors wrong, by delivering a world-class event while leading the anti-ambush charge when it mattered most. It can be reasonably inferred that China's motivation therein was more political than economic.

- 3.10 Evidently, the call for anti-infringement legislation has multiple roots. The evidence of event hosting today suggests that those roots are only going to become more firmly established with the passage of time.

### C. Legislation Demanded

"The IOC, as early as in the phase of bidding for the Olympic Games, requires a guarantee from Candidate Cities, confirming that prior to the commencement of the Olympic Games, legislation will be passed in the Host Country which is necessary to effectively reduce and sanction ambush marketing..."<sup>65</sup> [Emphasis added]

- 3.11 The IOC's requirement is indicative of its awareness of the threat of ambush marketing to the Olympic commercial programme and that of its event sponsors and partners. The IOC's goals are to reduce the practice of ambush marketing, punish offenders and control the extent of commercial activity taking place in and around Olympic venues. The brand protection measures of bidding nations must mirror those objectives. Additionally the Organising Committee "must study existing laws, identify those areas where additional legislation is needed to fulfill the IOC's requirements and work to develop and gain approval"<sup>66</sup> for different types of legislation that would protect Olympic intellectual property (IP) rights, control Games operations and combat ambush marketing practices.
- 3.12 The IOC's mandate, while clearly defined appears self-contradictory. On one hand, a guarantee must be given that legislation will be passed. The inference here is that some new or additional law must be passed to regulate ambush marketing. Yet, this requirement is followed by the instruction to "study existing laws" and discern "where additional legislation is needed." That suggests the existing legal mechanisms may suffice, negating the need for further legislative guarantees. It is submitted that the latter instruction should prevail over the former as it promotes careful consideration of laws before there is an overzealous and premature implementation of new laws.
- 3.13 The question then begs: is it fair for a country with world-class facilities, a strong sporting history, financial support, an efficient transportation system, five-star hotels and a visionary post-event legacy plan to be rejected from hosting a major sporting event because it did not intend to enact brand protection legislation? The danger that these influential world governing bodies face is that although their objectives are legitimate, they are bordering on micro-managing the hosting of major events. It is in this context that competition law concerns are raised, since most sports governing bodies hold dominant market positions due to the fact that their gover-

nance structure gives them a virtual monopoly. In the European context, the competition provisions of the EC Treaty<sup>67</sup> may very well apply if the decisions of the sporting bodies distort trade between member states or are deemed anti-competitive in light of dominant positions held in the sports market. EC law, though, does not frown upon the *existence* of a dominant position, but the *abuse* of it.

- 3.14 Rejected European nations can conceivably present the case that their rejection as a host nation has distorted competition in the European sports market because of a failure of the governing bodies, as undertakings, to apply objective criteria during the bidding process. Perhaps the legal minds in Spain will pursue that route some day having lost consecutive Olympic bids for the 2012 and 2016 Summer Olympics. The *Danish Tennis Federation*<sup>68</sup> and *Hendry*<sup>69</sup> rulings confirm the need for objectivity, fairness and transparency at the bidding stage of a selection process.
- 3.15 This alleged "micro-management" of event hosting by powerful world bodies is a reflection of the changed priorities of modern sporting culture. Previously, the salient factor in bidding was the quality of facilities. While that remains a central feature, the paramount consideration is now the protection of commercial interests so that brand protection and strong intellectual property security are pertinent and perhaps, indispensable elements of a bid package. Recent bids highlight the emphasis placed on IP protection in prospective host nations.

### D. Bids In Phases 2 and 3: 2000-2019

"The Scandinavian nations are also becoming more competitive when bidding to host showcase sport events, while Turkey and the Middle East receive strong support from their respective governments who are expressing a desire to host a mega event in the future"<sup>70</sup>

- 3.16 Walters' synopsis sets the backdrop for the popularity of major event bidding today and the increasing trend towards government support in that process. Since 2000, commercial traffic on the high-way of sport has reached unprecedented levels with major events occurring practically every year. This bid analysis begins with arguably the world's largest sporting spectacle.

#### (I) Olympic Bids

- 3.17 The IOC has established guidelines for bidding nations.<sup>71</sup> The expectation is laid out that a host city and its National Olympic Committee (NOC) should ensure the protection of Olympic properties and that they "shall obtain from their government and/or their competent national authorities, adequate and continuing legal protection..."<sup>72</sup> The mandate originates not only in the boardroom of the IOC executive but more significantly in the commercial programme of IOC sponsors, who provide 40% of Olympic marketing revenue<sup>73</sup>.
- 3.18 A host city and its NOC are obliged to protect the Olympic symbol, the Olympic motto as well as the terms 'Olympic' and 'Olympiad.' It is pragmatic for this to be realised thorough legislation, unless the IOC grants permission to each of approximately 205 NOC's to register the terms as word marks, an admittedly cumbersome process. Trade mark law permits, *inter alia*, the registration of words as trade marks, especially if the principal requirement of distinctiveness is met.
- 3.19 NOC's have also sought to obtain Olympic IP protection by persuading their governments to become signatories to relevant international treaties like the 1981 Nairobi Treaty,<sup>74</sup> although that Treaty applies only to the Olympic symbol and not the other Olympic properties.<sup>75</sup> There is general agreement that the Treaty was not popular because, as Michalos notes, "the requirement of the authorisation of the IOC, rather than of the respective national Olympic Committee, is probably the stumbling block of many nations."<sup>76</sup> Johnson adds that a real problem is created with such an expectation since a country's domestic law may have already granted rights in the Olympic symbol to the NOC, as is the case in the USA<sup>77</sup> under its 1978 Amateur Sports Act.<sup>78</sup>
- 3.20 The upshot is that, at least with regard to the Olympics, the imple-

63 Brand Protection Council.

64 "Can China protect the Olympic Brand?" - <http://www.bpcouncil.com/apage/printv/638.php> [accessed on May 8, 2008].

65 IOC Requirements on Brand Protection and Ticket Touting, *supra*.

66 *ibid*.

67 1957 Treaty establishing the European Economic Community (Treaty of Rome) amended by the Treaty of Amsterdam which came into force on May 1, 1999.

68 [1996] 4 CMLR 885.

69 *Hendry v. World Professional Billiards & Snooker Association*[2002] 1 ISLR SLR-1.

70 "Bidding for Major Sports Events: Key Issues and Challenges faced by Sports Governing Bodies in the UK"-Dr. Geoff Walters, Birkbeck Sports Business

Centre, Research Paper Series, Volume 1, Number 1, September 2008 at page 4.

71 Rules of Conduct for all cities wishing to organise the Olympic Games-2010 and 2012 bid process to be found at [http://multimedia.olympic.org/pdf/en\\_report\\_810.pdf](http://multimedia.olympic.org/pdf/en_report_810.pdf).

72 2012 Candidature Procedure and Questionnaire/Part 1/Chapter 1.5.

73 [www.olympic.org](http://www.olympic.org).

74 The Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

75 Johnson, *supra*, at paragraph 4-03.

76 "Five Golden Rings: development of the protection of the Olympic Insignia"-Christina Michalos, *International Sports Law Review* [2006] 3 (Aug) pp.64-76.

77 Johnson, *supra*, at paragraph 4-06.

78 36 U.S.C. Section 220501-29.

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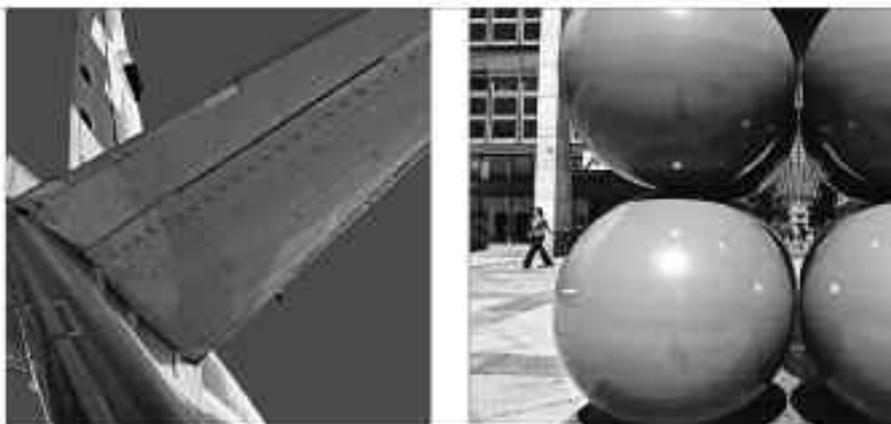
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mentation of specific legislation is the preferred option for bidding nations. Alternatively, the existing legal structure must be potent. A few salient observations can be made from the recent race to host the 2016 Summer Olympics.

(a) The unsuccessful 2016 bids

- 3.21 Expectedly, “Chicago 2016” “Tokyo 2016” and “Madrid 2016” were all registered in their respective Trade Mark offices. The City of Chicago enacted the Olympic Approval Ordinances 2007 and 2009 while the State of Illinois passed the 2016 Olympic and Paralympic Games Act. Chicago also relied on existing legislation like the 1946 Trade Mark Act (Lanham Act), the 1999 Anticybersquatting Consumer Protection Act, the 1976 Consumer Protection Act, the 1984 Trademark Counterfeiting Act and the 1978 Olympic and Amateur Sports Act as part of its legal strategy to protect the relevant event marks.
- 3.22 Japan’s legal approach was different to Chicago’s in that it proposed to rely solely on existing legislation like the Unfair Competition Prevention Act to protect the Games. The IOC Evaluation report notes that in Japan “new enabling legislation would be introduced *if required*.” [Emphasis added] Japan’s approach highlighted that not all stakeholders feel the desire to rush to *sui generis* ambush marketing legislation.
- 3.23 Since 1990, Spain enacted a Sports Law 10/1990 dated October 15<sup>79</sup> which offers protection to Olympic properties generally and is not limited by a sunset provision. The Spanish law, notably, purports to protect the words “Olympic Committee” and “Paralympic Committee” which is broader than most other jurisdictions and perhaps unnecessary. No additional legislation was drafted in Spain for its 2016 bid and reliance was placed on existing laws.
- 3.24 Despite its failure, one noteworthy aspect of the Chicago Bid was that an event like the Olympics if “held in the United States is designated as a National Special Security Event.”<sup>80</sup> The effect of this is to allow the US Federal Aviation Administration to restrict advertising in the airspace above the 2016 Games.<sup>81</sup> This is a useful measure that can have great utility in the future of event bidding.

(b) Rio’s Success

- 3.25 The Rio Bid contained a compact brand protection programme. Both the State and City of Rio de Janeiro had already passed Olympic Acts.<sup>82</sup> “Rio 2016” was registered with the Brazilian Trademark Office while brand protection was based on the 1988 Federal Constitution, the 1996 Industrial Property Law, the 1998 Pelé Law and the 2003 Counterfeit Law.
- 3.26 Similar to Tokyo, the Brazilian approach was to amend the existing legislative framework “as necessary to accommodate any Games-specific requirements.”<sup>83</sup> Article 124 of the Industrial Property Law is particularly relevant to the ambush marketing fight as it “prohibits companies that are not official sponsors, providers or supporters of the Olympic Games from registering any item, brand or symbol which could easily be confused with official partners and symbols.” As a result of its legislative proactiveness, Brazil was well placed to prove that Olympic and other commercial brands would be secure.

(II) Other Event Bids

“Venue guarantees and agreements are in place and legislation is drafted and ready to be introduced should we be successful.”<sup>84</sup>

- 3.27 Since that statement was made, Glasgow won the right to host the 2014 Commonwealth Games. Lewis and Taylor observe that “the announcement in late 2007 that Glasgow had won the bid to host the 2014 Commonwealth Games was closely followed by the introduction of the Glasgow Commonwealth Games Bill, which sought to give effect to the commitments made by the Scottish Government as part of the bid...”<sup>85</sup> Bidding countries for the Commonwealth Games are therefore also obliged to make commitments that legislation will be passed.
- 3.28 Similarly, the South African government gave guarantees to FIFA that, if awarded the 2010 World Cup, it would ensure brand protection of official partners. In this regard, the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006 and the Second 2010 FIFA World Cup South Africa Special Measures Act 12 of 2006 were passed. These statutes will be considered in greater detail in Chapter 5. Likewise, nine host countries in the Caribbean passed ‘Sunset Legislation’ in order to meet ICC host nation requirements for the 2007 Cricket World Cup while New Zealand has already passed legislation as it anticipates hosting the 2011 Rugby World Cup and the 2015 Cricket World Cup.<sup>86</sup>

E. Conclusion

- 3.29 The reasons for choosing one bidding territory over another are not usually given after the event is awarded. Yet, certain fundamental issues surface:
- (i) Is that country’s culture a “protective” one when it comes to sports, brands and marketing?
  - (ii) Does the bidding nation have a track record of strong IP protection?
  - (iii) Does it have an effective law enforcement policy and practice?
- 3.30 These questions deserve consideration and may reveal what future trends will develop for sports hosting. Certain countries have already been awarded multiple major events<sup>87</sup> since 2000, including Australia<sup>88</sup>, South Africa<sup>89</sup>, New Zealand<sup>90</sup>, Canada<sup>91</sup> and the United Kingdom.<sup>92</sup> It appears that for these countries the above three questions can all be answered affirmatively. Notably, each of those five nations has a common law legal system, while some civil law countries like Spain, Japan, Switzerland and Mexico have each hosted only one ‘mega’ event during Phases 2 and 3. France is exceptional among civil law countries having hosted the 1998 FIFA World Cup and the 2007 Rugby World Cup.
- 3.31 This is ironic in view of the fact that it is countries with civil law legal systems that tend to hold legislation as their pre-eminent source of law. The recent dominance of major event hosting by common law countries suggests that a country’s legal system may not have much bearing on the selection of the host nation. The election of the 2018 host nations for both the FIFA World Cup and the Commonwealth Games may elucidate the key determining factors in this prestigious but competitive race. That being said sports governing bodies would do well to further educate bidding nations about the criteria used for electing a host nation and whether the eminence of commercial considerations should instruct Bid Committees to pay closer attention to brand protection.
- 3.32 The palpable conclusion is that the practice of enacting protective legislation for sports events is well entrenched. The only distinction from one bid to another is whether the legislation already exists or new legislation must be introduced. Some territories have secured brand protection by amending existing laws. In South Africa, both the Trade Practices Act 76 of 1976 and the Merchandise Marks Act 1941 were amended to prepare for CWC 2003, the 2009 Confederations Cup and the 2010 FIFA World Cup. In Switzerland, in anticipation of the 2008 European Football Championships, amendments were made to Federal Act on Unlawful Competition provoking much controversy. Australia amended its 1987 Olympic Insignia Protection Act (OIPA) to prepare for the 2000 Sydney Olympics, but still saw it fit to enact the Olympic Arrangements

79 Madrid 2016 Candidature File-Theme 4, Legal Aspects at page 69.

80 Chicago 2016 Bid Book at page 129.

81 *Ibid*.

82 IOC Evaluation Report at page 48.

83 Rio 2016 Bid Document at Theme 4, page 65.

84 The Glasgow 2014 Commonwealth Games Candidate City File-Summary Document at page 8.

85 Lewis and Taylor, *supra*, at paragraph G 1.150.

86 New Zealand passed its Major Events Management Act in 2007.

87 Includes FIFA World Cup, ICC Cricket

World Cup, Olympic Games, Commonwealth Games and Pan American Games.

88 2000 Sydney Summer Olympics and 2006 Melbourne Commonwealth Games.

89 2003 ICC Cricket World Cup and 2010 FIFA World Cup.

90 2011 Rugby World Cup and 2015 Cricket World Cup.

91 2010 Vancouver Winter Olympics and 2015 Pan Am Games.

92 2002 Manchester Commonwealth Games and 2012 London Summer Olympics.

Act 2000 (OAA) and the Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Sydney Act). The OAA was one of those pieces of 'sunset legislation' that was passed for a limited time only, while the Sydney Act expanded the list of protected words first created under the OIPA 1987.

- 3.33 England also chose the path of legislative amendments when it altered the 1995 Olympic Symbol Protection Act but like Australia, UK law-makers saw the need for further statutory intervention by enacting the 2006 LOGPGA in anticipation of hosting the 2012 Olympics. Whatever route is taken, the onus remains on event organisers to strike the balance between satisfying the needs of event partners while adhering to the broad spectrum of legal principles. That discussion is continued in Chapter 4.

## Chapter Four - Sui Generis Legislation: Necessity and Legality

### A. The Pro-Legislation Reality

*"There is a growing trend for governments, in response to pressure from event organizers wishing to protect their events and contractual agreements with their sponsors, to introduce specific anti-ambush laws. These go beyond the traditional protections offered by trademark law, unfair competition/passing off, copyright, competition law and human rights..."*<sup>93</sup>

- 4.1 The popularity of ambush marketing legislation especially within the last decade has brought it under close legal scrutiny. The backdrop for the enacting of ambush marketing legislation in many instances is the inadequacy of existing laws, including intellectual property and unfair competition laws. In other cases, legislation was enacted because of the compulsion bidding nations felt to please powerful sports governing bodies as well as sponsors, as discussed in Chapter 3. It is noteworthy that with regard to the Olympic Games, more and more countries,<sup>94</sup> both civil law and criminal law, have taken steps to afford special legislative protection for the Olympic symbol.<sup>95</sup> Despite the prevailing objections about the validity and enforceability of ambush marketing legislation, the reality is that it is now commonplace in the world of sport. There is still a case, however, for reliance on existing legal and non-legal mechanisms.

### B. Not Without Options

- 4.2 Opponents of ambush marketing legislation believe that some provisions are oppressive, draconian, restrictive or unnecessary. Duthie presents various alternatives to enacting legislation under the following heads<sup>96</sup>: controlling the levels of sponsorship, ticketing, media, intellectual property, locality, public persuasion and merchandise. Each of these deserves brief consideration.
- 4.3 The idea behind controlling the levels of sponsorship is to restrict the exposure given to non-event sponsors who may nevertheless be the sponsors of teams or individuals. This is a powerful tool for an event organiser who, at the planning stages of the event, can look at the rights landscape<sup>97</sup> and determine both the level and the number of sponsors. Bitel<sup>98</sup> holds the view that fewer sponsors are better, preferring FIFA's 6-sponsor model to the 30-plus sponsors used for the New York City Marathon.<sup>99</sup>
- 4.4 In practical terms, this may mean that athletes will not be allowed to display branding from their sponsors during press conferences or prize-giving ceremonies, for instance.<sup>100</sup> This type of scenario is

not uncommon as occurred during a medal ceremony at the 1992 Barcelona Olympics when basketball legend Michael Jordan could be seen covering the logo of US team sponsor, Reebok, in order to protect his personal endorsement with Nike. Similarly, at Beijing 2008, star US basketball player Dwight Howard, personally endorsed by Adidas, used a basketball to hide the Nike logo on his US kit. This type of restriction is admittedly more of a practical measure than a legally enforceable one since an event organiser will be hard-pressed to prove any illegality on the part of a commercial entity who has genuinely invested financially and otherwise in a team or athlete.

- 4.5 Managing ambush marketing through ticketing controls is effective where conditions for entry include limitations on spectators' apparel where such attire advertises the brand of non-sponsors.
- 4.6 As far as media regulation is concerned, event organisers can seek to control the broadcast sponsorship of an event so that confusion is reduced. This not only allows for less clutter but reduces the likelihood of a repeat of the aforementioned Kodak ambush of Fuji at the 1984 Olympics. Likewise, the 1991 World Rugby Football Cup was the source of similar spectator confusion when Heinz's association with the event as a major sponsor was diluted by Sony's sponsorship of the television broadcast coverage. Additionally, at the 1992 Barcelona Olympics, Wendy's advertising campaign allowed it to capitalise on official sponsor Mc Donald's failure to purchase broadcast rights. Duthie even suggests that broadcast sponsors should offer a right of first refusal of broadcast sponsorship to event sponsors, but qualifies the proposal by noting that the latter should seek to also become broadcast sponsors of the events that they partner.<sup>101</sup>
- 4.7 Verow, too, acknowledges that broadcast sponsorship is an effective means of ambushing an event. He notes that one possible solution to this type of ambush is to "ensure that all the rights in broadcast events are dealt with together, at least giving an events sponsor the opportunity to cover the transmission and be its broadcast sponsor if it wants."<sup>102</sup> Leone concurs with Verow concluding that instead of "demanding ever more stringent legislation, sponsors themselves should be expected to counter ambush marketing by purchasing all the commercial opportunities afforded by a particular event."<sup>103</sup> Commercial partners of sports events would therefore be wise to purchase connected rights as a way to reduce the threat of non-partner competitors gaining an association with the event. While such involvement by non-partners is not strictly speaking illegal, it does reduce the value of the exclusivity that official partners not only seek to enjoy, but for which they have devoted large sums. This "saturation sponsorship"<sup>104</sup> strategy can also include the purchase of billboard and other advertising space in and around the event venue. It is a useful tool in preventing intrusion ambush as practiced by Nike at the 1996 Atlanta Olympics when it bought the billboard advertising space around the Games venues.
- 4.8 The use of public education campaigns is always helpful in reducing ambush marketing since it is a proactive measure. Event organisers do their commercial partners a huge favour when they inform the public about the identity of official sponsors, suppliers and licensees. Typically, however, the average spectator is not *au courant* about such matters but the public awareness does impact on the consumers' attitudes towards ambushers. These campaigns also provide an ideal occasion for educating the public on genuine and false merchandise relating to the event.
- 4.9 Intellectual property regulation is one of the most used and effective anti-ambush tools. Copyright, patent, design and trade mark laws provide a strong legal basis for brand protection, while offering various remedies against infringement. It is for this reason that Leone believes that "official sponsors are by no means defenseless under existing law. They already have intellectual property and unfair competition laws at their disposal. Any emblems or logos developed specifically for an event can be protected, especially by trademark or copyright. Unfair competition laws are available where a company engages in misleading or deceptive advertising."<sup>105</sup>
- 4.10 Pauline Dore<sup>106</sup>, in reviewing LOCOG's preparation for the 2012

93 "European Sponsorship Association position statement on ambush marketing"-wsD7D.tmp/draft/NEJ/07.09.04.

94 The list includes France, Argentina, Germany, the United States of America, Australia, Mexico, Austria, China, the Czech Republic and the United Kingdom.

95 Johnson, *supra*, at note 41.

96 "It's Not Just Cricket: Ambushing the Ambusher in South Africa"-Max Duthie, *Sport and the Law Journal (SATLJ)*-Volume 11, Issue 1, page 171 at page 173-4.

97 Term used by Richard Verow in "Sports

Business; Law, Practice and Precedents" at paragraph 6.2.

98 Nick Bitel, London Marathon Chief Executive.

99 "Tips on how to successfully run a large-scale sporting event"-Nick Bitel, *C5 Online Sports Law and Business Conference-April 29-30, 2009*.

100 Duthie, *supra*.

101 *Ibid*.

102 Verow, *supra*, at paragraph 6.6.3.3.

103 Leone, *supra*, at page 77.

104 Duthie, *supra*, at note 96.

105 Leone, *supra*, at page 77.

106 "Let the Games Begin"-Pauline Dore-

Olympics also mentions the traditional legal methods like passing off, trade mark and copyright law, while Lewis and Taylor name the following alternative measures: trade marks, design rights, copyright, other laws and regulations, the Olympic Charter and International Paralympic Committee Handbook, contractual controls, authorities responsible for Intellectual Property protection, education and public relations.<sup>107</sup> The case presented for alternatives to *sui generis* legislation is a strong one.

- 4.11 Miller highlights three measures used by LOCOG outside of event-specific legislation to protect the 2012 brand, listing traditional legal protection, continuing education and a robust defence as alternatives to special statutory rights.<sup>108</sup> Leone's assessment confirms the above as she speaks of "non-legal measures with which to combat ambush marketing" referring to methods like inserting appropriate contractual provisions, acquiring advertising space, pre-selling airtime to sponsors and policing unofficial merchandise with the help of local government officials.<sup>109</sup> The existence of this range of alternatives suggests that sports rights holders are not without recourse in the absence of *sui generis* legislation. The question of the appropriateness of event-specific ambush marketing may very well be determined by the magnitude of the event itself. The Australian experience is informative.

#### *Lessons from the Australian Ambush Marketing Legislation Review*

- 4.12 The Ambush Marketing Legislation Review<sup>110</sup> of Australia conducted between March and May 2007 was a very thorough documentary presentation of the strengths and weaknesses of specific Australian legislation in relation to effective ambush marketing protection. The statutes under review were the Olympic Insignia Protection Act 1987 (OIPA) and the Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2006 (Melbourne Act).
- 4.13 The Review observed that in light of "the perceived limitations and inadequacies of existing trade practices and IP Laws, one strategy has been to deal with ambush marketing through specific legislation."<sup>111</sup> Here, the Review speaks of "perceived limitations" implying that existing laws fail to provide adequate protection.
- 4.14 The Review adds that the "perceived inadequacies of the pre-existing law in protecting certain rights is a core justification"<sup>112</sup> for enacting ambush marketing legislation. It notes that the New South Wales Government and the Sydney Organising Committee for the 2000 Olympic Games held the view that "certain things at the time (e.g. certain Olympic expressions) were not covered by pre-existing law... Similarly, it was argued that many words and symbols associated with the Olympics were unlikely to be registrable as trade marks."<sup>113</sup> Outside of special legislation protecting Olympic expressions, a lack of distinctiveness is the consistent registration obstacle for typically generic Olympic terms.

- 4.15 It is settled knowledge that the Olympic symbols have received special protection in some territories through the 1981 Nairobi Treaty following the 1980 Paris Convention.<sup>114</sup> Yet, protection of Olympic properties has often come in the form of specific legislation so that reliance is not always placed on traditional IP laws. Johnson notes that the genesis of Olympic symbol protection was actually not for the purposes of ambush marketing protection but instead to develop Olympic merchandising rights.<sup>115</sup> Over time, its value has grown almost exponentially.
- 4.16 The Australian concern about the registrability of certain Olympic expressions was well founded since terms like "silver" "gold" and "Games" would hardly satisfy any statutory which refers to "any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings."<sup>116</sup> It would take something additional to protect the family of terms usually associated with the Olympics.
- 4.17 As a result of these concerns the Senate Legal and Constitutional Reference Committee (SLCRC) "was persuaded that there needed to be an expansion of the scope that the Australian Olympic Committee (AOC) could license, because the pre-existing law meant enforcement of rights to certain subject matter was restricted. By removing these restrictions, the OIP Act could expand the organiser's rights and increase its licensing revenue."<sup>117</sup> The observation was therefore made that existing IP law in Australia was too restrictive on the AOC, who needed more commercial flexibility in order to maximise revenue-generation potential. It would take the enactment of the OIP Act to achieve that objective.
- 4.18 Hence, opposing viewpoints exist regarding the necessity of *sui generis* legislation. One solution may be that the need for ambush marketing legislation must be assessed on an event-by-event basis, in which the magnitude of the event and the strength of existing law are among the salient factors to be considered. The New Zealand criteria is useful and includes the following considerations: Will the event-
- i) attract a large number of international participants or spectators
  - ii) raise New Zealand's international profile
  - iii) require a high level of professional management and co-ordination
  - iv) attract a large number of New Zealanders as participants or spectators
  - v) offer substantial sporting, cultural, social, and economic benefit to New Zealand?<sup>118</sup>
- 4.19 This model, though in need of further specifications for each of the benchmarks set, is commendable since it seeks to establish objective criteria upon which decisions are made with regard to protection from infringement.

#### C. Passing Legal Muster

"...their legal validity could and should be challenged from an enforceability perspective in certain specific circumstances."<sup>119</sup>

- 4.20 Mouritz's assertion that the Vancouver 2010 ambush marketing legislation should be challenged is a fair indication that legal scrutiny is not misplaced for anti-ambush laws. On closer examination, other principles of law are often compromised by ambush marketing legislative provisions.

#### *(I) Competition Law*

- 4.21 The merger of sport, business and law has become well established during the last few decades. Not only is this synthesis a practical one, it now also has legal backing as European Court of Justice (ECJ) and Court of Arbitration for Sport (CAS) jurisprudence have acknowledged the application of EU law to sport. The line of cases beginning with *Walrave*<sup>120</sup> and *Dona*<sup>121</sup> through to *Bosman*<sup>122</sup>, *Kolpak*<sup>123</sup> and *Simutenkov*<sup>124</sup> and culminating with more recent rulings in *Meca-Medina*<sup>125</sup>, *QC Leisure*,<sup>126</sup> *Webster*<sup>127</sup> and *Matuzalem*<sup>128</sup> tell a compelling story of how sport has been impacted by the rule of law, especially where it constitutes an economic activity under Article 2 of the Treaty of Rome.

International Sports Law Review (2006) Volume 1 (May) 40-45 at page 107  
 Lewis and Taylor, *supra*, at paragraph H 2.8.  
 108 "London 2012-meeting the challenge of brand protection"-Terry Miller, International Sports Law Review (2008) Issue 4, pp 44-47.  
 109 Leone, *supra*, at page 77.  
 110 Ambush Marketing Legislation Review, October 2007-Prepared for IP Australia and the Department of Communications, Information Technology and the Arts (DCITA).  
 111 *Ibid* at paragraph 2.3.  
 112 *Ibid* at paragraph 4.3.1.  
 113 *Ibid* at paragraph 4.3.1.  
 114 Paris Convention for the Protection of Industrial Property.  
 115 "Look out! It's an ambush!"-Phillip Johnson-International Sports Law Review 2/3, *supra* at page 25.  
 116 UK Trade Mark Act 1994 s.1(1).  
 117 Ambush Marketing Legislation Review,

*supra*, at paragraph 4.3.1.  
 118 "Look Out! It's an ambush!"Phillip Johnson-International Sports Law Review 2008 2/3 Page 24-29.  
 119 Mouritz, *supra*.  
 120 *Walrave & Koch v. Association Union Cycliste International* [1974] ECR 1405.  
 121 *Re: Dona & Mantero* [1976] ECR 1333.  
 122 *Union Royal Belge des Societe de Football Association ASBL v. Jean-Marc Bosman* [1995] ECR I-4292.  
 123 *Detscher Handbalbund v. Kolpak* (Case C-438/00) [2003] ECR I-4135.  
 124 *Simutenkov v. Spanish Football Federation* (Case C-265/03) [2005] ECR I-2579.  
 125 *Meca-Medina & Majcen v. Commission* (Case 519/04) ECR 2006 I-6991.  
 126 *FA Premier League v. QC Leisure* [2008] EWHC 1666 Admin.  
 127 *Andrew Webster & Wigan Athletic v. Heart of Midlothian CAS* 2007/A/1300.  
 128 *The Court f Arbitration for Sport, the Matuzalem Decision*, 19 May 2009.

- 4.22 By virtue of the European Community (EC) Treaties and the 1998 Competition Act in the United Kingdom, principles of competition law have been conspicuous in the regulation of the commercial aspects of sport. Treaty Articles 81 and 82 respectively address matters relating to distortion of competition and abuse of dominant market positions. Decisions in *Hendry*<sup>129</sup> and *MOTOE*<sup>130</sup> highlight the approach of the ECJ with respect to Article 82 questions. In the former case, Lloyd J. evaluated the defendant body's rules as they sought to restrict the formation of rival snooker tournaments. He held that that kind of rule breached competition law and was also an unreasonable restraint of trade. The latter case also addressed the abuse of dominant positions in the context where the Greek State refused to grant *MOTOE*<sup>131</sup> the necessary authorisation under Greek law, to organise motorcycle competitions in Greece.<sup>132</sup>
- 4.23 The question begs whether the IOC's and FIFA's monopoly positions are abused when they offer exclusivity to one set of sponsors over another. That issue resembles the matters raised in the *Danish Tennis Federation (DTF)*<sup>133</sup> litigation in which there was an apparent lack of objective criteria in the selection of exclusive tennis ball manufacturers. The court in *DTF* objected to the Federation's decision to appoint tennis ball manufacturers without the objectivity of a tendering process. Additionally, the length of exclusivity granted to Slazenger and Trethorn in that case, meant that other manufacturers were excluded from the market for the full period of exclusivity which was three years.
- 4.24 The granting of exclusive rights inherently raises competition law issues. In the context of ambush marketing laws one issue arising is if it is lawful for event organisers to grant exclusive rights to sponsors. To resolve that matter, one needs to determine the nature of the market, the manner in which sponsors were chosen and whether non-sponsors were afforded the opportunity to enter that market. It is for reasons like these that Kobel pondered whether the popular Lillehammer ambush by American Express<sup>134</sup> raised market foreclosure issues on the part of the IOC that warranted legal action by American Express and ticket vendors and retailers.<sup>135</sup>
- 4.25 Verow's analysis of market definitions offers a helpful perspective in the context of competition law and sport. He notes that generally speaking, "the scope of the relevant market for competition law purposes is determined by reference to the application of 'demand side substitutability' or in appropriate cases 'supply side substitutability'"<sup>136</sup> with the former being the more prevalent test in sport-related cases.<sup>137</sup> Demand side substitutability deals with consumer reaction to price increases whereby they make a switch from one product to another in the face of a price rise. In the sports sector, a consumer's ability to find adequate substitutes for the desired product or service is very dependent on the sport itself, its popularity and its access. For this reason, exclusivity issues must be carefully managed if the effect of granting exclusivity is to restrict consumer access to sporting products and sports content.
- 4.26 Lewis and Taylor also acknowledge the need to properly regulate product category exclusivity arrangements noting that they "may raise competition concerns under Article 81 of the EC Treaty..."<sup>138</sup>

It is hard to dispute that exclusive arrangements, especially if lengthy, will distort competition. Only if these restrictions are proportionate and are made in pursuit of legitimate objectives will they escape the punitive hand of competition authorities.

- 4.27 It is also not uncommon for sponsorship contracts to include rights of first refusal for existing sponsors who therefore get to monopolise their association with a particular brand, tournament or event. This, too, may very well contravene Article 81 of the EC Treaty since again, competition is restricted. Again, issues of proportionality and legitimacy of objectives become key determining factors in assessing the legality of a rights holder's actions.
- 4.28 Leone's concerns are instructive. She notes that in "every other sector of the economy ambush marketing is an accepted practice which promotes competition. Banning it would constitute a major restraint of trade and by benefiting a few major companies at the expense of many others, could well be anti-competitive."<sup>139</sup> While it is debatable whether ambush marketing is accepted in other economic spheres, there is a case for stating that bans on ambush marketing can on the particular facts be seen as anti-competitive since few are protected at the expense of many. On the other hand, a commercial free-for-all is hardly a desirable outcome because of its disruptive effect on business, marketing and financial regulation.
- 4.29 Restrictions on competition are not misplaced because in the absence of them, income-earning potential through sponsorship can be undermined with detrimental effect. No sponsor will show alacrity in making future investments if there is no tangible benefit when current investments are made. At the same time, the conduct of event organisers must also be kept on a leash of competitive parity. Gardiner notes that "competition regimes exist to regulate economic activity within countries and are usually predicated on the notions of 'fair play.' Most competition regimes aim to avoid anti-competitive behavior of cartels and prevent firms from abusing their dominance in any particular market."<sup>140</sup> Hence, legal doctrines like the essential facilities doctrine exist to ensure that strong market powers do not unlawfully exclude others from market entry. It is nevertheless important to articulate that exclusivity in and of itself is not illicit if there is a lawful tendering process, as enunciated in *Danish Tennis Federation*.
- 4.30 Leone adds that "Governments do come under much pressure from event controllers, like the IOC and FIFA, to introduce such legislation and one may query whether such actions on the part of event controllers comply with EC competition law."<sup>141</sup> This is a classic case of balancing legitimate interests of multiple stakeholders and it is incumbent upon world governing bodies and rights holders generally to avoid being myopic in their outlook on event delivery.
- 4.31 The IOC and FIFA, in particular, are quite aware of their power and influence and are seemingly unafraid to challenge existing legal systems if their interests are being compromised. These two world bodies were rather vocal in expressing their dissatisfaction with the 2007 EU White Paper on Sport, while FIFA, like the ICC, also loudly voiced its concerns about the whereabouts rules that the World Anti-Doping Agency (WADA) brought into force on January 1, 2009. Yet, the power of these bodies makes them vulnerable to being blind to other perspectives, so that future contention can be expected between them and the law.

## (II) Constitutional Law

"To date, the laws in the United States have been on the side of ambush marketers. As long as their statements are generally truthful, they have been protected as commercial speech under the First Amendment."<sup>142</sup>

- 4.32 One of the biggest legal hurdles to the enactment and enforcement of ambush marketing legislation is the potential conflict with constitutional and/or fundamental human rights. Kaufmann-Kohler, Rigozzi and Malinverni note that since 1970, the European Court of Justice (ECJ) held that "the protection of fundamental rights is a general principle of European law..."<sup>143</sup> An analysis of specific clauses in ambush marketing legislation reveals that some provisions are likely to be declared legally unenforceable.
- 4.33 A useful starting point is the United States (US) *status quo* where

129 *Hendry v. World Professional Billiards & Snooker Association* [2002] 1 ISLR SLR-1.

130 Case C-49/07, 1 July, 2008.

131 *Motokyleistitiki Omospondia Elladus NPID*.

132 "ECJ: Moteo decision"-World Sports Law Report-April 2009-Volume 07 Issue 04.

133 [1996] 4 CMLR 885.

134 Discussed further in Chapter 5 at paragraph 5.6 et seq.

135 Kobel, *supra*, op.cit. 52.

136 Verow, *supra*, page 84 at paragraph 3.6.5.

137 *Ibid*.

138 Lewis and Taylor, *supra*, at paragraph G 5.32.

139 "Ambush Marketing: Criminal Offence or Free Enterprise?"-Luisa Leone, *International Sports Law Journal* 2008/3-4, page 75.

140 "Sports Law"-Gardiner et al, *supra*, at page 351.

141 *Ibid* at page 76-77.

142 "United States: Ambush Marketing: protecting sport from brand hijacks"-Stephen P. Durchslag- *World Sports Law Report, August 2007*-Volume 5, Issue 8.

143 "Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-Doping Code"-Antonio Rigozzi, Gabrielle Kaufmann-Kohler, Giorgio Malinverni, *International Sports Law Review* 2003, 3 (Aug) pp 39-67 at page 41.

unlike “other nations such as the United Kingdom, New Zealand and South Africa, the US has not enacted legislation which prohibits ambush marketing.”<sup>144</sup> This reality clarifies Schmitz’s assertion that in the US a trade mark holder will more often than not seek relief against an ambusher under the 1946 Lanham Act.<sup>145</sup> The implication, then, is that US lawmakers are wary of enacting legislation that can be deemed to breach constitutional rights, a fact which requires a special Parliamentary majority in some Commonwealth nations. It is this legal friction that is at the centre of the current controversy caused by the whereabouts requirements of the World-Anti-Doping Agency for athletes in national or international registered testing pools. Evidently, the balancing of competing rights is a central feature of any effective legal system.

- 4.34 Many constitutions also protect the freedom of expression. Anti-ambush laws purport to curtail that liberty.<sup>146</sup> This tension mirrors the dichotomy between the “potentially conflicting rights”<sup>147</sup> of European Convention on Human Rights (ECHR) Articles 8 and 10 as it concerns the right to privacy and the freedom of expression. These competing interests were judicially considered by the South African Constitutional Court in *Laugh It Off Promotions*.<sup>148</sup> The court held that “this case brings to the fore the novel, and rather vexed, matter of the proper interface between the guarantee of free expression enshrined in s.16(i) of the Constitution and the protection of intellectual property rights attached to registered trade marks as envisaged by s.34 (i) (c) of the Trade Marks Act 194 of 1993 and consequently to related marketing brands...”<sup>149</sup>
- 4.35 This right to free speech will continue to be a thorn in the side of law-makers who fail to consider the panoply of vested rights among various stakeholders.

### (III) The Law of Tort

*“Economic torts are also relevant to sport. There the wrongdoing consists of a deliberate act, not involving a breach of contract towards the victim, causing economic loss.”*<sup>150</sup>

- 4.36 Beloff’s succinct analysis of the marriage of tort and sport reaches the heart of the offences of passing off, trespass and deprivation of property without compensation. Ambush marketing laws that seek to regulate advertising and marketing conduct in the locations bordering event venues usually ignore the proprietary rights of private landowners. Rights to property are also well enshrined fundamental and constitutional rights. The problem with the anti-ambush laws is that landowners who cede proprietary rights for the duration of the event are not compensated. These imbalances must be addressed at the drafting stage of *sui generis* laws.

### (IV) Advertising and Media Law

*“The proposed amendments have already provoked a vehement reaction in Switzerland. Certain voices complain about the impairment of the liberty*

144 Durchslag, *World Sports Law Report*, supra, op.cit.134.

145 “Ambush Marketing: The Off-Field Competition at the Olympic Games”- Jason K Schmitz, *Northwestern Journal of Technology and Intellectual Property*, (Spring 2005) Volume 3, Issue 2.

146 Article 10, ECHR.

147 “Media Law”-Peter Carey and Peter Coles, Nick Armstrong and Duncan Lamont.

148 *Laugh It Off Promotion CC* (trading as Sabmark International) and another 2005 BIP 201 (CC).

149 Quoted at “South Africa: Ambush Marketing: sanctions and state legislation”- Michael Murphy, *World Sports Law Report*, November 2009-Volume 7, Issue 11.

150 “Sports Law”- Michael Beloff Q.C., Tim Kerr, Marie Demetriou at paragraph 2.50.

151 “Switzerland: new legislative steps

against ambush marketing”-Daniel Hufschmid, *International Sports Law Review* 2006 3 (Aug), pp.77-78.

152 “EURO 2008 demonstrates need to prepare for ambush marketing attacks”- [source:www.sportbusiness.com/news-June 25, 2008] [Accessed on August 6, 2008].

153 *Ibid*.

154 “South Africa: Ambush Marketing: sanctions and state legislation”- Michael Murphy, *World Sports Law Report*, October 2009-Volume 7, Issue 10.

155 *Ibid*.

156 Whitehead, Mark-“Ambushing the Ambushers”-Sports Law Administration and Practice, April 2000 at page 9.

157 “The Countdown begins”, Legislative Comment-Mia Sudzum, Jason Rudkin-Binks, *Entertainment Law Review* 2007, Volume 18 (8), pp.253-257 at p.253.

158 Johnson, supra, op.cit. 45.

159 *Ibid*.

*to produce advertisements, others reproach the Swiss Government for being compliant with UEFA and cementing the quasi-monopolistic status of large sports organisations.”*<sup>151</sup>

- 4.37 Hufschmid captured the reactions to Switzerland’s brand protection attempts prior to Euro 2008. The cry was the familiar one from media organisations who jealously guard both their rights. It seems, though, that the complaints in Switzerland did produce a negative impact given reports of 18 instances of ambush marketing<sup>152</sup> at the 2008 European Championships (Euro 2008) co-hosted by Switzerland and Austria. The Centre for the International Business of Sport (CIBS) reported Burger King’s “red card” advertising campaign which ambushed Mc Donald’s official sponsorship as well as Heineken’s ambush of event sponsor Carlsberg through its distribution of Heineken-branded hats for the benefit of Dutch fans.<sup>153</sup> It appears that respecting the liberty to produce advertisements was exactly the open door that Burger King needed to create an association with Euro 2008 without being an official sponsor.
- 4.38 In South Africa, the Advertising Standards Authority adopted a Code of Advertising Practice and Procedural Guide, with the main objective of consumer protection and the promotion of advertising fair play.<sup>154</sup> One of the central features of the Code is the stipulation that express permission must be obtained by any advertiser seeking to refer to a living individual.<sup>155</sup> The Code therefore contemplates the protection of privacy, a useful tool to prevent the unauthorised exploitation of an athlete’s image.
- 4.39 These regulations may well be tested at the 2010 World Cup, since FIFA plans to restrict footballers who wish to show allegiance to their individual sponsors.

### D. Clean Venue, Clean City, Clean Athlete!

*“The IOC now thinks of the Olympic Games in terms of a ‘clean city’ and not just a ‘clean stadium’ entering into direct agreements with local authorities in an attempt to eradicate ambush marketing”*<sup>156</sup>

- 4.4 Like FIFA, the IOC’s vision of an effective commercial programme is an enigmatic mixture of foresight and paranoia. The ‘clean venue’ concept is well established but its legality remains in doubt. New Zealand, for instance, lost the right to co-host the 2003 Rugby World Cup due to its failure to provide ‘clean venues.’<sup>157</sup> The legal footing for this expectation from world bodies is, at best, shaky and is destined to be challenged sooner than later.
- 4.41 Admittedly, the ‘clean city’ vision is commendable and the search for “commercial purity” in and around event venues is reasonably justifiable but in practical terms, the purging of an entire city is disproportionate. Nevertheless, it is the concept of the ‘clean athlete’ that is most disturbing.
- 4.42 ‘Clean athlete’ in this regard s not to be confused with a drug-free athlete, which is a universally desired objective. ‘Clean athlete’ in this regard refers to the sportsman or sportswoman who is prohibited from displaying the branding of his or her individual sponsor during the period of the sporting event. There is an inherent injustice when an entity has decided to invest in the growth and development of an athlete and through that support, the athlete achieves global acclaim and status. Now that the athlete has qualified for the Olympics, for instance, he has to divorce himself for two weeks from the very body that helped to harness his innate ability. This is apparently justified because Brand Z, the athlete’s sponsor, is not an Olympic sponsor.
- 4.43 The solution herein is in the negotiation and conclusion of clearly defined contracts and carefully-drafted sporting rules that effectively consider the rights of athlete, sponsor and event organiser.

### E. ‘Creepy’ Legislation

*“The ability of international federations to make these demands has led to horizontal and vertical creep”*<sup>158</sup>

- 4.44 Johnson’s very insightful assessment of the concepts of vertical and horizontal creep is noteworthy.<sup>159</sup> He defines the latter as occurring when one country almost blindly adopts the legislation of a previous host. The effect is that the second event, often less prestigious gets just as much or even broader than the earlier event. Classic

examples include the CWC 2007 legislation mirroring that of the 2003 CWC laws with almost verbatim legislative language. Johnson saw similar trends with Vancouver and New Zealand imitating the 2006 London Olympic Act.<sup>160</sup> The result tends to be the enactment of laws that are disconnected with both the commercial and legal reality of the second enacting nation.

- 4.45 Vertical creep occurs where the same country hosts multiple events with the similar result that the second event may get protection that is too generous for its size as occurred with the 2009 Lusophony Games in Portugal benefitting from the Euro 2004 legislation in Portugal. Johnson also noted that the 2006 Melbourne Commonwealth Games received broader protection in some regards than the 2000 Sydney Olympics.

#### F. Lessons from Vancouver 2010

- 4.46 After its successful bid, the Vancouver Organising Committee for the 2010 Winter Olympics (VANOC) proposed the *Olympic and Paralympic Marks Bill C-47* as the relevant statute to address the ambush marketing threat. Its justification lies in the fact that the total operating revenue is US \$1.63 million of which US \$760 million is expected to be contributed by VANOC sponsors.<sup>161</sup> Mouritz notes that this sum represents the biggest portion of VANOC's Operating Revenues.<sup>162</sup> The case is therefore built for strong measures to be enforced to protect the significant contribution made by VANOC's commercial partners. Nevertheless, Mouritz equally observes that the Bill contains what he calls "very stringent protective provisions." He believes that the "Canadian Legislator seems to have gone overboard in some of the protective measures"<sup>163</sup>
- 4.47 The fact that "the Bill outlaws nearly all use of Olympic trademarks and of certain generic Olympic terms" does raise the concern about the extent to which the Canadian legislation has gone to protect Olympic marks and sponsors' brands. Like London 2012 and Sydney 2000, Vancouver 2010 has sought to protect words like "Gold" and "Silver" as well as the word "winter." The Vancouver laws have therefore been deemed "overly restrictive."<sup>164</sup> Perhaps during the 2009 Christmas season, these overbroad restrictions made Canadians hesitant to recite the verse referring to "five golden rings" in the popular "12 Days of Christmas" carol!
- 4.48 Mouritz further highlights VANOC's fear that Olympic IP rights will be used in an unauthorised manner which has the direct result of undermining "VANOC's ability to raise the funds necessary to host and stage the 2010 Olympic Games."<sup>165</sup> To deal with those fears the legislation has been enacted but the restrictions placed, *prima facie*, appear disproportionate.
- 4.49 A significant issue is therefore raised: "The question at hand is therefore whether the restrictive provisions in the Bill on the use of Olympic trademarks and of generic Olympic terms are legally enforceable under English law in a non-commercial setting."<sup>166</sup> The Canadian Bill does not allow for non-commercial use of Olympic trademarks nor of the generic Olympic terms.<sup>167</sup> Canada's Trade Marks Act, like the UK 1994 Trade Mark Act creates an infringement only when protected marks are used "in the course of trade." There is no infringement if use is not in the course of trade. For this reason, Mouritz argues that "non-commercial use of the Olympic Trademarks would fall outside of ECJ case law, and, in any event, the UK Trade Marks Act 1994 and the Canadian Trade Marks Act and should therefore be allowed in absence of the Bill.

160 *Ibid.*

161 "Challenging the legal enforceability of the Vancouver 2010 Olympic Games' anti-ambush marketing provisions"- Abraham Mouritz-Sport and the Law Journal 2008, Volume 16, Issue 1, page 10

162 *ibid.*

163 *Ibid.*

164 *Ibid.*

165 *Ibid.*

166 Mouritz, *supra*.

167 *Ibid.*

168 *Ibid.*

169 *Ibid.*

170 Mouritz, *supra*.

171 Sports City-"SAFA takes action against ambush marketing"-July 29, 2009.

172 Sports City, *supra*-"SAFA takes action against ambush marketing"-July 29, 2009.

173 "It's Not Just Cricket: Ambushing the Ambusher in South Africa"-Max Duthie, Sport and the Law Journal (SATLJ)-Volume 11, Issue 1, page 171.

174 *Ibid.*

175 *Ibid.*

There is thus a conflict between the Bill and VANOC's policies on one hand and UK and Canadian intellectual property laws and ECJ case law on the other hand in relation to non-commercial use."<sup>168</sup>

- 4.50 Indeed a conflict is apparent since ECJ, UK and Canadian jurisprudence caters for non-commercial trade mark use while the VANOC bill does not. The explanation given is that the Canadian Government seems "to be applying the legal principle of *lex specialis derogat lex generalis* in order to justify its departure from its own trade mark legislation."<sup>169</sup> That principle essentially means that in a case of two conflicting laws, the more specific law takes precedence over the more general law.
- 4.51 When considering non-commercial use of generic Olympic terms in domain names as well as the freedom of expression right granted under the ECHR, Mouritz concludes that the Canadian legislative provisions will be hard-pressed to be found as legally enforceable.<sup>170</sup> It is hard to disagree with this viewpoint.
- 4.52 In Chapter 5, the focus switches to the legal systems in place for the 2010 World Cup and the 2012 Summer Olympics.

### Chapter Five - The Legal Landscape of South Africa 2010 and London 2012

#### A. Hosting Multiple Events

- 5.1 Some nations have had the privilege of hosting major events on multiple occasions. The experience gained now provides a useful toolbox for other countries. In this chapter, South Africa and England will be examined with a view to assessing the legal preparations for the 2010 World Cup and the 2012 Olympics respectively, especially as it relates to protection from ambush marketing.

#### B. Case Study#1: South Africa

- 5.2 The FIFA World Cup 2010 has not even arrived and already the ambush marketing attempts have begun. It was reported<sup>171</sup> that the South African Football Association (SAFA) recently took two cases to the Advertising Standards Authority and was successful on both occasions with the culprits being Hyundai and Mobile Telephone Networks (MTN), both organisations being neither sponsor nor supplier to SAFA or to the men's senior national football team (Bafana Bafana). Hyundai ran an advertisement in which a national team player was wearing an official national team jersey. This misled the public into thinking that Hyundai was an official partner of the national team. Similarly, MTN also suggested an association with the national team by its use of the words 'Bafana Bafana' in an advertisement.
- 5.3 The report identified the documentary support in place for SAFA through its *Sponsorship Code*, in particular at Article 11.1.1 which states that: "No organisation, other than an official sponsor, may directly or by implication create an impression that its communications relate to a specific event or create an impression that they are an official sponsor of such an event."<sup>172</sup> The Code therefore prevents an unauthorised association with an event whether directly or impliedly. This mirrors the intent of most anti-ambush mechanisms. In the above scenario, it is only the national team sponsors, Absa and Castle that can lawfully make an association with Bafana Bafana.
- 5.4 When South Africa was preparing to host the 2003 Cricket World Cup (CWC), event organisers relied on the *Trade Practices Act 1976* (TPA) and the *Merchandise Marks Act* (MMA) for intellectual property protection. Amendments were made to these statutes to have specific applicability to the 2003 CWC.
- 5.5 Duthie notes one such amendment to the 1976 TPA that "prohibits the making or displaying of statements or advertisements that falsely imply or suggest a connection between the person making the statement and a sponsored event."<sup>173</sup> The MMA amendment sought to "prohibit the use of an ambusher's trade mark in relation to a designated sporting, entertainment or other event where such use is unauthorised by the event organiser but is nevertheless 'calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit' from the event."<sup>174</sup>
- 5.6 Such an amendment, on its face, seemed both necessary and effective.

tive as it widened the offence to include not just offensive conduct but also offensive motivation. Trade mark use that was “calculated to achieve publicity” was now included. Admittedly, it is always difficult to discern motives or intent, but the widening of the offence would itself put ambushers on the alert.

- 5.7 Duthie usefully notes that the amendment represents “a real change in emphasis because it catches those advertisers that merely seek to benefit from another event’s publicity, rather than suggest any connection with the event.”<sup>175</sup> This latter behaviour is typical of those who ambush by intrusion and it is instructive to note that the MMA amendment extends beyond sporting events to include entertainment or other events. This breadth is similar to that envisaged by the New Zealand *Major Event Management Act 2007*.<sup>176</sup> The MMA amendment has also taken on additional significance in that it creates a criminal offence for infringers. Notably, the European Sponsorship Association (ESA) does not believe that infringing anti-ambush marketing laws should be criminalised, noting that the “threat of jail should be reserved for genuinely criminal matters”.<sup>177</sup>
- 5.8 With greatest respect to the ESA, it may take the increased involvement of the criminal to help curtail ambush marketing which if left under-regulated will ultimately undermined the future of sports development especially at the grassroots level.

(i) *Case Law in South Africa*

- 5.9 By virtue of the vastness of football business today, FIFA’s frequent appearances as a litigant can is not unexpected. In April 2009, FIFA’s contentious muscles were flexed in the North Gauteng High Court in Pretoria, South Africa, arising from a World Cup 2010 dispute. In *FIFA v. Eastwood Tavern*<sup>178</sup> the Defendant restaurant embellished its signage with the inscription “World Cup 2010” which would have been conspicuous in its appearance due to its proximity to Loftus Stadium in Pretoria, one of the 2010 World Cup venues. Further, the number ‘2010’ and the words “two thousand and ten South Africa” were featured close to the hoisted flags of reputable football-playing countries. The Court decided in FIFA’s favour ordering Eastern Tavern to abstain from this form of unlawful competition.<sup>179</sup>
- 5.10 The decision was a predictable one given the passage of the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006 and the Second 2010 FIFA World Cup South Africa Special Measures Act 12 of 2006 and Government Gazette notice of December 14, 2007. Annexure C 1 to the Gazette notice prohibits the use of expressions including but not limited to “World Cup 2010” “2010 FIFA World Cup South Africa” “SA 2010” “2010 FIFA World Cup” and “Football World Cup.”<sup>180</sup> Additionally, the World Cup in South Africa has been designated a “protected event” under s.15 (A) of the Merchandise Marks Act, offering the event statutory protection.<sup>181</sup> The designation of the “protected event” is akin to the New Zealand legislative policy to declare certain events as “major events” for the purposes of its Major Events Management Act 2007.
- 5.11 As discussed in Chapter 4, the South African Constitutional Court in *Laugh It Off* decision was forced to balance competing interests relating to protection of IP rights and freedom of expression. Any discussion of juridical developments in South Africa must consider its status as a constitutional state, in which 1996 Constitution, including its Bill of Rights, has priority over other rules<sup>182</sup>, includ-

ing those of sports bodies. The Bill of Rights provides for the right of access to court, which is also an ECHR right, as well as rights to equality, property, freedom of expression and administrative justice.<sup>183</sup> It means that the period of the 2010 World Cup will be one where competing interests must be delicately balanced given the multiple stakeholders involved.

- 5.12 In *Coetzee v. Comitis*<sup>184</sup>, the South African High Court took the bold step of setting aside *in their entirety*, the rules of the Professional Footballers Association. The rationale for this was that they breached the fundamental rights of the footballers. Again the priority given to the fundamental rights of athletes was evident.
- 5.13 As the 2010 World Cup draws nearer, legal authorities in South Africa are getting sharper. It is destined to be exciting both on and off the field.

C. Case Study #2: London 2012: The legislative landscape

- 5.14 The London 2012 Bid received outstanding stakeholder support, including “over 400 guarantees from bodies who would be involved with the delivery of the Games.”<sup>185</sup> Government guarantees consisted of “commitments from 11 different Ministers, including the Prime Minister underwriting the UK Government’s commitments, the Secretary of State agreeing to introduce *further laws* to protect the Olympic symbols and to prevent ambush marketing...”<sup>186</sup> [Emphasis added]
- 5.15 Again the question begs whether London’s bid would have been successful without the commitments from the Secretary of State to introduce further protective laws. The use of the word “further” infers that protective laws already existed. The issue that arises, then, is whether the existing laws in England, on their own, would have satisfied the IOC. The question seems to be more a matter of degree than relevance. *Prima facie*, the case for automatic *sui generis* legislative IP protection to secure a successful bid is questionable and the preferred option would be the introduction of such legislation on a case by case basis.
- 5.16 European Union law established the principle of subsidiarity in the 1992 Maastricht Treaty and it is arguable that the heart of the principle should be transposed into the event bidding context. A local Olympic Committee is more than competent to create, implement and enforce proper and functional commercial programmes, capable of safeguarding the investments of sponsors and other official partners. The need for the strong supervisory role of the IOC is rather misplaced and should be critically evaluated under the competition provisions of the EC Treaty in so far as its actions affect the activities of member states bidding to host a major event.
- 5.17 The *London Olympic Games and Paralympic Games Act 2006* (LOGPGA) was passed within months of London being awarded the 2012 Olympic and Paralympic Games on July 6, 2005. Key initiatives created by the LOGPGA include the London Olympic Association Right and the Paralympic Association Right as well as Advertising and Street Trading Regulations. LOGPGA also made amendments to *The Olympic Symbol Etc. (Protection) Act 1995* (OSPA), an Act which created the Olympic Association right in the UK.<sup>187</sup>
- 5.18 A significant feature of OSPA is that it transcends the wide gamut of past, present and future Olympic and Paralympic Games so that its effect will outlive the 2012 Games.<sup>188</sup> Further, the Act “made an important amendment to the protected words by adding “similar” words likely to create an association with the Olympic Games or the Olympic Movement.”<sup>189</sup> This latter amendment in itself reflects the increasing pressure that Olympic host nations have felt with regard to the protection of Olympic properties. Such a move could either be interpreted as necessarily strict protection or unjustified paranoia.
- 5.19 Miller identifies why the protection of the London 2012 brand is essential noting that “Until the end of 2012 LOCOG is the guardian of the Olympic Rings and the Paralympic agitos. It is legally bound to protect these Symbols and the value, integrity and image of the Olympic Games and Paralympic Games.”<sup>190</sup> Use of the London 2012 is reserved for LOCOG licensees including the IOC’s leading international sponsors<sup>191</sup> and the major domestic sponsors.<sup>192</sup>

176 Considered in Chapter 6.

177 “European Sponsorship Association position statement on ambush marketing”-supra, op.cit 88.

178 Quoted at Michael Murphy, supra, at WSLR, September 2009.

179 Murphy, supra, WSLR, November 2009.

180 Murphy at Note 176.

181 *Ibid.*

182 Quoted at Michael Murphy, supra, WSLR September 2009.

183 *Ibid.*

184 [2001] 1 All SA 538 (c).

185 Sport: Law and Practice (second edition): Adam Lewis and Jonathan Taylor at page 1367 paragraph H 1.60.

186 Lewis and Taylor, supra, at para H 1.60.

187 Lewis and Taylor, supra, at paragraph H 2.9.

188 *Ibid.*

189 *Ibid* at paragraph H 2.16.

190 “London 2012-meeting the challenge of brand protection”-Terry Miller-International Sports Law Review (2008) Issue 4 page 44-47.

*The scope of LOGPGA 2006 protection*

- 5.20 LOCOG has employed the combination of “traditional legal protections”<sup>193</sup> and specific statutory rights. Under the traditional legal mechanisms, reliance has been placed on copyright, trademark and contract law. With regard to the statutory rights, LOCOG was granted special rights under LOGPGA to prevent unauthorised associations, the sale of counterfeit merchandise and conduct that undermines revenue generation.<sup>194</sup>
- 5.21 One question generated is whether these three goals could have been achieved otherwise. As has been discussed earlier, it is evident that the combination of other legal principles can be very effective. However, it does become legally cumbersome for sports brand owners to resort to borrowing morsels of contract, IP law, tort and property law to invoke their rights when one statute can offer broad protection.
- 5.22 The LOGPGA goes on to identify ‘Listed Expressions’ which are reserved only for LOCOG sponsors, partners and licensees. This is an area that produces much disagreement since generic words like “summer” “gold” or “silver” are given protection when used in conjunction with other expressions like the number “2012” or the word “Games.” It is no surprise that advertisers have expressed their concerns that the Act restricts artistic license.<sup>195</sup> Whether the defences offered under the Act such as journalistic or artistic use, honest statement and incidental use provide sufficient security for advertisers and non-sponsors is an important consideration. Legislators of sport-related statutes have the unenviable task of stipulating Parliamentary intention while offering sufficient exemptions that recognise other stakeholder rights.
- 5.23 Central to the protection being given under the LOGPGA is the London Olympics association right (LOAR), found in s.33 and Schedule 4. The LOAR is defined as a right which “shall confer exclusive rights in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and-(a) goods or services and (b) a person who provides goods or services.” Subsection (2) elucidates what comprises an association referring to contractual, commercial and corporate connections.
- 5.24 The legal draftsmen have therefore placed significance on the concept of association. It is good policy not only to define what association is but also what it is not, as found in subsection 2 (b), which states that “a person does not suggest an association between a person, goods or a service and the London Olympics only by making a statement which-
- (i) accords with honest practices in industrial or commercial matters, and
  - (ii) does not make promotional or other commercial use of a representation relating to the London Olympics by incorporating it in a context to which the London Olympics are substantially irrelevant.”
- While the section is broad enough to capture the essence of the right without being excessive, the situation is different regarding the protected words.
- 5.25 Words like “Olympic(s)” “Olympian(s)” and ‘Olympiad(s)’, unsurprisingly, have received special protection. The matter becomes contentious when attempts are made to protect generic words like “silver” “gold” and “games.”
- 5.26 The LOGPGA in Schedule 3 makes amendments to the OSPA and seeks to expand the category of protected words to include words “so similar to a protected word as to be likely to create in the pub-

lic mind an association with the Olympic Games or Olympic movement.”<sup>196</sup> It therefore seems that “golden games” would constitute an infringement of the Act. The fact that there is no need for the association to be either intentional or misleading increases the likelihood of an offence being committed. Such breadth on its face appears disproportionate to what is necessary to protect the Olympic brand.

- 5.27 Further, the LOGPGA has given protection to “2012” “twenty twelve” and ‘two thousand and twelve.’ Interestingly, another permutation “two zero one two,” clumsy as it sounds, was not protected and arguably could be used to infringe the LOCOG marks. There appear to be no obstacles to deter a commercial entity that sells televisions from attracting customers with the slogan: “Get the Best View of Two Zero One Two.” Doubt remains as to whether such an advertisement creates sufficient association with the 2012 Games to breach the LOGPGA. Admittedly, these issues rarely are straightforward, nor can legislation ever capture every possible infringement. It becomes a matter of reasonable limitations and proportionate restrictions.
- 5.28 It is this very need to balance interests that was a probable cause for what has been deemed a watering down of the original Bill. This has its benefits since LOCOG and event organisers generally must also be held accountable. In fact, the OSPA in some instances allows an action to be brought against a Proprietor of protected marks who makes groundless threats.<sup>197</sup>

*(ii) A word on Scotland*

“The Town and Country Planning (Scotland) Act 1997, the Trade Marks Act 1994, the Trade Descriptions Act 1968, the Control of Misleading Advertising Regulations 1988 and the common law of “passing off” already provide some protection against these activities. Nonetheless the short term, high profile nature of these Games leaves it vulnerable to ambush marketing strategies which could successfully operate within the law. The Bill seeks to fill the gaps in the current legal framework to allow the Games to take place free of ambush marketing and unregulated commercialisation.”<sup>198</sup>

- 5.29 The language used in the Consultation Document suggests dissatisfaction with the protection provided by the existing Scottish legal framework, a sentiment also expressed in Australia, when passing its Sydney 2000 and Melbourne 2006 legislation. Something more was needed to “fill the gaps in the current legal framework.” But what were those gaps?
- 5.30 Generally speaking IP laws, especially trade mark laws, do not go far enough to protect Games-specific word marks whose application for registration would otherwise be refused for want of distinctiveness. Consequently, *sui generis* legislation offered additional width for the Commonwealth Games Organising Committee. Lewis and Taylor also note that the Glasgow Commonwealth Games Bill created “new criminal offences prohibiting unauthorised advertising and outdoor trading near to the Games venues, as well as further new criminal offences prohibiting the unauthorised sale of Games tickets.”<sup>199</sup> Like South Africa when it hosted the 2003 CWC, criminal offences were created. The creation of criminal offences is not the function of IP laws so that inherent limitations also arise in that regard. Admittedly, such measures are typically effective as a deterrent but are not usually proportionate.
- 5.31 The Commonwealth Games Host City Contract (HCC) also places additional responsibilities on Glasgow which needed to be reflected in its legislation. Among them is the requirement for “clean venues”<sup>200</sup> which has now become standard for host nations. Clean venues clear the way for official partners to fully exploit their brands having earned that right by virtue of the investments made in the event. The legality of the requirement is debatable as discussed in Chapter 4. In Chapter, judicial and academic opinions on ambush marketing are juxtaposed.

## Chapter Six - The Juxtaposition of Academic and Judicial Opinions

### A. Litigation Largely Avoided

“Italy is an interesting example of a specific legislation adopted in relation to the Turin Winter Games which did not give rise to any court case. We

191 LOCOG’s worldwide partners are Coca-Cola, Acer, Atos Origin, General Electric, Mc Donald’s, Omega, Panasonic, Samsung and VISA. Its official partners are Adidas, British Petroleum, British Airways, Nortel, Lloyds TSB, EDF and BT.

192 Miller, ISLJ, *supra*.

193 Miller, ISLJ, *supra*.

194 Miller, ISLJ, *supra*.

195 Miller, ISLJ, *supra*.

196 LOGPGA 2006 Schedule 3, s.3 (i).

197 Lewis and Taylor, *supra*, at paragraph H 2.23.

198 Consultation Document on the Glasgow Commonwealth Games Bill, section 4.

199 Lewis and Taylor, *supra*, at paragraph G 1.150.

200 Section 7.

have no means to determine whether this is due to the extreme efficiency or the uselessness of that legislative package, or a little bit of both.”<sup>201</sup>

6.1 Kobel’s frank assessment confirms the general position that relatively few ambush marketing disputes have culminated in litigation. This could either result from effective anti-infringement programmes or from ambush marketers skillfully circumventing the law. This chapter proposes to examine international case law with a view to understanding the court’s approach to the legal legitimacy of ambush marketing and to ascertain the levels of consistency between judicial and academic opinion.

## B. Illegal, Immoral or Creative?

### (I) Academic opinion

“Conversely, there are also those who admire ambush marketing, taking the view that if it is not illegal, then it is no more than the free market at work. Putting morality to one side, it is tempting to recognise it as (on occasion) ingenious and entrepreneurial, perhaps even an art form.”<sup>202</sup>

“Ambush marketing... occurs when one brand pays to become an official sponsor of an event (most often athletic) and another competing brand attempts to cleverly connect itself with the event, without paying the sponsorship fee, and more frustratingly, without breaking any laws.”<sup>203</sup> [Emphasis added]

6.2 The abovementioned opinions typify the wide-ranging thoughts on the status of ambush marketing. Thoughts vary on the double-barreled question of what behavior actually constitutes ambush marketing and whether the practice *per se* is lawful or unlawful. Both limbs are not easily discernible. While Leone considers the practice “perfectly legitimate”<sup>204</sup>, Mandel calls it “stealing” and “thievery.”<sup>205</sup> Even when there is agreement on activities that can be classed as ambush marketing, its legality remains a factious issue.

6.3 Leone offers the following as examples of ambush marketing:

- a) sponsoring participating athletes or teams rather than the event
- b) sponsoring television broadcasts of the event and
- c) painting footballs on airplanes during a major football tournament.

6.4 It would seem legally untenable to label examples (a) and (b) as illegal activities since they involve legitimate sponsors investing in individuals, teams and media coverage. The fact that spectators may be confused as to the identity of the event sponsors is not the fault of the secondary sponsors. Reducing confusion then becomes a matter of a proper commercial programme and the strategic distribution of rights. The football-painting conduct is creative yet it would be unfair to label it illicit conduct unless the airplanes displaying the footballs were flying over protected airspace contrary to specific laws, a live issue during the 1996 Atlanta Summer Olympics where the Local Organizing Committee requested that the Federal Aviation Authority prohibit all unauthorised flights “within the city limits for the duration of the Games.”<sup>206</sup>

6.5 A morality argument against ambush marketing would be premised on the fact that proper business etiquette requires entities, *inter alia*, to enter a market by making the requisite financial investments. Notably, the alternative designation “parasite marketing” itself lends

to an inherently ethical stance as was recently highlighted in Switzerland, where the use of the term “parasitical” in the proposed amendment to the Federal Act on Unlawful Competition was criticised as “moralistic and unclear.”<sup>207</sup>

6.6 The 1994 Lillehammer Winter Olympics highlighted what could be deemed immoral behaviour when American Express ran a campaign stating in effect that to travel to Lillehammer one needed a passport but not a visa. This was a clever play on words used by American Express to literally discredit its credit card rival Visa. Ethical? Perhaps not. Legal? Why not?

6.7 The wittiness of the American Express campaign does force legal observers to consider whether any legal principles have been breached. The law of passing off, *prima facie*, does not apply because there was no confusion about the goods or services of American Express being those of Visa. The more applicable set of principles appear to be advertising and unfair competition laws which vary from jurisdiction to jurisdiction.

6.8 Gardiner views the American Express campaign as ambush that falls within the category of comparative advertising.<sup>208</sup> He also believes that broadcast sponsorship by non-event sponsors and the purchase of commercial air time equally constitute ambush marketing. Miller held the view that Dutch beer Bavaria’s 2006 FIFA World Cup attempt to upstage Anheuser Busch’s Budweiser beer was a clear ambush deserving censure. Evidently, the German stadium authorities held the same view instructing the Bavaria clad fans to remove their orange lederhosen.

6.9 Kobel’s comprehensive ambush marketing report<sup>209</sup> lists a series of thought-provoking questions that attempt to uncover the enigma that ambush marketing sometimes can be. His queries, asked in 11 countries<sup>210</sup>, included the following activities: any reference to the event without using the official name or logo; organisation of parallel events in the same town covering similar activities; the use of disclaimers by competitors of event sponsors; congratulatory messages during an event from team/athlete sponsors; and the purchase of television advertising slots around the event broadcast.

6.10 The determination of the status of each example rests very much with the statutory set up in the country in which the activities occur. Identifying an ambush may yet turn out to be easier than ascertaining its legality. However, the inconsistency surrounding its definition and its composition will leave the law in this area in a state of uncertainty for some time.

### (II) Judicial Opinion

“It is humbly submitted that the Delhi High Court judgment refusing to accept ambush marketing as a ground for relief is a retrograde step.”<sup>211</sup>

#### Case Law in India

6.11 Bhattacharjee’s comments were made following the decision in *ICC v. Britannia*<sup>212</sup> in which the Delhi High Court held that ambush marketing was not available to the Plaintiff, the ICCDIL,<sup>213</sup> as it sought injunctive relief against Britannia Industries. At the heart of the conflict was the Plaintiff’s claim that the Defendant’s scheme “Britannia Khao World Cup Jao” amounted to unfair trading and that its use of the 2003 Cricket World Cup (CWC) logo was unauthorised and constituted ambush marketing. Holding that the balance of convenience did not lie in the Plaintiff’s favour, the court observed that the Plaintiff’s failure to contest the existence of a lawful agency agreement on the Defendant’s behalf was fatal to its case. Further, the evidence in the rights contracts confirmed Britannia’s right to use some of the event marks that it did, including the mascot.<sup>214</sup>

6.12 Bhattacharjee’s concern is meritorious. Even though the legality of Britannia’s actions hinged on the rights granted in the relevant commercial agreements, the better approach for the Delhi High Court would have been to allow the plea of ambush marketing, even if the requirements to establish an offence were not met. To reject the plea is to imply that the claim was frivolous, arbitrary or capricious. Were the case heard in South Africa, the competition venue, the ICCDIL’s case would have had a stronger legal footing due to the amendments

201 Kobel, *supra*, op.cit. 52.

202 Duthie, *supra* at page 171.

203 “Ambush Marketing: Steals the Show”- Abram Sauer, *brandchannel*-May 27, 2002.

204 Leone, ISLJ, *supra*.

205 Norman Mandel, Business Affairs Counsel, Coca-Cola.-Global Sports Law Conference, Cardiff, November 1999 and quoted at “Sports Law”-Gardiner et al, *supra*, at page 459.

206 Becker, *supra*, at page 14 footnote #23.

207 “Switzerland: new legislative steps against ambush marketing”-Daniel Hufschmid, *International Sports Law Review* 2006 3 (Aug), pp.77-78.

208 Gardiner et al, *supra* at page 459.

209 *Ibid*.

210 Austria, Belgium, Brazil, Finland, France, Germany, Hungary, Italy, Spain, Switzerland and the United Kingdom.

211 “Ambush Marketing-The Problem and the Projected Solutions *vis-a-vis* Intellectual Property Law-A Global Perspective”- Sudipta Bhattacharjee, *Journal of Intellectual Property Rights*-Volume 8, September 2003, pp 375-388.

212 Quoted in “ICC plea for stay on use of World Cup logo rejected”-December 4, 2002 [Accessed on January 1, 2010].

213 International Cricket Council Development International Limited, a company formed by the International Cricket Council.

214 Op cit. 159.

made to the 1976 Trade Practices Act and the 1941 Merchandise Marks Act.<sup>215</sup> The amended laws prohibited the implication of a contractual or other connection with a sponsored event, and the unauthorised use of a trade mark relating to the event which use achieves publicity or derives benefit from the event.<sup>216</sup>

- 6.13 Before a South African court, the ambush marketing plea would at least be open to the ICCDIL, although it would have failed since Britannia had the requisite authorisation to use the event marks on its promotional material. Evidently, any such litigation would possibly have been the first since Cornelius, writing in 2003, noted that at “the time of writing hardly any legal action had been taken against any apparent contravention of these provisions during the Cricket World Cup tournament.”<sup>217</sup>
- 6.14 It is submitted that in rejecting the plea of ambush marketing, the Delhi High court failed to embrace the modern sports business culture and bowled an unplayable delivery at event organisers. The court, even if it ruled in Britannia’s favour, missed an opportunity to make a categorical statement about the damage that ambush marketing can cause to the long-term health of sports funding and development.
- 6.15 In *Arvee*<sup>218</sup> and in *EGSS*<sup>219</sup>, the ICCDIL, as Plaintiff in both decisions, had contrasting results. In the former case, the court rejected the pleas of passing off and ambush marketing, holding that there was no misuse of the ICC logo with the effect that consumers would not conclude that there was a connection between the Defendant’s goods and the 2003 CWC sponsors.<sup>220</sup> However, in *EGSS*, an injunction was granted against the use of the ICC logo which use was deemed to have been caught by the Indian Copyright Act.<sup>221</sup>
- 6.16 It is hard to reconcile the Indian World Cup cases, especially since copyright law, if applicable in *EGSS* should have been equally relevant in *Arvee* and *Britannia*. The dichotomy in the decisions may be explained by considering the causes of action presented to the court in each case. Had the ICCDIL not pursued passing off and ambush marketing in the first two cases, but instead relied on traditional intellectual property law, the outcome may very well have been different. The courts, generally, appear more willing to entertain causes of action based on well-entrenched legal principles, rather than novel grounds for relief, even if they are legally sound. That trend is also evident in North America.

#### North American Case Law

“Unless a clear decision is made by the courts or legislature, ambush marketing will continue and increase.”<sup>222</sup>

- 6.17 Schmidz voiced his concerns during the time of the 2004 Athens Summer Olympics, as he observed the hesitance of the US courts to give a definitive ruling on ambush marketing. American jurisprudence however does reveal “the willingness of the courts to protect sponsorship and licensing contracts”<sup>223</sup> under section 43(a) of the Trade Mark Act of 1946 (“Lanham Act”) which covers false designations of origin and false descriptions or representations. Such was the case in *MasterCard v. Sprint*<sup>224</sup> where both parties had official status, MasterCard as an official sponsor and Sprint, the official long distance telecommunications provider. Difficulties occurred when Sprint did not respect the product exclusivity requirements

of ISL Football AG which had granted MasterCard the exclusive right to use the trademark ‘World Cup 94’ on card-based payment and account access devices, which included phone cards.<sup>225</sup> Sprint’s use of the World Cup trade mark on its telephone cards was deemed unlawful since it was outside of its designated product category.

- 6.18 Schmidz’s acknowledgment of the United States Olympic Committee (USOC) line of cases which cemented the function of the 1998 Ted Stephens Olympic and Amateur Sports Act (OAS Act)<sup>226</sup> is useful. In *Stop the Olympic Vision*<sup>227</sup>, *Union Sport*<sup>228</sup>, *International Federation of Body Builders*<sup>229</sup> and *David Shoe*<sup>230</sup>, the courts held that the purpose of the OAS Act was to “insure the market value of licences.”<sup>231</sup> This shows an admirable appreciation of and awareness for the value of the commerce of sport. In the US courts, then, primacy is accorded to contractual obligations in commercial agreements and there is an unmistakable loyalty to the letter of the law. This was evident in *FIFA v. Nike*.<sup>232</sup>
- 6.19 In that case, FIFA sought a restraining order that would stop Nike from using the designation “USA 2003” in circumstances where Adidas was the official footwear sponsor for the 2003 Women’s World Cup<sup>233</sup>. At the same time, Nike had a legitimate claim for use of the designation being the sponsor of the US Women’s National Soccer Team. Interestingly, the court refused to grant the order, holding that the “Football Association had not acquired secondary meaning in the descriptive designation ‘USA 2003.’”<sup>234</sup>
- 6.20 The ruling raises critical legal issues. The declaration of the designation as distinctive brings to bear the importance of trade mark owners showing alacrity not only in registering their marks but also in complying with registration requirements. Johnson advises that word marks comprising the event plus the year, the event and the location or the location and the year should be registered,<sup>235</sup> hence ‘Commonwealth Games 2018,’ ‘Pan American Games Toronto’ and ‘Rio 2016’ respectively. In the *WORLD CUP 2006 OHIM*<sup>236</sup> series of decisions<sup>237</sup>, the cancellation division held that the fact that although the marks GERMANY 2006, WORLD CUP GERMANY, WORLD CUP 2006 and WM 2006 “were suggestive of the tournament does not mean that they are devoid of distinctive character.”<sup>238</sup>
- 6.21 By contrast, the registration of FUSSBALL WM 2006 was cancelled by the German Supreme Court who found it to be descriptive with regard to some goods. The court observed that the addition of the word FIFA would likely have pushed the word mark over the distinctiveness threshold.<sup>239</sup> In the *FIFA v. Nike* decision the ‘USA 2003’ designation was only descriptive and FIFA would have had to acquire a secondary meaning in that designation. To acquire a secondary meaning, the public would have had to recognise the ‘USA 2003’ mark as identifying FIFA as the trade source of any products bearing the mark,<sup>240</sup> thus arousing issues similar to those considered in the *Arsenal v. Reed*<sup>241</sup> decision. These are the obstacles faced when there is an attempt to register generic terms like ‘World Cup’ or ‘Football’ as FIFA itself would very well know.
- 6.22 Additionally, the ruling suggests that Nike’s reputation as an aggressive marketer and habitual ambusher did not have any bearing on the court’s decision. Nike’s marketing strategy seems unique and unorthodox considering its abovementioned record of ambushes including Barcelona 1992, Atlanta 1996 and Cardiff 1999 as well as

215 Amended by the Trade Practices Amendment Act 26 of 2001 and the Merchandise Marks Amendment Act 61 of 2002, respectively.

216 *Ibid* at s.9 (d) and s.15 A, respectively.

217 “South African Measures to Combat Ambush Marketing in Sport”- Steve Cornelius, *International Sports Law Journal* 2003/1 at page 38.

218 (2003) 26 PTC 245 (Del) quoted in Bhattacharjee, *supra*, op. cit. 158.

219 (2003) 26 PTC 228 (Del) quoted in Bhattacharjee, *supra*, op. cit. 158.

220 Bhattacharjee, *supra*, op. cit. 158.

221 *Ibid*.

222 Jason K Schmitz, *Northwestern Journal of Technology and Intellectual Property*, *supra*, op. cit. 137.

223 *Ibid*.

224 MasterCard International Inc. v. Sprint Communications Co. 1994 WL 97097 (S.D.N.Y. 1994).

225 Schmitz, *supra*, op. cit. 197.

226 This Act amended the 1978 Amateur Sports Rights Act.

227 *Stop the Olympic Prison v. United States Olympic Committee*, 489 F.Supp. 1112, 1120 (S.D.N.Y. 1980).

228 United States Olympic Committee. v. Union Sport Apparel, 220 U.S.P.Q. 526 (E.D.Va. 1983);

229 United States Olympic Committee v. International Federation of Body Builders, 219 U.S.P.Q. 353 (D.D.C. 1982);

230 United States Olympic Committee v. David Shoe Co., Inc., 835 F.2d 880 (6th Cir. 1987).

231 Schmitz, *supra*, op. cit. 197.

232 295 F. Supp.2d 64, 68 U.S.P.Q.2d 1849 (D.D.C. 2003).

233 United States: Ambush Marketing: protecting sport from brand hijacks”-

Stephen P. Durchslag, *World Sports Law Report*, August 2007-Volume 5, Issue 8.

234 *Ibid*.

235 Philip Johnson, *supra*, op. cit. 39.

236 Office for Harmonisation in the Internal Market.

237 October 28, 2005, Cases:(No. 215635), (No. 2153005) (No. 2152817) and (No. 2155521).

238 *Ibid* at paragraph 2-22 footnote 73.

239 *Ibid* at paragraph 2-23.

240 Lewis and Taylor, *supra*, op. cit.6 at paragraph G 1.114 footnote 3.

241 [2003] EWCA Civ. 696, considered in Chapter 5.

its unexpected stance to maintain its sponsorship relationship with Tiger Woods falling his fall from grace. Nike co-founder Phil Knight has gone as far as saying that scandal is “part of the game” for companies signing endorsement deals.<sup>242</sup> The court in *Nike* therefore showed commendable conviction in separating Nike’s reputation from the relevant legal principles.

- 6.23 In *NCAA v. Coors Brewing Co.*,<sup>243</sup> Coors used tickets for the NCAA Men’s Final Four Basketball tournament as prizes. The National Collegiate Athletic Association (NCAA) sued Coors alleging unfair competition and breach of a revocable licence.<sup>244</sup> The latter claim was based on ticket conditions prohibiting use as a contest prize, while the former claim was based on Coors’ attempt to gain an association with the NCAA.<sup>245</sup> The case was settled before a ruling was given but remains historic because it pioneered ambush marketing cases involving tickets as prizes in the United States.<sup>246</sup>
- 6.24 If the *Coors* facts were judicially considered, contract law would have applied in the NCAA’s favour in the US courts and in most other jurisdictions. The terms and conditions on tickets represent contractual terms which are binding on purchasers. The unfair competition claim, however, would not be easily resolved since its determination would depend on competition laws germane to the respective territories.

The significance of *National Hockey League v. Pepsi*<sup>247</sup>

“Indeed, there were times when it seemed that the plaintiffs were as much interested in persuading this Court to denounce the practice of what advertising executives refer to as “ambush marketing” as they were in the resolution of the legal issues in the case.”<sup>248</sup>

- 6.25 This decision was one of many involving the same litigants. The key issues to be ventilated in the case were summarised by Hardinge J as passing off, and in the alternative, trade-mark infringement or interference with contractual relations. The court relied on the House of Lords decision in *General Electric*, as it found that although Pepsi’s advertising campaign did constitute ambush marketing, there was “nothing in law that could be done to protect either Coke or the NHL in its endeavours to protect Coke from its main competitor.”<sup>249</sup>
- 6.26 The dictum of Hardinge J. is telling as he elucidated: “It may be that due to Coke’s failure to secure the right to advertise its product during the television broadcasts of NHIC and the securing of such rights by the defendant, the commercial value to Coke of the right to describe its product as the “Official Soft Drink of the NHL” has less commercial value than would have been the case if Coke had also obtained the right to advertise on NHIC. But that cannot diminish the defendant’s rights.”<sup>250</sup>
- 6.27 The decision strengthens the earlier arguments of Duthie and Leone that “saturation sponsorship” is not only practically prudent but also legally wise. Coca-Cola learned this lesson the hard way.

Case Law in Australia and New Zealand

- 6.28 Decisions from the Commonwealth nations have traditionally provide persuasive precedent for fellow Commonwealth countries. A key decision was that in *New Zealand Olympic and Commonwealth Games Association v. Telecom New Zealand*<sup>251</sup>, in which the plaintiff’s claim against Telecom New Zealand was three-fold: infringement of the Fair Trading Act 1986, passing off and Trade Mark forgery.

242 “Nike Chief backs Woods”-  
www.sports-city.org/news\_details.php?news\_id=10338&idCategory=31,  
Decembert6, 2009 accessed on  
December 31, 2009.  
243 2002 WL 21431479 (S.D. Ind. 2002).  
244 “Durchschlag, *World Sports Law Report*,  
August 2007-Volume 5, Issue 8, supra.  
245 *Ibid.*  
246 *Ibid.*  
247 Supreme Court of British Columbia,  
Case No. C 902104.  
248 Dictum of Mr. Justice Hardinge, *ibid.*

249 Bhattacharjee, supra.  
250 Hardinge J, as quoted in Bhattacharjee,  
supra.  
251 Quoted in “Ambush Marketing  
Legislation Review, October 2007-  
Prepared for IP Australia and the  
Department of Communications,  
Information Technology and the Arts  
(DCITA)”.  
252 *Ibid.*  
253 Quoted in Australian Legislative  
Review, supra.  
254 All quoted in Michalos, supra.

- 6.29 The Plaintiff sought interlocutory relief in the form of an interim injunction to prevent the Defendant from publishing a contentious advertisement. The views of Justice Mc Gedan are instructive where he noted that “Telecom’s conduct is certainly of concern to the Olympic movement, but there is no proven inevitability of damage... Telecom has been adventurous, perhaps unwisely so, but the Olympic Association, perhaps pushed by the competitor Bell South, may have been perhaps a little paranoid as to possible repercussions.”<sup>252</sup>
- 6.30 The rationale of the judge in ruling for the alleged infringer, Telecom, was that the lack of proof of damage being inevitable was fatal to the Olympic Association’s case. While he acknowledged concerns about Telecom’s conduct, it was not far enough to be considered unlawful. The ruling highlights the need for an event organiser or rights holder to prove the risk of actual damage, whether financial loss, damage to reputation or confusion in the public mind that leads to decreased revenue. A concern or ‘paranoia’ about possible adverse ramifications is not enough.
- 6.31 The decision also highlights the role that official sponsors can play in influencing rights holders to initiate legal proceedings. Bell South, a rival of Telecom, saw the latter’s association as a threat to its own commercial potential, even if it were only perceived. This places rights holders in a difficult situation as they seek to allay the fears of commercial partners while being legally prudent. It is why proactive anti-infringement measures are usually more effective than reactive measures, as evidenced in Australia during Sydney 2000 and Melbourne 2006.

In *AOC v. Baxter & Co.*<sup>253</sup> the Australian Olympic Committee (AOC) brought action against Baxter & Co. who sought to register the words “THE OLYMPIC” as a trade mark. The relevant legislative provisions were found in the Sydney 2000 Act. It was held that the mark did not fall foul of the Sydney Act so as to prevent registration under the Trade Marks Act. The ‘Olympic’ cases have been difficult to reconcile.

## Conclusion

### Judicial Inconsistencies

- 6.33 Michalos laments the inconsistencies that have arisen out of the ‘Olympic’ cases like *Astral Olympic*, *Compulympics*, and *Family Club Belmont Olympic*<sup>254</sup> in which OHIM permitted the registration of the mark “Astral Olympic” in the former case but rejected similar registrations in the latter cases. Even some judges have found it difficult to find consistency as the dissenting judgments of Justices O’Connor and Blackmun in *SFAA v. USOC* indicate. They viewed the Amateur Sports Act as “overbroad because it vested the USOC with unguided discretion” regarding the Olympic properties. This is not only indicative of the intricacies of IP law but the need for greater international harmonisation especially in Olympic-related litigation.

## Chapter Seven - Conclusions and Recommendations

### A. The Marks of Success

“At first look it would appear that recent events such as the 2006 Torino Winter Olympics or the 2004 Athens Summer Olympics were less targeted by ambushers, perhaps an indication of the impact of legislation”<sup>255</sup>

- 7.1 There is little disagreement that it is difficult to quantify whether rights owners have been successful in the anti-ambush battle. Reminiscent of the anti-doping movement is the fact that as counter-measures are initiated new ways of infringement are created. This is confirmed by the continuing advance in sophistication of ambush-ing measures.

### B. Conclusions

- 7.2 It is submitted that the material assessed in this presentation necessarily leads to the following conclusions:
- 7.3 The law as it relates to ambush marketing is still very unsettled due to inconsistencies in definition of the practice and the application of the relevant law. Pertinent legal questions raised in the Australian Review remain largely unanswered, in particular the issue of how

does regulation of ambush marketing operate when (a) existing law is either uncertain in its application or is very dependent on the facts of each case and (b) the law is in no way contravened.

- 7.4 The presentation also points to the fact that nations that are new to event hosting are likely to lose the battle against ambush marketers. The criticisms doled out to the Swiss government before Euro 2008 were typical for countries new to major event hosting. The accusation of compliance with governing bodies at the expense of others' rights is reminiscent of the very backlash received by the West Indies Cricket Board and Caribbean governments during Cricket World Cup 2007. The hosting of ICC Cricket World Cup in the West Indies was historic given the fact that it was the first sporting event of such magnitude being hosted in the Caribbean region. Many in the West Indies became acquainted with the term "ambush marketing" for the first time and in keeping with modern trends of major event hosting, the nine (9) host venues were mandated by the ICC to pass event-specific "sunset" legislation.
- 7.5 The legislation itself was strict on its face but this was not by the calculated and well-planned efforts of the organisers. The new hosts may just have been happy "to be there" Yet, this is not entirely surprising given the novelty of this scale of sports event to the Caribbean region and perhaps an innate pressure to "get it right" the first time around. This relative legislative strictness, however may have been the ideal fillip for a region that is still largely unfamiliar with the full commercial landscape regarding sponsorship, image rights and intellectual property law. In this regard, Schmitz was on point when he noted that "the practice of ambush marketing encourages organizers to work harder to thwart intellectual property violations, and raises the awareness of intellectual property rights globally-a long-term benefit to all intellectual property owners."<sup>256</sup>
- 7.6 Thirdly, the ambushers have been more successful than the

255 Burton and Chadwick, supra, op. cit. 31.

258 *Ibid.*

256 Schmitz, supra, op.cit. 197.

259 Burton and Chadwick, supra, op. cit. 31.

257 ESA position statement, supra, op.cit no. 88.

ambushed. The anti-infringement programmes reviewed have had limited success as evidenced by the continued ambushing activity at 'mega events'. The recommendations below will offer a few solutions:

### C. Recommendations

"In order to make any specific anti-ambush legislation workable, it is essential that it is simple and unequivocal."<sup>257</sup>

- 7.7 This logical approach to law-making is sometimes overlooked in the desire to be meticulous. The ESA expands on this useful recommendation by adding that anti-ambush laws should provide marketers with certainty and should incorporate fair and proportionate civil sanctions.<sup>258</sup> In this way the nebulous legal status of the ambusher and the ambushed will slower receive much needed clarity.
- 7.8 Greater forethought and advance planning is needed both by sponsors and event organisers. As Burton and Chadwick note: "While proactive strategies provide a foundation upon which to build, greater anticipation and sponsorship activation are fundamental to the successful defence against ambush marketing."<sup>259</sup> Too many anti-ambush campaigns have been reactive leaving rights holders to play catch up.
- 7.9 Finally, it is submitted that there should be a move towards the creation of a "World Anti-Ambush Code" of sorts. One of the latent benefits arising from the creation of the first World Anti-Doping Code in 2003 was the consistency and harmonisation brought to the fight against doping in sport. Extensive stakeholder consultation resulted in a working document that addressed a vast spectrum of needs expressed by athletes and regulators alike. A similar movement is recommended for the sports business industry, albeit on a scaled-down basis simply because the complexity of intellectual property law will make any major global Code on ambush marketing regulation difficult to harmonise. Perhaps, regional or continental Codes encapsulating IP, trade and advertising law will be a useful starting point. The business of sport demands as much creativity and innovation possible to keep thriving.

The International Sports Law Journal

# Sports Image Rights in The Netherlands\*

by Steffen Hagen\*\*

## 1. Introduction

As the legendary Nike slogan said: "Image Is Everything". Successful sportspersons are right up there with the famous actors, pop stars and other showbiz celebrities, as the commercial icons of our time. Even more so in this day and age of outer appearances and multimedia, the image of a sportsperson has become more than just the depiction of a sporting person - it has become a marketable asset often representing great value.

In June 2009, Real Madrid took over striker Cristiano Ronaldo from Manchester United for the astronomical amount of €94 million, making for the most expensive transfer in football history. Although the payment of such a high transfer amount was frowned upon by many sceptics, Real Madrid allegedly recovered its costs within a year's time due to the enormous marketing income that Cristiano Ronaldo generated for the football club. It goes to show that Real Madrid didn't pay almost €100 million just for Ronaldo's football playing qualities, but also for the value of Ronaldo as a commercial product, a marketing commodity. Cristiano Ronaldo is the new Beckham.

Well-known sportspersons, especially footballers, are the idols admired by their fans - the consumers - and therefore commercial organisations are eager to bind a sports personality with a positive reputation as the 'face' of their product or service, or to otherwise link their trade name or trademark to that sportsperson in order to boost sales by profiting from the positive image of the player reflecting on the company's product. Clearly, there is a significant commercial value in the exploitable popularity of sportspersons with a reputation. In this respect, exclusivity is of the essence. The popular player therefore has every reason to prevent third parties, without consent, from using and profiting of such player's reputation. This is where Sports Image Rights come into play.

## 2. Image Rights in the Netherlands

### 2.1. Defining image rights

The term 'image' may have different meanings. It may refer to a particular depiction (portrait) of a person - a photo, picture, painting, caricature - or to one's physical appearance generally. Image may also have the broader meaning of: how a person is perceived by the public, i.e. a person's *reputation*. In the latter sense, one's image (reputation) will not merely be connected to a person's physical appearance, but the public will also associate such image to other elements of one's *persona*, such as name, nickname, voice, autograph and/or other symbols particular to such person (for instance, the shirt number of a famous football player).

\* This chapter is based on, and is a completely revised version of, the chapter on The Netherlands in the first edition of *Sports Image Rights* (T.M.C. Asser Press, The Hague, 2005) book © 2005, written

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It goes without saying that sports personalities have an interest in controlling the commercialisation of their image in the broadest sense - image meaning the reputational goodwill value represented in one's persona (depiction, name and other personal elements). Such control lies in the legal protection enjoyed by (sports)persons against the (commercial) use of one's image by a third party without consent or valid reason. This is what is often referred to as 'image rights'.

## 2.2. Legal protection

Dutch law does not recognise an image right as such - neither in the broader sense of one's right to (the exploitation of) his or her *persona* (reputation generally), nor in the sense of a right to one's own image (in the meaning of depiction) similar to the "*Recht am eigenen Bild*" as recognised in Germany.

Nevertheless, in the Netherlands a famous (or less famous) sportsperson does have several grounds for legal action available to him or her to prevent third parties from (mis)using or profiting from such sportsperson's image without his or her consent. This legal arsenal - what's in a football club's name - can be found in the Copyright Act, the Civil Code and the Benelux Convention on Intellectual Property.

The Copyright Act contains certain provisions that may protect sportspersons against the unauthorised (commercial) exploitation of their portrait. These provisions are generally referred to as Dutch 'portrait law' as they provide 'image rights' in the narrow sense of depiction or portrait rights. These portrait rights are discussed in further detail in chapter 3 below.

As to the commercial exploitation of the elements of one's persona other than his or her depiction - such as name, nickname, voice - a sportsperson may enjoy a protection similar to that provided by portrait law by invoking the doctrine of the unlawful act as laid down in the Civil Code. Such protection of a sportsperson's indicia (other than one's appearance) are considered in chapter 4.

In addition, sportspersons may strengthen the legal protection of their image by registering certain elements of their persona as a trademark. Chapter 5 elaborates on these possibilities of trademark protection.

The remedies and sanctions available to a sportsperson looking to enforce his image rights in proceedings before the Dutch courts are set out in chapter 6.

## 2.3. Limitations

In practice, a sportsperson may often be limited in the commercial exploitation of his image. The image rights of a sportsperson may often be restricted by contractual (sponsorship) obligations pursuant to an employment contract or membership of a club and/or national sports federation or union. As a member of a club or federation, a sportsperson is bound by constitutions and regulations, including regulations regarding sponsorship, and he or she can therefore be bound by sponsorship obligations towards third parties. Also, practice shows that where a sportsperson has several relationships (e.g. with his club/employer, as well as with the national sports federation) which confer different contractual obligations upon him, this may result in conflicting sponsorship obligations. These issues will be further discussed in chapter 7.

## 3. Definition of a Portrait

The term 'portrait' may first of all bring to mind the classic notion of a painting or photograph of the face of a person posing. However, in Dutch law the concept of a 'portrait' is much broader than that.

### 3.1. Depiction

In the Explanatory Memorandum to the Copyright Act - which dates back to the introduction of the Act (including the aforementioned 'portrait right articles' included therein) in 1912 - a portrait was defined as "a depiction of a person's face, with or without the depiction of other parts of the body, however it has been created".

First of all, this definition makes it clear that the production manner or *form* of the portrait is not relevant. A portrait may be made with a photo- or video camera, painted or drawn, cast in bronze, etc.

Essential for a portrait is that it is a *depiction*. In this respect, it is irrelevant whether the person portrayed has actually posed for its depiction; a photograph of a person taken by chance, or including that person unintentionally, may also qualify as a portrait. A description of someone's appearance, however striking or recognisable, does not make for a portrait.

Also, to qualify as a portrait the depiction must be of a *person*. A photograph of a football team will not qualify as a portrait of the football club concerned. An attempt to have a team photo qualify as a portrait of the football club Ajax therefore failed in 1980.<sup>1</sup> The court in this case explicitly considered that portrait rights are only attributable to natural persons. Consequently, a football club, or any other corporate body or entity, does not qualify as a "person portrayed" within the meaning of the Copyright Act.

For a long time, it was taken from the above referenced passage in the Explanatory Memorandum that at least a person's *face* must be visible in a depiction in order for it to qualify as a portrait. However, the concept of depiction - and therefore the concept of a portrait as such - has been further developed in case law and its interpretation has become broader over time. As to what nowadays qualifies as a portrait, the line will be drawn in further detail in the following paragraphs.

### 3.2. Corresponding facial features

Initially, the Dutch Supreme Court found that for an image to qualify as a portrait (and thus for the person depicted to have a claim based on portrait rights) corresponding facial features were required. Mere association did not suffice to speak of a portrait.

This followed from the Supreme Court's judgment in the *Ja zuster/nee zuster* case in 1970.<sup>2</sup> In this case the issue concerned promotional key rings with little plastic figures (dolls) attached which represented the main characters/players in a popular television series. The figures did not display recognisable facial features, but they did represent - also clear from the legends on them - the main characters from the series.

The Supreme Court considered, in so many words, that there must be a recognisable visual likeness between an image and the depicted person in order to qualify as a portrait of that person. In this respect, the Supreme Court found that if the face depicted on an object does not correspond with the facial features of a person, such object will not qualify as a portrait of that person, regardless of whether the public will associate or identify (the face on) the object with that certain person.

This judgment received mixed comments in the Dutch legal community. One included the example of a 'depiction of the football player Crujff in action, who's head is hidden from view by a teammate'. Although everybody would immediately recognise Crujff, he would not be able to claim any portrait right in such picture.

### 3.3. Possibility of recognition

Later, in 1987 the Supreme Court in its *Naturiste* judgment<sup>3</sup> still considered the 'depiction of the face', but held that the *possibility* of recognition of the depicted person is sufficient to make for a portrait. This case concerned the publication without consent in a magazine of a photograph of a woman depicted naked, standing up. Her hair was partly over her face, so that the eye area was not visible.

The Supreme Court found that it is not always required that a person's eyes are visible in the depiction. It is not necessary that the viewer of the depiction should be able to get a (clear) representation of the depiction of the face. It is also not required that each viewer should be able to identify the person portrayed. It is sufficient if the person portrayed can be recognised even by only a few people.

### 3.4. Posture

The characteristic posture of a sportsperson may also be of relevance in the assessment of potential infringement of one's portrait right. In the abovementioned *Naturiste* judgment, it was found that a *striking body posture* may also be considered in determining whether the depiction of a person is recognisable.

<sup>1</sup> President of the District Court in Utrecht, 16 January 1980, NJ 1980, 481 (*Krol c.s./Panini*).

<sup>2</sup> Supreme Court, 16 January 1970, NJ 1970, 220 (*Ja zuster/nee zuster*). [Transl.: Yes nurse/no nurse.]



Luca Modric: a Johan Cruyff look-a-like?

This view was confirmed in a 1991 court ruling.<sup>4</sup> The case concerned an advertisement by the Burnham Company for a new gas boiler. This advertisement featured an action photo of the well-known marathon skater Yep Kramer without his consent. The accompanying text made a comparison between the stamina of Kramer and that of the gas boiler. The court found that the advertisement infringed on the portrait rights of Kramer by free-riding on the persona of Kramer which constituted commercial use of his popularity. The court considered that Kramer was clearly recognisable in the photograph used in the advertisement, not only because his facial features were visible, but also due to the characteristic posture in which he was known to move across the ice.

### 3.5. Other identifying elements

Since the Supreme Court's *Breekijzer*<sup>5</sup> judgment in 2003, the threshold for possibility of recognition has been lowered considerably. This judgment lives up to its name as it indeed represents a 'crowbar' in Dutch portrait law history (*Breekijzer* translates as crowbar). Although not using the word 'association' as such, in this judgment the Supreme Court has basically accepted that even if a depiction lacks any corresponding facial features all together, it may nevertheless qualify as a portrait due to other identifying elements depicted.

This case concerned the television programme 'Breekijzer, a programme aimed at exposing abuses and reprehensible behaviour by confronting persons responsible on camera unannounced. In this particular case the relevant question was whether the person filmed could oppose the broadcasting of the recording even though his face had been blocked out making it *completely unrecognisable*. The Supreme Court ruled that if the face of the person depicted is partly or even entirely made unrecognisable, this does not necessarily stand in the way of qualification of the depiction as a portrait, in the event that the person portrayed can also be identified from any other elements in the picture.

In view of the foregoing, it may not come as a surprise that also pictures of caricatures and look-alikes may qualify as a portrait of the actual (sports)person 'portrayed'.

### 3.6. Caricatures and look-alikes

A caricature, which shows a minimum of resemblance, may also qualify as a portrait within the meaning of the Copyright Act, especially if the context makes it clear which specific (sports)person is depicted in the caricature. In 1965, the President of the District Court of The Hague prohibited the unauthorised sale by the company Electro-Visie of various white metal pins bearing the caricatures and names of the players and trainer of football club Feyenoord.<sup>6</sup> In a more recent case, the use in a commercial advertisement of a caricature of Jan-Peter Balkenende, at that time the Prime Minister of the Netherlands, depicted as a toddler named J.P., was prohibited.<sup>7</sup>

Whether the depiction of a look-alike will also qualify as a portrait is less obvious. Portrait law protection may be granted depending on



Luka Modric, Johan Cruyff © Paladino

the context of the image. Mere corresponding facial features of a look-alike will probably not suffice. However, if the resemblance would intentionally be emphasized, for instance by the use of make-up, hair style, typical posture and/or by stating the name of the sportsperson represented in the image, the portrait of the look-alike may indeed qualify as a portrait of the person that the look-alike resembles.

In 1994, the President of the District Court of Amsterdam denied the claim brought by the late Dutch television celebrity Silvia Millecam against the use of a look-alike in an advertising brochure of Escom computer shops. Although Millecam evidenced that acquaintances had 'recognised' her in the picture of the curly red-haired female model, such picture was not accepted as a portrait of Millecam within the meaning of the Copyright Act. In this respect, the court considered that the said resemblance had not been intended by Escom and that the brochure lacked any references to Millecam or any of her programmes or activities (i.e. there was no additional context that could make the picture of the look-alike model qualify as a portrait of the celebrity in question). Therefore the use of the look-alike in the brochure was not considered a breach of the portrait rights of Millecam.<sup>8</sup>

However, in more recent case law it has indeed been confirmed that the depiction of a look-alike may indeed qualify as a breach of a sports person's portrait rights when it follows from the context in which the image is used that the image intends to impersonate such sports person. This was decided in the *Kalou/Achmea* judgment, which is discussed in more detail in para. 3.3.3 below.<sup>9</sup>

### 3.7. In summary: the current view

The concept of a portrait within the meaning of Dutch portrait law as laid down in the Copyright Act has been stretched considerably over the years. The current view on what qualifies as a portrait follows from the Supreme Court's *Breekijzer* judgment in 2003, which has been cited and followed in a number of judgments since. Basically, it is accepted that even if a depiction lacks any corresponding facial features altogether, i.e. even if the face of a person is not included in the picture at all, it may nevertheless qualify as a portrait due to other identifying elements depicted. The test is, in fact, whether a person may be recognised in a certain image taking into consideration all the identifying elements pro-

3 Supreme Court, 30 October 1987, NJ 1988, 277 (*Naturiste*).

4 Sub District Court in Harderwijk, 29 May 1991, PRG 1991, 3507; Mediaforum 1991, B115 (*Kramer/Burnham*).

5 Supreme Court, 2 May 2003, NJ 2004, 80 (*Niessen & IPA/Storms Factory; Breekijzer*).

6 President of the District Court in The Hague, 7 December 1965, BIE 1966, nr. 66 (*Feyenoord players*).

7 District Court in Amsterdam, 2 February

2005, LJN: AS4624 (*The State vs. Kijkschop*).

8 President of the District Court in Amsterdam, 22 December 1994, IER 1995/12 (*Millecam/Escom*).

9 President of the District Court in The Hague, 13 April 2006, BMM bulletin 2006-2, p. 80-81 (*Kalou/Achmea*).

10 District Court in Breda, 24 June 2005, IER 2005/80 (*Katja Schuurman, Gouden Gids/Yellow Bear*).

vided in or with the image. Such elements must be considered altogether as making up the image in correlation. In other words: the overall impression of the image must be such that the viewer recognises a particular (sports)person in such image. This may indeed be the case where a depiction lacks any facial elements, but where a sportsperson is nevertheless recognisable from such picture due to other identifying elements, such as a characteristic posture or, for example, a striking hair-do, a certain style of clothing or sports gear, a players' shirt number or the typical colours of his club or team. Often, a combination of these elements will be decisive to conclude that an image is clearly recognisable as a portrait of the sportsperson depicted.

The aforementioned element of a striking body posture is obviously of specific relevance in the case of sports images - arguably, the way in which Cristiano Ronaldo celebrates a goal, Arjen Robben's typical posture when dribbling over the pitch, the way Usain Bolt celebrates winning the 100 metres sprint, or the typical posture of Michael Jordan or Kobi Bryant when they make a slam dunk, may be eligible for portrait right protection in the Netherlands.

The Court of Breda has even granted portrait law protection against the use of the recognisable posture of a *look-alike* viewed from the backside, so without any recognisable facial features at all. In 2005, the Dutch celebrity actress Katja Schuurman was the face of the Dutch yellow pages and she starred prominently in the nationwide advertising campaign. Hooking into this, competitor Yellow Bear launched a similar campaign using a look-alike model with the same hair style and colour, the same silhouette, posture and pose and similar high-heeled shoes. With explicit reference to the Supreme Court's *Breekijzer* judgment, the Court considered that although the advertisement lacked any corresponding facial features, the "not-quite portrait" (as the Court phrased it) of the look-alike did indeed qualify as a portrait of Katja Schuurman, as the picture used contained all characteristic features of the portraits used in the original yellow pages campaign. What also didn't help Yellow Bear was that they (internally) named their own campaign the 'Katja campaign' which the Court considered a clear indication that the depicted woman was intentionally suggesting to be Katja Schuurman.<sup>10</sup>

So, in the Netherlands even the picture of a look-alike, without depicting any part of the face, may in certain circumstances - depending on the various typical (identifiable) elements contained therein - qualify as a portrait of the sportsperson resembled in such picture.

#### 4. Portrait Rights

Dutch 'portrait law' is laid down in the Dutch Copyright Act, in articles 19 - 21, 25a and 35. These articles not only contain rules regarding (restrictions on) the copyrights of the portrait maker, but also - more importantly - attribute specific rights to the portrayed person, vis-à-vis both the portrait maker as well as third parties. The inclusion of these rules of law in the Copyright Act is not directly obvious or logical, and in a sense a bit arbitrary. The rights of a portrayed person towards third parties have little to do with copyright. After all, one is not the creator of his own image. In essence portrait rights are rather *privacy* rights and/or, particularly when a famous sportsperson is concerned, *commercial* rights to control and profit from the exploitation of one's image. This includes the right to prohibit the unauthorised association with, and profiting from, one's popularity by a third party.

In the preceding chapter, the picture has been painted as to what it takes for an image to qualify as a portrait within the meaning of the Copyright Act (i.e. for an image to be eligible for portrait right protection). The next assessment to make is obviously whether the sportsperson depicted in an image qualifying as a portrait may indeed have any rights to such image, in particular, whether the sportsperson depicted may prohibit the use (exploitation) of this image without his or her consent.

First of all, it will depend on whether or not the portrait was commissioned by the person portrayed.

#### 4.1. Portrait commissioned by person portrayed

Articles 19 and 20 of the Copyright Act (CA) provide for the situation where a portrait has been commissioned by the person(s) portrayed.

In such case, article 19(1) CA provides that the person portrayed will always have the right to reproduce the portrait, regardless of the copyright of the author of the portrait (i.e. a reproduction by or on behalf of the person portrayed shall not be deemed an infringement of copyright). If more than one person has been portrayed in one image, the portrayed persons will need each other's consent for reproductions (art. 19(2) CA).

Furthermore, article 20 CA prohibits the author (e.g. the photographer) of a portrait commissioned by the person portrayed to make such portrait (e.g. photograph) public without the portrayed person's consent. If the portrait is made of two or more persons, the author will require the consent of all persons portrayed.

#### 4.2. Portrait not commissioned by person portrayed

Most disputes concerning sports images will concern cases where a picture of a sportsperson is made without having been commissioned by or on behalf of that sportsperson and where such picture is being used without his or her consent. In such case of unapproved use of a sportsperson's portrait, the copyright owner (usually the maker of the picture and/or the publisher of the publication containing the image) shall not be allowed to communicate it to the public, in so far as the person portrayed (or, after his death, any of his relatives) has a *reasonable interest* in opposing its communication to the public.

##### 4.2.1. Weighing of conflicting interests

However, a reasonable interest as such does not automatically lead to a valid portrait right claim. This was decided by the Supreme Court in its *Murderer of G.J. Heijn* judgment in 1994.<sup>11</sup> If such a reasonable interest is found to be present, then such interest will be weighed by the court against any other interests, particularly the freedom of information, as codified in Article 10 of the European Convention on Human Rights (ECHR) and Article 7 of the Constitution of the Netherlands. The Supreme Court found that (also) in the context of Article 21 CA the right to privacy (as a reasonable interest) was not more absolute than the freedom of information/expression. This weighing of the interests of Articles 8 and 10 ECHR was later also applied in the first image rights decision of the European Court of Human Rights in January 2000.<sup>12</sup>

##### 4.2.2. Reasonable interest

So, if an image qualifies as a portrait within the meaning of Article 21 CA - and as we have seen in the previous chapter, this will often be the case - the person portrayed can oppose publication/exploitation, provided that the person portrayed has a *reasonable interest* in doing so. Case law over the years has given further clarification as to what may qualify as a 'reasonable interest' within the meaning of Article 21 CA. Two types of reasonable interest can be distinguished: (i) the *privacy* interest and (ii) the *commercial* interest.

##### 4.2.3. Privacy interest

The right to one's privacy is codified in Article 8 of the European Convention on Human Rights (ECHR) as well as Article 10 of the Constitution of the Kingdom of the Netherlands. In the above referenced *Naturiste* judgment (see para. 3.3) in 1987, the Supreme Court for the first time acknowledged the privacy interest as a ground for protection of the person portrayed. In the 1988 *Vondelpark* case<sup>13</sup>, the Supreme Court expressly linked the privacy interest under Article 21 CA with the right to one's privacy of Article 8 ECHR.

Such privacy interest is not a privilege of the common man. Public figures (other than persons in an official function), including famous persons that are often in the public eye, may also rely on a privacy right, which right may outweigh the freedom of information of the (entertainment) press. This follows from the decision of the European Court of Human Rights in the case of *Caroline von Hannover v. Germany*.<sup>14</sup> Obviously, a famous sportsperson may also qualify for such privacy protection.

In practice, however, the privacy interest will not often be relied on

<sup>11</sup> Supreme Court, 21 January 1994, NJ 1994, 473 (*Moordenaar van G.J. Heijn*).

<sup>12</sup> ECHR, 11 January 2000, *News Verlags GmbH & Co.KG v. Austria* (no. 31457/96, ECHR 2000-I).

<sup>13</sup> Supreme Court, 1 July 1988, NJ 1988, 1000 (*Vondelpark*).

<sup>14</sup> ECHR, 24 June 2004, *Caroline von Hannover v. Germany* (no. 59320/00), *Mediaforum* 2004-7/8, no. 27, p.252.

in sports image cases. In such disputes, the reasonable interest of the sportsperson will typically be a *commercial* interest.

One of the rare cases in the Netherlands in which a sportsperson successfully<sup>15</sup> invoked protection of his privacy concerned a weekly tabloid that suggested a homosexual relationship between a singer and a professional footballer. It was presented as a fact on the cover of the magazine, but denied in the relevant editorial article. The football player felt that his privacy had been infringed by this publication. The District Court in Amsterdam agreed, considering that although public figures, such as professional football players, must tolerate a certain degree of interference of their personal life, in this case the magazine had crossed the line. Rectification was ordered and damages were awarded in the amount of NLG 5,000 (approx. €2,250).<sup>16</sup>

#### 4.2.4. Commercial interest

The reasonable interest of a person portrayed to object to publication of his image may also lie in a financial or commercial interest of the person portrayed. Such a commercial interest can only be invoked by specific groups of professionals, namely people with an *exploitable popularity*. Such professionals who are able to commercialize (i.e. make money out of) their popularity include popular artists, TV personalities and, in particular, professional sportspersons.

The first case in which such a commercial interest was recognized by a Dutch court as a reasonable interest for opposing publication of one's image without consent, dates back to 1960. This concerned the portrait of Teddy Scholten, a popular singer at the time, which was used in an advertising campaign without her consent. The Court of Appeal in The Hague considered that a popular singer such as herself was indeed in a position to make (commercial) use of her popularity by, for instance, licensing third parties to use her image for promotional purposes against payment of a consideration (fee, royalty). Such third parties would only be prepared to pay for such use on the basis of exclusivity. The Court reasoned that this gave the popular singer a reasonable interest to oppose publication of her image without consent.<sup>17</sup>

Five years later followed the first case in which professional sportspersons were awarded the right to cash in on their popularity. In this case, the players and coach of football club Feyenoord successfully opposed the production and sale of badges depicting their caricatures. The District Court in The Hague found that players and coach could have exacted a reasonable payment in exchange for their consent to use their depictions, whether or not with mention of their names and whether or not in connection with the sale of specific products.<sup>18</sup>

In 1979, the Supreme Court ruled on the issue whether a financial interest qualifies as a reasonable interest within the meaning of article 21 CA. In the *'t Schaep met de Vijf Pooten* judgment,<sup>19</sup> the Supreme Court indeed recognized the commercial interest of popular professional personalities:

“Although when drawing up the Copyright Act the legislator in using the words ‘a reasonable interest’ in article 21 CA will mainly have had in mind interests of a non-financial nature, given also the developing social views in this respect, there can also be a reasonable interest when the popularity of those portrayed, acquired in the exercise of their profession, is such as to make possible the commercial exploitation of that popularity by any form of publication of their portraits. The interest of those portrayed in such case to be able to share in the benefits of such exploitation by not having to allow the publication of their portraits for commercial ends without receiving compensation for it, is a reasonable interest in the meaning of article 21.”

15 Two recent cases in which the privacy interest was invoked but denied, are the *Van Basten* case and the *Cruiff* case, both discussed in further detail in para. 4.2.4.5. In both cases, a *commercial* interest was indeed accepted, although in the particular case of *Cruiff* this reasonable interest was ultimately outweighed by the freedom of expression/information.

16 President of the District Court in Amsterdam, 2 May 1996, KG 1996/171.

17 Court of Appeal in The Hague, 13 April

1960, NJ 1961, 160 (*Teddy Scholten*).

18 President of the District Court in The Hague, 7 December 1965, BIE 1966, no. 66, p. 240 (*Bouwmeester c.s./Jacobi*).

19 Supreme Court, 19 January 1979, NJ 1979, 383, BIE 1979, no. 23, p. 163 (*'t Schaep met de Vijf Pooten*).

20 Court of Appeal in Amsterdam, 27 May 1993, NJ 1994, 658 (*Amateurbokser Vanderlijde*).

21 Court of Appeal in Amsterdam, 14 April 2009, B9 7818 (*Snowboarders*).

Therefore, in order for a sportsperson to have a reasonable commercial interest to oppose publication of his or her image, such sportsperson must have: (i) popularity acquired in the exercise of his/her profession, and (as a result) (ii) commercial exploitation potential in that popularity.

#### 4.2.4.1. Popularity acquired in exercise of profession

As said above, a person opposing use of his portrait will first of all have to show that he has acquired popularity in the exercise of his *profession*. For the world of sport, the interesting question then arises whether the *amateur* sportsperson could have any commercial interest at all in order to invoke portrait law protection. Case law shows that no clear dividing line can be drawn in this respect. Popular sportspersons who do not, strictly speaking, exercise their sport as their (main) profession, may still enjoy portrait law protection.

This is illustrated by the judgment of the Court of Appeal in Amsterdam in the case of *Amateurboxer Vanderlijde*. This case concerned a large photo of the Dutch amateur boxer Arnold Vanderlijde on the centre pages of Panorama magazine (i.e. the picture could be removed and put up as a poster) published without the boxer's consent. Vanderlijde went to court claiming compensation in the amount of NLG 30,000 (almost €15,000), invoking a reasonable commercial interest and arguing he could have stipulated such amount for his prior consent to such a promotion. Panorama stated in its defence that Vanderlijde's popularity - which was undisputed - had not been acquired in the exercise of his *profession* as he was an *amateur* boxer. The Court rejected this defence and held that it is a matter of whether the popularity which Vanderlijde acquired as a boxer - irrelevant whether as amateur or professional boxer - is such that it can be commercially exploited by way of publication of his portrait.<sup>20</sup>

In other words, in order to enjoy a portrait right it is essential for a sportsperson to acquire substantial popularity in the exercise of his sport, rather than exercise his sport on a professional level. Where the popular amateur may enjoy protection, on the other hand the *pro* status of a sportsperson is not automatically a guarantee for (significant) portrait law protection.

Popularity does not necessarily have to mean famous or known by the general public. In its *Snowboarders* judgment, the Court of Appeal in Amsterdam held that two (allegedly unknown) snowboarders were in principle eligible for portrait law protection given that, as they had participated in World Cup and National Cup tournaments, the snowboarders would at least be known by some within the snowboarding community.<sup>21</sup>

#### 4.2.4.2. Commercial exploitation

However, a certain degree of popularity is not enough for a portrayed sportsperson to actually have a reasonable interest to oppose publication of his or her portrait. In addition, the sportsperson will have to show that such popularity is commercially exploitable, i.e. that the sportsperson's popularity is such that commercial exploitation of his popularity by publication of his portrait can reasonably be considered a realistic possibility.

In the aforementioned case of the *Snowboarders*, the Court of Appeal considered that the two snowboarders depicted on the cover and back of a book on snowboarding were not popular enough to have significant commercial exploitation potential in that limited popularity. Also, the snowboarders failed to show that the publisher of the book had chosen their image for commercial reasons. The book did not contain any reference to the names of the two snowboarders nor any hints to their identity. The Court therefore concluded that the commercial use of the pictures was to such a limited extent geared at, and resulting from, the identity of the snowboarders that no exploitable popularity could be taken from such use.

In respect of well-known sportspersons, in particular professional football players, it is generally accepted that they have a right to take action against unauthorized commercial exploitation of their 'portrait'. After all, these sportspersons have acquired popularity in the exercise of their profession (sport), and such popularity is commercially exploitable (i.e. they can cash in on their popularity). Hence, they have a legitimate interest in controlling the commercial use of their images.

The question arises what exactly qualifies as ‘commercial exploitation by any form of publication’ opposable by the popular sportsperson. In this respect, one may distinguish three categories of commercial exploitation, namely: (i) advertising, (ii) products and (iii) publications.

#### 4.2.4.3. Use of a portrait in advertising

The first category concerns the use of a sportsperson’s portrait in a commercial advertising for the promotion of products or services. This includes advertising in printed media - such as newspapers, magazines, billboards, promotional brochures - as well as broadcasting/video ads (TV, film) and online (which may also include social media).

A clear example of commercial advertising in printed media is the aforementioned unauthorized use of the photograph of ice skater Yep Kramer in an advertisement for Burnham boilers (see para. 3.4 above), which the Court found to be an infringement on the portrait rights of Kramer. Similarly, the use of the portrait of horseman Arjen Teeuwissen in a promotional brochure by its former sponsor Bieman *after* termination of the sponsorship agreement was considered unlawful by the President of the Arnhem District Court.<sup>22</sup>

In the run-up to the FIFA World Cup 2006 in Germany, there was a public debate in the Netherlands on the accelerated naturalization request that Feyenoord player Salomon Kalou had filed with the Dutch government to acquire the Dutch nationality so that he could join the Dutch national team playing in the World Cup tournament. The responsible Minister had rejected this request. Playing into this topical matter, indemnity insurance company Achmea launched a TV-commercial in which Kalou’s portrait was used as well as a look-alike (starring as Kalou playing in the 2006 World Cup final, but against the Dutch, as a naturalized German...). The President of the District Court of The Hague recognized Kalou’s reasonable commercial interest to object to the use of his portrait without his consent, and banned the TV advertisement.<sup>23</sup>

#### 4.2.4.4. Use of a portrait on products

The second form of commercial exploitation that may be distinguished is the use of a portrait on (or as) commercial product. In 1965, Monty Factories gave away a free promotional surprise pack with its chewing gum products, which pack included photographs of PSV football player Ger Donners. The Court issued a prohibition on the publication of Donner’s portrait, as Monty Factories could not demonstrate the alleged permission by Donner for such use.<sup>24</sup>

Another example of the use of a portrait on (or as) commercial product is the aforementioned use of caricatures (qualifying as portraits) of the Feyenoord players on promotional buttons (see para. 3.6 above).

Where Feyenoord won, Ajax lost. The President of the District Court in Utrecht held that the use of portraits of the Ajax players on stickers that were sold by Panini separately for collection in an album could, in this case, not be considered infringing use, as Panini had paid a fee to the VVCS, the Dutch association of professional football players, as agreed with the VVCS as remuneration for the use of the portraits of all football players performing in the Dutch premier league. Without such remuneration arrangement, the commercial exploitation by Panini of the football players’ portraits on stickers would have been unlawful.<sup>25</sup>

22 President of the District Court in Arnhem, 18 February 2003, LJN AF 4949 (*Teeuwissen/Bieman de Haas*).

23 President of the District Court in The Hague, 13 April 2006, BMM bulletin 2006-2, p. 80-81 (*Kalou/Achmea*).

24 President of the District Court in The Hague, 17 February 1965, BIE 1966, no. 14, p. 44 (*Donners*).

25 President of the District Court in Utrecht, 16 January 1980, NJ 1980, 481 (*Ruud Krol c.s./Panini*).

26 An exception to standard case law forms: President of the Amsterdam District

Court, 12 May 2004, AMI 2004, no. 17, p. 198 (*Jongensdromen*).

27 President of the District Court in Haarlem, 26 June 1974, NJ 1974, 415; BIE 1977, no. 3, p. 11 (*Cruijff c.s./Boom-Ruygrok*).

28 President of the District Court in Haarlem, 26 June 1974, BIE 1977, no. 4, p. 13 (*Cruijff c.s./Martini & Rossi*).

29 District Court in Amsterdam, 14 April 2010, AMI 2010/6, no. 16, p. 198 (*Cruijff/Tirion*).

30 District Court in Amsterdam, 23 March 2011, LJN: BP8933, B9 9498 (*André Rieu Productions/Stijl & Inhoud Media*).

#### 4.2.4.5. Use of a portrait in publications or other media

The publication of pictures of sportspersons in a newspaper or magazine (if not included in a commercial advertisement therein - see under 4.2.4.3 above) or in a book is in principle *not* a form of commercial exploitation opposable by such sportspersons portrayed on the basis of a commercial interest (regardless that such media are published with a profit motive). Use of portraits in such media will usually be considered to be for informative purposes. In other words, the freedom of information/journalism (as codified in Article 10 ECHR) will in such cases generally outweigh any reasonable (financial) interest the sportsperson portrayed may have to prevent such use.<sup>26</sup>

This is made clear, *inter alia*, by the President of the Haarlem District Court in the *De Slag om het Voetbalgoud* judgment. Further to the FIFA World Cup in 1974, in which the Dutch team reached to the finals, a book was published entitled ‘The battle for football gold’ which included action photographs depicting well-known football players. The Dutch football players’ union (with Johan Cruijff in its ranks) opposed this publication. The President of the Court ruled that the publication of this book was not, in itself, unlawful towards the footballers depicted in it, because it was likewise not customary for publishers of newspapers and magazines to make payments to footballers for the insertion of action photos.<sup>27</sup> However, in this particular case the distribution of this publication was prohibited by the court after all, as the whole print run of 20,000 copies was sold by the publisher to the well-known drinks manufacturer Martini & Rossi, who used it in advertisements in various magazines. The book could be obtained at a discount by sending in a flattened Martini bottle cap. The President of the Court found that the publisher had gone too far by, in turn, selling the book to a company that wanted to use the publication for commercial purposes. For this reason the further distribution of the book was banned.<sup>28</sup>

In a recent case Cruijff was less successful in preventing the publication of a book including his image. This case concerned the unauthorized publication of a book of photographs titled *Johan Cruijff - De Ajacied* which included action pictures taken of Cruijff in his time as Ajax player. The District Court of Amsterdam acknowledged that Cruijff has an exploitable popularity, but found that such reasonable commercial interest was outweighed by the publisher’s appeal to Article 10 ECHR. The Court considered that Cruijff is a public figure who, also given his achievements in sport in the past, is still continuously in the public eye. A biography of images was found an adequate means to inform the public about a specific part of Cruijff’s period as professional football player. The photos in the book were taken during such period as part of free gathering of news and concerned situations in which the public figure Cruijff knew he was subject to this. For this reason, the public would not think that Cruijff had participated in the realization of this book, so reputational damage was considered out of the question. The Court also took into account that Cruijff had never responded to the offer made by the publisher prior to publication to pay Cruijff a certain financial compensation for the use of the photos. Only in the proceedings Cruijff had claimed he could have stipulated a significantly higher amount for his permission to use his portrait, but failed to substantiate such claim. Also, Cruijff did not provide proof of his claim that he had an exclusive agreement with another publisher.<sup>29</sup>

In another recent case, the Amsterdam Court did prohibit the publication of a *magazine* on the basis of portrait right infringement. The famous violin player André Rieu was considered to have a reasonable commercial interest to object to the publication of a glossy magazine consisting of 131 pages of photographs, mostly portraits of Rieu. The publisher had not denied that these merchandising revenues formed a vital source of income in times of decreasing record sales. The publisher’s defense that Article 10 ECHR applied, in this case, was rejected by the Court because the magazine had no news value, as it lacked any reference to Rieu’s upcoming concerts. A rectification was also awarded as the Court found that the public had been given the false impression that André Rieu had provided his cooperation to this publication.<sup>30</sup>

An injunction against the use of a portrait on and in a DVD has also been ordered. In *Van Basten/Dutch Filmworks* the Court ruled that a DVD named ‘The most beautiful goals of all time (part 2)’ infringed on the portrait rights of the famous football player Marco van Basten.

The infringement concerned both the unauthorized use of Van Basten's picture on the cover of the DVD box as well as the inclusion of footage of several historic goals of Van Basten in the DVD itself. The Court found such use as primarily intended to commercially exploit the famous player's popularity. The Court rejected the argument of the distributor that this would in practice mean a restriction of the freedom of information and/or lead to Van Basten having an exclusive right to the footage of his goals.<sup>31</sup>

## 5. Other Image Rights

### 5.1. Exploitable elements of one's persona (other than portrait)

As noted above, the image (reputation) of a famous sportsperson - and therefore such person's exploitable popularity - will not merely be connected to one's physical appearance. The public will also associate a sportsperson's image to other elements of his or her *persona*. These exploitable elements, which are also referred to as *indicia*, may be: one's name, nickname, voice, autograph, or other symbols particular to such person, such as the shirt number of a famous football player.

### 5.2. Civil law protection (unlawful act)

In para. 3.7 above, we already concluded that the concept of a portrait has been stretched considerably over the years. As a consequence even 'not-quite portraits' of look-alikes may qualify as a portrait and thus be in breach of a sports person's portrait rights as laid down in the Copyright Act. But even where qualification of an image as a portrait within the meaning of the Copyright Act would be questionable, in such cases the sportsperson portrayed may claim that the use of such image constitutes an unlawful act within the meaning of Article 6:162 of the Civil Code. For example, in case of a picture of a look-alike, where portrait law protection would be denied (e.g perhaps where it is (too) clear that the look-alike is not the actual sportsperson in question), in such case at least protection may be granted to the impersonated sportsperson by virtue of the Civil Code - Article 6:162, unlawful act - completely analogue to the protection granted to a person portrayed under the Copyright Act.<sup>32</sup>

The same legal ground may be applied to take action against the unauthorised use of a sportsperson's *indicia*, i.e. the abovementioned exploitable elements of one's persona, other than his physical appearance/likeness. Although the Supreme Court has not yet had the opportunity to consider in a judgment whether the rules of portrait law should similarly apply in cases concerning other elements of one's persona, it may be expected that the Supreme Court will indeed apply the same standards in such case. In lower case law, however, the commercial use of a sportsperson's name has indeed been considered unlawful on several occasions.

### 5.3. Protection of one's Name

In one case, the famous Dutch field hockey player Floris Jan Bovelandt successfully objected to the use of (part of) his first name by the company Cruiff Sports. The Court found that such company unlawfully profited from Bovelandt's reputation by promoting hockey shoes using the slogan "Floris Johan Cruiff".<sup>33</sup>

In a case concerning the Dutch national football team, however, the unauthorised use of the names of 11 players of the Dutch team in a full-page advertising for milk in national newspapers shortly before an international match, was *not* considered unlawful towards the players concerned. The advertisement showed 11 glasses of milk, each marked with the name of a player of the Dutch team, and headed: "Are we going all

out tonight men?" The court found that the use of the names of popular persons in a once-only advertising hitching onto a current topic regarding such persons would only then be unlawful when the promoted product is associated in such a manner with these persons that the public will get the impression that these persons are actually recommending the promoted product to the public. It is questionable whether the Court was right to demand this additional requirement of association (i.e. of creating a wrong impression). There is also much to say for the argument that a popular sportsperson should be able to oppose the use without his consent in commercial advertising of his name as he can the use of his portrait.<sup>34</sup>

### 5.4. Domain names

Sportspersons often register their names (or nicknames) as domain names. Such domain names will usually be activated and used to point to the sportsman's own website. Alternatively, the registration may be done by a sportsman not to actually use the domain name himself, but rather to prevent third parties from registering the domain name first for such parties' use and benefit. After all, domain names, with any extension, can only be registered once, and are issued on a first come first served basis. Often enough, a third party will be the first to register a sportsperson name, leaving the latter with empty hands. If that third person would have a legitimate reason for registering that specific domain name, it will be difficult for the sportsman to claim a transfer of that domain name. This may be the case, for instance, if the registrant has exactly the same name, or where he has a bona fide intention of running a fan site. Often, however, the registrant may appear to be a so-called 'domain name grabber' who's intention is simply to sell the domain name for a profit.

If a sportsperson is confronted with domain name grabbing in respect of his name, in case of a .nl domain name (the extension for domain names in the Netherlands) there are different procedural measures available to the sportsman to attempt to recover that domain name. Perhaps the most simple and efficient option would be to file for a dispute resolution procedure with WIPO. Alternatively, the sportsman may file a claim for the transfer of the domain name in preliminary relief proceedings or proceedings on the merits before the Dutch courts. The legal ground for such a claim would be that the domain name grabber's registration in bad faith constitutes an unlawful act within the meaning of Article 6:162 CC.<sup>35</sup>

## 6. Trademark Protection

### 6.1. Portrait and name as a trademark

In addition to invoking their portrait rights (as laid down in the Copyright Act) and/or additional civil law protection (unlawful act/unfair competition), sports personalities may also turn to trademark law as an additional means of legal protection of their image, to a certain extent. For trademark protection in the Netherlands, one may apply either for a Benelux trademark (valid for the Netherlands, Belgium and Luxemburg) or for a Community Trademark (valid for the entire EU territory). Depending on the type of trademark, one will adhere to either the rules of trademark law contained in the Benelux Convention on Intellectual Property (BCIP) or the EU Community Trademark Regulation (CTR). Both statutory regimes contain a similar definition of what may qualify as a trademark, in other words: what signs are eligible for trademark protection.

Both article 2.1 BCIP and article 4 CTR provide that any signs capable of being represented graphically may (potentially) qualify as a trademark (under the Convention or Regulation, respectively). Both articles expressly provide that a 'personal name' (CTR) or 'surname' (BCIP) may be registerable as a trademark. Consequently, a portrait or a name of a sports star is, as such, perfectly capable of being accepted as a trademark and therefore of enjoying trademark protection.

However, in order to actually qualify as a trademark and obtain registration - which is an absolute requirement to enjoy trademark protection - a trademark must have distinctive character. In the Netherlands it is generally accepted in case law that a portrait possesses this distinctiveness. The same goes for a sports star's name, or nickname.

With a trademark registration a sportsperson may increase the scope

31 District Court in Amsterdam, 5 December 2007, AMI 2008/2, p. 41, IER 2008, no. 18, p. 80 (*Van Basten/ Dutch Filmworks*).

32 In the *Millecam/Escom* case mentioned in para. 3.6 above, a claim was also based on the doctrine of unlawful act, given that Escom had wrongly profited from her popularity (although the claim was in this case rejected).

33 President of the District Court in 's-

Hertogenbosch, 18 November 1997, PRG 1998, 4887 (*Bovelandt/Déonor Sportsfashion*).

34 District Court in The Hague, 16 May 1986, IER 1986, no. 56, p. 120 (*Players Dutch national team/The Dutch Dairy office*).

35 For example: President of the District Court in Arnhem, 3 December 2002, DomJur 2002-159; Mf 2003, no. 9, p. 64 (*Jan-Peter Balkenende/Stichting Liever*).



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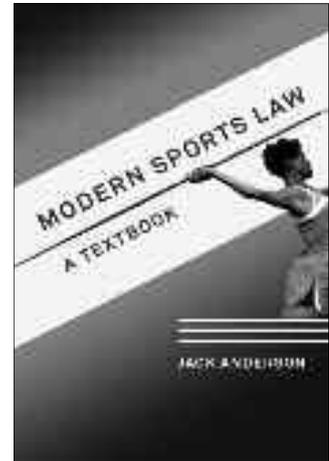


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of legal protection against the unauthorized commercial use of his image. Pursuant to article 2.20(1) BCIP (article 9(1) CTR) a trademark owner (or its licensee) has the exclusive right to prohibit any third party, without his permission, the use of any sign which is identical and/or similar to the registered trademark insofar as it concerns use in relation to distinct goods and/or services.

### 6.2. Limitations to effective trademark protection

There are two essential aspects of trademark law, however, that make it not ideal for effective protection of sports image rights.

First of all, the primary function of a trademark is to distinguish certain goods and/or services of the trademark owner and/or its licensees from those of other parties. This is the so-called origin function of a trademark. Trademark legislation is not designed to protect image rights (such as one's name or likeness) as such, and its usefulness in this respect is therefore limited. A sportsperson's name cannot be registered as a trademark for that sportsperson as a person. However, registration can be useful (and is recommended) particularly with a view to merchandise (even if yet to be produced). In this respect, it should be noted though that the reputation of the sportsperson does not mean that the trademark will immediately also have a reputation in respect of the goods and services for which it is registered: Lionel Messi is a world-famous football player, but that doesn't automatically make Messi a world-famous trademark *for socks* (assuming Messi would register a name mark for such products).

Secondly, in case of a *portrait* mark, in practice protection is limited due to the static registration of the portrait. Any such trademark registration will concern one specific photo of the sportsperson in question. Any unauthorized use by a third party of a sports star's image will seldom concern use of an image in a form identical, or even highly similar, to the portrait of the sports star *as registered*.

In the above referenced *Crujff/Tirion* case (see para. 4.2.4.5) the Court found that the use by the publisher of the name and the portrait of Johan Crujff on and in the book concerned did not qualify as 'use' of Crujff's name mark and portrait mark (Benelux registrations 307509 and 614969).

### 6.3. Examples and case law

Other than Crujff, there are relatively few Dutch sportspersons who have strengthened their image protection with trademark registrations. Examples are the former football player Patrick Kluyvert and former Formula 1 racer Jos Verstappen. For the latter, his portrait mark registration has actually proven successful, in a case against a magazine publisher in 2000. Prior to the 2001 Formula 1 season, publisher Albion of the magazine "Formula 1" had issued a special edition which previewed the forthcoming racing season, in which all 16 racing circuits for that season were discussed. For each of these circuits, Verstappen's opinion was given in a single sentence by reference to previous interviews in various media. These opinions were provided with a photograph of Verstappen and headed "Jos Verstappen's view". The Court found that not only did this breach Verstappen's portrait rights, but Verstappen could also object to these publications on the basis of his trademark rights pursuant to his registered name mark and portrait mark. Remarkably, the portrait consisted only of Verstappen's helmet and eyes. The Court found this to be sufficient, in combination with the use of his name, to assume infringement.<sup>36</sup>

Fan loyalty or admirance of the sports star will not provide a fan of a sports star a justifiable reason to use such sports star's trademark. This follows from the *Arsenal vs Reed* judgment of the European Court of Justice. In this particular case, football club Arsenal objected to the sale by a Mr. Reed of non-official Arsenal merchandise just outside the Highbury stadium. In his defense, Mr. Reed justified his business by explicitly making it clear to all his customers that he did not sell official club merchandise. This argument was rejected by the Court consider-

ing this did not take away the likelihood of *post sale* confusion on the part of the public.<sup>37</sup>

## 7. Remedies and Sanctions

### 7.1. Procedures

If the sportsperson's image rights are infringed by third parties, the sportsperson has a number of procedural options for taking action against such infringement.

#### 7.1.1. Summary proceedings

The most obvious - and in practice most taken - route is to initiate summary proceedings (also referred to as preliminary relief proceedings or interlocutory proceedings), as in such summary proceedings (a so-called *kort geding*) injunctive relief can be obtained rapidly. The duration of most summary proceedings is 4-6 weeks. However, in very urgent cases - for example where action is taken to prevent an immediate publication that may cause irreparable harm - a court order may be obtained within only a couple of days.

Summary proceedings may be initiated if the plaintiff can demonstrate he has an urgent need for obtaining a provisional measure. Generally, in cases of image rights infringement the requirement of urgency is easily deemed to be met, in particular if the infringement is continuing. Summary proceedings are initiated by serving a writ of summons upon the infringer(s), followed by a court hearing (2-3 hours) before the President of the District Court, resulting in a preliminary decision. If infringement is likely to be the case, the plaintiff's claims may be awarded. As summary proceedings are relatively informal and quick, this also makes them the attractive procedural option from a cost perspective.

The disadvantage of summary proceedings is that, as a preliminary decision is rendered, only an advance payment of damages can be claimed. The same applies in respect of surrender of profits made from the infringement. Also, due to the preliminary nature of summary proceedings, they should in principle be followed (if injunctive relief has been granted) by proceedings on the merits. However, in practice this will often not be the case, as parties will enter into a settlement after a preliminary decision has been rendered, in order to avoid the substantial costs that parties would incur in connection with subsequent proceedings on the merits.

#### 7.1.2. Proceedings on the merits

Alternatively, a sportsperson seeking to take legal action against infringement of his or her image rights may skip summary proceedings and immediately seek final relief by starting proceedings on the merits of the case (also referred to as ordinary proceedings). The advantage of these proceedings is that the designated District Court will look into the matter in detail and render a final<sup>38</sup> decision. Another advantage is that full damages and/or surrender of profits can be claimed. In cases that lack urgency proceedings on the merits are the only procedural option. However, practice shows that in cases of image rights infringement the sportsperson will usually have an urgent need to obtain immediate injunctive relief as soon as he becomes aware of the infringement. As a result, practically all image rights cases are dealt with in summary proceedings.

Compared to summary proceedings, proceedings on the merits are more formal and include more procedural steps, both required and optional ones - examples of the latter are witness hearings or obtaining expert opinions. As a result, proceedings on the merits will take approximately 1 - 1,5 years (or even longer in case of extra procedural steps or complications). Not surprisingly, the legal costs involved in proceedings on the merits are substantially higher than in summary proceedings.

### 7.2. Claims

#### 7.2.1. Injunctions

In case of infringement of image rights, the sportsperson concerned may bring several claims, the most obvious claim being an injunction, i.e. a claim to cease and refrain from any infringing acts.

36 District Court in Amsterdam, 16 October 2002, IER 2003/18 (*Verstappen/Albion*).

37 European Court of Justice, 12 November 2002, BIE 2003/51 (*Arsenal/Reed*).

38 Any decision in proceedings on the mer-

its is a final decision in first instance.

Within three months following the judgment, any party to the proceedings may (but is never under any obligation to) file for an appeal.

### 7.2.2. Other (non-monetary) claims

In addition, if the infringement entails an unauthorized publication already made, a rectification may be claimed. Other possible claims include a recall of infringing products from the market place or surrender and/or destruction of infringing product. Also, the infringer may be summoned to provide information on its suppliers and/or customers or information on the number of infringing publications printed and/or issued.

All the above claims (including the injunction claim), as well as the monetary claims to be discussed below, may be strengthened by an incremental penalty sum which the infringer shall forfeit if he does not conform to any such claim awarded by the Court.

### 7.2.3. Damages

In addition the aforementioned claims, a sportsperson may also file various monetary claims: for compensation of damages, for surrender of profits made from the infringement, and/or for compensation of legal costs incurred.

If a sportsperson's image rights are infringed, he will generally suffer a loss, and therefore may file a claim for damages. However, the sportsperson concerned will need to demonstrate that such damages are attributable to the infringer, or that the infringer is accountable by law or according to generally accepted standards. Also, questions may arise as to how the damages should be calculated and whether it is concrete enough to be claimable.

Case law shows that, in determining the level of damages, the courts will often make an assessment on the basis of what they find reasonable, considering the particular circumstances of the case. For example, in the earlier-mentioned case of the amateur boxer Arnold Vanderlijde, the District Court made the following consideration, that has later been followed by other courts in several judgments:

"The loss suffered by the claimant (Vanderlijde) in relation to the illegal publication of his portrait can be set at the amount that the claimant would have been able to stipulate from the defendant if he had been asked for his consent for its publication."

An important element in such an assessment is of course the level of popularity of the particular sportsperson concerned. The assessment is to be made on a case by case basis: the criterion is what the sportsperson in question could have stipulated, rather than what a sportsperson in general could negotiate for consent for a similar publication.

### 7.2.4. Surrender of profits

Apart from a claim for damages, a sportsperson may also bring a claim for the surrender of profits made from the infringement. If a sportsperson's trademark rights are infringed he or she may bring a separate claim for surrender of profits, in addition to a damages claim, pursuant to article 2.21(4) BCIP. If the infringement is made in bad faith, both claims may be awarded cumulatively. If an image rights infringement is rather based on the portrait rights conferred upon the sportsperson under the Copyright Act, or on the basis of unlawful act (article 6:162 DCC), a claim for surrender of profits will be regarded as a form of damages.

A claim for damages and/or a claim for surrender of profits may be brought in proceedings on the merits. However, as mentioned above, in summary proceedings one may only bring a claim for advance payment of damages or advance payment of profits made from an infringement. Such advance payment claims will not easily be awarded. The Supreme Court has ruled that in such cases the President of the District Court should adopt a reticent attitude in awarding such a claim for advance payments. The plaintiff will have to convince the President of the District Court that preliminary relief is of the essence<sup>39</sup>.

### 7.2.5. Compensation of legal costs

Finally, a claim may be brought - both in summary and in final relief proceedings - for (partial) compensation of legal costs incurred. The legal system in the Netherlands provides for the unsuccessful party to be ordered to pay only a relatively low fixed rate to compensate the successful party for procedural costs (usually no more than €1,000 in civil cases). Since the implementation of the EU Directive 2004/48 on the enforcement of intellectual property rights in the Dutch Code of Civil

Procedure (CCP), however, any party in legal proceedings concerning the enforcement of an IP right may claim that all reasonable and proportionate legal costs and other expenses actually incurred by such (successful) party shall, as a general rule, be borne by the unsuccessful party.<sup>40</sup>

In this respect, the question has arisen whether the portrait rights in Dutch law would qualify as an IP right within the meaning of the CCP or not. According to established case law, the answer is no. In a number of judgments<sup>41</sup>, District Courts have ruled that a portrait right is not an intellectual property right, but rather a justifiable limitation on copyright, for the protection of the person portrayed against unlawful infringement of such person's right to privacy or other (commercial) interests. Although portrait law is codified in the Copyright Act, it is not a copyright, but rather to be considered a *species* of the 'common' unlawful act doctrine as laid down in the Civil Code. This also applies in cases concerning a strictly commercial interest, namely exploitable popularity, of sportspersons.

In this respect, any image rights infringement claim that can also be based on a trademark registration offers a significant advantage. As a trademark is obviously an IP right, any proceedings brought on the basis of (also) a trademark right, will allow a claim to be brought for the compensation of all (reasonable and proportionate) legal costs and other expenses incurred by the successful party in the proceedings. Case law shows that the Dutch courts are usually willing to accept at least (the larger) part of the claimed amounts as being reasonable and proportionate, and therefore payable by the other party. The downside of this 'advantage' is that - conversely - if a trademark based claim for alleged image rights infringement is rejected, the defending party may likewise claim full compensation of its incurred legal costs, payable by the sportsperson who unsuccessfully claimed image rights infringement.

## 8. Sponsorship Obligations by Virtue of Membership or Employment Contract

### 8.1. Contractual exploitation of image rights

As noted in the chapters above, a sportsperson in the Netherlands may enjoy a reasonable level of image rights protection. In many situations, a sportsperson will be able to prohibit the use by a third party of such sportsperson's image without his or her consent. In principle, it is the sportsperson who holds the commercial exploitation rights in respect of his image. A sportsperson is free to decide to whom he wishes to grant rights to the use of his portrait, name or other indicia. Such rights may usually be granted by way of a contract under which the sportsperson grants to a third party the right to use his image for commercial purposes, and for which grant of rights (often referred to as a license) the sportsperson receives a financial compensation in return.

Such third party will usually be a sponsor of the sportsperson concerned. Often, the image rights license will be part of the (written) sponsorship agreement entered into between the sportsperson and his sponsor. A sponsor may profit from the commercial association of his product or company with a sportsperson's image not only by obtaining a right to use the sportsperson's image, but also by putting the sportsperson under the obligation to promote the sponsor's brand name by using (often: wearing) the sponsor's branded product when exercising his sport or otherwise being in the public eye.

In practice, however, the freedom of a sportsperson to exploit and license his image rights is often limited also by agreements between the sportsperson and his sports club. Such agreements may either take the form of an employment contract or follow from a sportsperson's membership of the club and/or of the relevant national sports federation.

### 8.2. Conflicting sponsorship

It is not always clear to the sportsperson what obligations arise for him from in particular his membership of the sporting club or - conversely

<sup>39</sup> Supreme Court, 14 April 2000, NJ 2000/489 (*H.B.S. Trading v. Danestyle*).

<sup>40</sup> Article 1019h of the Dutch Code of Civil Procedure

<sup>41</sup> For example: District Court in Amsterdam, 5 December 2007, AMI

2008/2, p. 41, IER 2008, no. 18, p. 80 (*Van Basten/Dutch Filmworks*); District Court in Amsterdam, 23 March 2011, LJN: BP8933, B9 9498 (*André Rieu Productions/Stijl & Inhoud Media*).

- it is not always clear to the club and/or sports federation how far their rights extend regarding the use of the image or other indicia of the sportsperson affiliated to such sports club or federation. This may lead to situations where image rights are granted by the sportsperson to his sponsor which conflict with the rights granted by such sportsperson's club or federation to its sponsor. These are often referred to as cases of conflicting sports sponsorship. Such conflicts may result in legal proceedings. In the Netherlands, there have been a number of court cases concerning conflicting sponsorship rights.

In 1977, the Court in Utrecht ruled in a case between the Royal Dutch Swimming Association (the KNZB) and swimmer Enith Brigitta. The KNZB put swimmers under the obligations to wear Speedo swimwear in competitions for national selection. One of the Netherlands' top swimmers, Enith Brigitta, refused to wear Speedo swimwear as she had her own swimwear sponsor. The Court found for the KNZB and confirmed that the KNZB may indeed commit its swimmers to wear its sponsor's clothing. In case of non-compliance, a swimmer may be refused selection for international competitions. In weighing the parties' respective interests, the Court considered that the KNZB's interest in promoting swimming in general, using the sponsorship moneys from Speedo, was to prevail over the interests of the individual sportsperson, who in this case also still held the amateur status.<sup>42</sup>

A year before, the Court in Utrecht had been faced with another case of conflicting sponsorship. The Royal Dutch Football Association (the KNVB) had entered into a sponsor contract with Adidas, under which the Dutch team players were obliged to wear Adidas boots. The football players concerned were 'not amused' as it had been customary for years for such players to enter into their own football boot contracts with personal sponsors. The Court found against the KNVB deeming the KNVB's action unlawful, as the association had not consulted with the players in advance about this change to the current practice, whilst the financial benefit of the sponsorship contract with Adidas was enjoyed only by the KNVB.<sup>43</sup>

Another case concerned a conflict in 1989 between football club Ajax and its player Brian Roy, and their respective sponsors. After Ajax had entered into an employment contract with Brian Roy under which Roy was forbidden to make himself available for advertising purposes without Ajax's express consent, Ajax and its sponsor Umbro brought a case against Brian Roy and his sponsoring clothing supplier Borsumij to prevent Brian Roy from wearing Borsumij clothing any longer. Some time prior to signing with Ajax, Roy had already entered into a clothing sponsoring contract with Borsumij, and this contract still existed side by side with the employment contract with Ajax. The Court rejected the claims of Ajax and Umbro, mainly because the contract between Borsumij and Roy predated the employment contract with Ajax and Ajax was aware of such contract when Roy signed with Ajax.<sup>44</sup>

From swimming to football, from football to skating: a case brought by one of the Netherlands' top skaters, Rintje Ritsma, and his sponsors against the Royal Dutch Skating Association (the KNSB). The question put to the Court was whether Ritsma was obliged to follow the clothing rules laid down by the KNSB. Pursuant to these rules, in international matches Ritsma had to appear in a skating outfit provided by the KNSB, with (predominantly) the KNSB sponsors' logos on it. Although there was no contractual link between the KNSB and Ritsma, the Court nevertheless considered that Ritsma was bound by the KNSB's clothing rules. This obligation followed from the membership relationship between the KNSB and Rintje Ritsma, as Ritsma was a member of a skating club which in turn was affiliated to the KNSB. The statutes of the KNSB impose on its members (the skating clubs) and their members (the skaters) an obligation to comply with the KNSB's statutes and regulations.<sup>45</sup>

42 President of the Utrecht District Court, 27 April 1977, BIE No. 3 (*KNZB/Enith Brigitta*).

43 Utrecht District Court, 23 February 1976, see H.T. van Staveren, *Het voetbalcontract: op de grens van sportregel en rechtsregel*, Deventer: Kluwer 1981, p. 152 (*Notten c.s./KNVB*).

44 President of the District Court in Breda, 1 November 1989, LJN: AH2909 (*Ajax-Umbro v. Brian Roy-Borsumij*).

45 Sportzaken [Sports Cases] 1997/1 no. B19 and B20 (*Ritsma and De Vegt v. KNSB*).

46 Court of Appeal in Amsterdam, 8 November 1996, Sportzaken [Sports Cases], no 1, p. 78 et seq.

### 8.3. Membership obligations

Clearly, a sportsperson may enter into arrangements with his club as to the use of his image. As the abovementioned case between Ajax and Brian Roy shows, older agreements will take precedence. In exchange for the rights granted by the sportsperson to his club, the sportsperson will receive a (generally financial) consideration from his club. The sportsperson and the club thus arrive at a contractual agreement based on negotiations.

In the case of a membership relationship between the sportsperson and his club or federation, a contractual relationship is not required to arrive at the same result. As illustrated by the aforementioned judgment between Ritsma and the KNSB, a sportsperson may be under the obligation to comply to the sponsorship commitments made by the federation even though the sportsperson did not himself enter into any contractual agreements with the sponsor concerned directly. This possibility is provided by Article 2:46 of the Civil Code (CC), pursuant to which associations (sports federations) can also impose obligations on their members (sportspersons) vis-à-vis third parties. This statutory provision states as follows:

"To the extent that the contrary does not follow from its articles of association, the association may stipulate rights for and on behalf of its members and, in so far as this has been explicitly provided for in the articles, may enter into obligations for and on behalf of its members. It may take legal action for and on behalf of its members to enforce such stipulated rights, including the right to claim damages."

It is therefore required that the articles of association explicitly provide for the possibility that the association contracts with third parties for and on behalf of its members, thereby committing to obligations towards third parties to be fulfilled by its members.

In the 1996 judgment *KNVB vs. Feyenoord*, the Court of Appeal in Amsterdam ruled that in such case the articles of association must be very clear in this respect. Articles of association containing only general and vague indications will not suffice. In this particular case the Royal Dutch Football Association (the KNVB) wanted to bind all the Dutch football clubs competing in the Dutch premier league ("Eredivisie") vis-à-vis a third party regarding the television broadcasting rights to home games. The Court of Appeal found that the articles of the KNVB were not concrete enough in this respect and too generally worded for Feyenoord (or any other member club for that matter) to be deemed to be bound by the obligations entered into by the KNVB towards the third party in question. For a person to be bound by a stipulation of this kind, the articles must contain a clear provision for this purpose, describing the nature of the obligation concerned. Otherwise, the situation would be such as if the clubs had given the KNVB full discretionary powers.<sup>46</sup>

It follows from the above that sportspersons can be bound vis-à-vis a third party, including in respect of their image rights, if the articles and regulations of the club or federation where they are under contract or of which they are a member, contain sufficiently clear provisions setting out what obligations can be imposed on them.

### 8.4. Conclusion

Sportspersons will generally have exclusive and enforceable rights to their own image - meaning their depiction, name and other indicia - and hence will also be able to exploit or commission others to exploit these rights. They must, however, be aware that they are in a dependent position vis-à-vis their sports club, the relevant national sports federation, the Dutch Olympic Committee, etc., as the latter decide to a significant extent whether a sportsman is selected for competitions (including international competitions) and the conditions on which that selection takes place. Obligations may be imposed on the sportsperson, either contractually or through the membership relationship, and the sportsperson will risk not being selected in case of non-compliance. Of course, the rights of a club or federation are not unlimited. The attitude and conduct of a club or federation towards 'its' players or athletes must be one reflecting reasonableness and fairness, should it not want to risk being called to order by a judicial body. In case of conflicting sponsorship arrangements, the parties will therefore generally have to come to the negotiating table to make conclusive agreements as to how

the exploitation of the available (image) rights are to be arranged or how such rights may be divided between the club's or sports federation's sponsor, on the one hand, and the sportsperson's sponsor, on the other hand.

From time to time, however, cases of conflicting sponsorship do nevertheless arise, as is illustrated by the judgments referenced above.

The International Sports Law Journal

## Negotiating, Drafting and Interpreting Sports Marketing Agreements: Some General Legal and Practical Points and Considerations\*

by Ian Blackshaw\*\*

### 1. Introductory Remarks

It has been generally well said, that if a commercial deal makes business sense, it also makes legal sense and it is relatively easy, therefore, to draw up the corresponding legal agreement - and, where necessary, enforce it. And this is certainly true of Sports Marketing Agreements, which come in all shapes and sizes. All the commercial and financial arrangements that have been negotiated need to be covered by clearly drafted provisions to avoid any legal challenges to the validity of the Sports Marketing Agreement concerned on the grounds of its uncertainty. Otherwise, the parties may find themselves with a void Agreement, which they cannot rely on or legally enforce. Clarity is the name of the game!

Before dealing with the subjects of drafting and interpreting Sports Marketing Agreements, which, as will be seen, go hand in hand, a word or two on the general principles of negotiating contracts generally would not be inappropriate.

### 2. Negotiating Sports Marketing Agreements

When negotiating Commercial Agreements generally and Sports Marketing Agreements, in particular, especially those with an international dimension, attention should be paid to the following general principles of negotiating.

Negotiating is an art - not a science - and there are a number of useful guidelines to be followed in order to achieve a successful outcome.

In basic terms negotiating is 'getting to yes'. Like any other form of advocacy - persuading another person to accept your point of view - a negotiation needs to be carefully *planned*. Before you start, you need to know clearly what your objectives are and how you are going to achieve them. Make sure, however, that your objectives are *realistic* and *reasonably achievable*.

An important part of the planning process is to gather as much *intelligence* about the other side in the negotiation as possible. You will need to know, amongst other things, the kind of people you are dealing with; their strengths and weaknesses; and their aims and objectives. Be prepared generally!

Again, as part of the planning process, the negotiation needs to be *structured* into distinct phases. The first phase should identify any points of agreement and get those out of the way; the next, any points of disagreement and the reasons for them. The following phases should be to evaluate, from your own point of view and that of the other side, the importance of these differences and the possibilities for any compromises. Try to identify the matters that are negotiable and the ones that are not negotiable. The points that can be conceded and '*given away*' and the ones that cannot - the ones that are '*deal breakers*' if not agreed!

Watch out for and try to interpret any '*body language*' - that is, non-verbal communications and gestures. This is very important in multicultural negotiations.

Negotiation also needs *time* and *patience* and should not, therefore, be rushed to avoid bad deals.

Every negotiation should be conducted in a courteous and conciliatory manner. When tempers and blood pressures begin to rise, it is time to take a break!

The use of '*role play*' - the '*hard*' person and the '*soft*' one - should be handled carefully. You should decide, in advance, on the particular roles to be played by each of the members of your negotiating team. And, having done so, you should stick to them! In particular, you should appoint one of the members of the team to lead the negotiations and someone else to take notes and keep a record of everything that is said and 'agreed' during them. As to the composition of your negotiating team, if the issues raised involve technical, legal and/or financial matters, make sure that there is someone who is qualified and, therefore, can deal with them.

Likewise the imposition of any *deadlines*, which are designed to move the negotiation along and reach a conclusion more speedily, should also be carefully managed. As in litigation, so also in good negotiation, you should never issue a threat that you are not able and have no intention whatever of carrying out!

*Timing* is also very important. Choose your moment carefully to press home a particular point. Always know when and how to retreat.

In international negotiations, be aware of and allow for *cultural differences* and the need, where necessary, for the other side to '*save face*'. This is especially important in negotiations with the Chinese and Japanese and also with parties from the Middle East, where pride may be at the heart of the matter or dispute.

Always remember that negotiating is '*getting to yes*', and so always try to make it easy for the other side to say '*yes*'.

You should be aware of all these negotiating techniques, not only to use them effectively in your own interests, but also be aware of any of them when they are being used against you!

In addition to all the other points that I have mentioned, there is one vital or '*golden rule*' that should always apply to any negotiations and it is this:

*Do not insist on getting the last penny!*

And always remember: *in a successful negotiation, everybody wins something!*

Many Books and Articles have been written and many Seminars and Courses are offered on the subject of Successful Negotiating, particularly on Negotiating Strategies and Tactics. A general article on this important aspect of Negotiating, intended to whet the appetite of the reader of this Book to investigate the subject of Negotiating in more detail, is reproduced in the Appendix I of this Chapter, for general information and interest purposes. Likewise, in Appendix II of this Chapter, the reader will find some general tips on How to Negotiate Successfully.

### 3. General Principles of Drafting and Interpreting Sports Marketing Agreements

As regards effective drafting, the following general principles should be borne in mind:

- Before starting to draft an agreement, the whole design of the document should be worked out (remember, the agreement will be looked at and interpreted as a whole);
- Nothing should be omitted or included at random;

\* This Article is an Extract of an Introductory Chapter (Chapter 2) from the New Book entitled 'Sports Marketing Agreements: Legal, Fiscal and Practical Aspects' by Professor Ian Blackshaw, recently published by the TMC Asser Press, The Hague, The Netherlands.

Note: The Appendices of this Chapter are not reproduced as part of this Article.  
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- The order of the agreement should be strictly logical;
- The ordinary and usual technical language should be followed; and
- Legal language, should, as far as possible, be precise and accurate.

Sir Ernest Gowers of 'Plain Words' fame<sup>1</sup> gave the following advice (in rather quaint terms) on making the meaning clear in a legal document:

*"The inevitable peculiarities of the legal English are caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one the further you are likely to get from the other. . . . it is accordingly the duty of the draftsman. . . . To try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be afraid of repetitions, or even of identifying them by aforesaid, he must limit by definition words with a penumbra dangerously large, and amplify with a string of near-synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute, and generally avoid every potential grammatical ambiguity. . . . All the time he must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words, and choose his phraseology to fit them."*

To avoid ambiguities and, therefore, disputes on the meaning, interpretation, scope and application of legal documents, keep sentences short and avoid convoluted ones with lots of relative clauses. Also, use simple and clear language and make sure that the document follows a logical and chronological order and, is therefore, easy to read and follow.

For further practical guidance on the art of effective drafting of legal documents, see the very useful little handbook entitled, 'The Elements of Drafting'.<sup>2</sup>

It should be added that, under the rules of interpretation (technical term: *construction*) according to English Law, the aim is to discover the intention of the parties from the language they have used in their written agreement, and, in that process, giving the words used their ordinary and natural meaning.<sup>3</sup> Only on an exceptional basis, where there is ambiguity or contradiction on the face of the document, may the Court call upon 'parol' evidence (that is, oral external evidence) in order to discover the real intention and meaning of the parties to the particular Agreement.<sup>4</sup>

In this connection, take care with the use of 'Recitals' (the so-called 'Whereas' clauses). These should be very carefully drafted, stating the background to and the reason(s) for the Agreement. For example, Recitals are important in the case of a Trademark Licence Agreement (which is what a Sports Merchandising Agreement essentially is), where there has been a previous dispute regarding the mark. If the 'operative part' of the Agreement is ambiguous or in conflict with the Recitals, the Recitals will prevail when it comes to determining the meaning of the Agreement. Lord Esher, MR, well expressed the legal position in the English case of *Ex p Dawes Re Moon* as follows:

*"If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."*<sup>5</sup>

1 'The Complete Plain Words' by Sir Ernest Gowers, first published in 1954 and never out of print since!  
 2 E L Piessie & J Gilchrist Smith, Stevens and Sons Ltd, London, 2nd edition 1954.  
 3 Often called the 'objective' method of interpretation.  
 4 See *Street v Mountfort* [1985] AC 809. On the contrary, under Civil Law in Continental Europe, it is much easier to introduce and rely on parol evidence to clarify and explain any ambiguity in an Agreement. This approach is often called the 'subjective' method of interpretation. In other words, what did the parties

intend to say?  
 5 (1886) 17 QBD 275, at p. 286, CA.  
 6 See the English Court of Appeal case of *Peak Construction (Liverpool) Ltd v McKinney Foundation Ltd* [1970] 1 BLR 111 and, in particular, the following remarks of Lord Justice Salmon in his judgement at p.121: "The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem."  
 7 [2002] IRLR 204.  
 8 For further comment on this case, see Blackshaw, Ian (2002) 5(1) Sports Law Bulletin, p 3.

So watch out and avoid such ambiguities and inconsistencies!

Whilst on the subject of ambiguities, mention should be made of the 'contra proferentem' rule of construction of contracts. This rule derives from the Latin maxim: '*verba chartarum fortius accipiuntur contra proferentem*' - 'the words of written documents are construed more forcibly against the party offering them.'

This rule provides that any ambiguous term will be construed against the interests of the party that imposed it in the Agreement. Thus, the interpretation of the term concerned will be construed in favour of the party against whom it was unilaterally included. In other words, there was no negotiation - it was 'a take it or leave it' situation. Again, the rule only applies where a Court determines that the term is ambiguous. This often forms the basis of a contractual dispute.<sup>6</sup>

The rationale for the rule is to encourage the person who drafted the contract to be as clear and explicit as possible and to take into account as many foreseeable situations as possible.

Again, the rule reflects the Courts' inherent dislike of standard form take-it-or-leave-it contracts, known as 'contracts of adhesion' - in other words, these are terms and conditions of business, take them or leave them! The Courts take the view that such contracts are the result of unequal or unfair bargaining positions of the parties. To mitigate these effects, the doctrine of 'contra proferentem' gives the benefit of any doubt to the party upon whom the contract was imposed.

This rule applies in numerous States of the US. For example, §1654 of the California Civil Code, enacted in 1872, provides as follows:

*"In cases of uncertainty ... the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."*

The rule particularly applies to clauses in Agreements that impose on one party restrictions that are not clearly drafted and are, therefore, ambiguous, where the party claiming the restrictions contends that they apply in a particular situation, which is not expressly covered by the wording of the clause, is met with the counter argument that such party could have made the position clear by expressly providing for that situation but has failed to do so.

Again, there is a need for clear and precise drafting of Agreements.

A further point in the interests of clarity: the draftsman should use a 'definition/interpretation clause', especially to define 'terms of art'; and also use *Annexes/Appendices* for technical information, which is particularly useful in Sports Licensing and Merchandising Agreements (e.g. to define and calculate complex royalties arrangements).

Drafting and interpretation of Agreements should always go hand in hand; they are two sides of the same coin!

Also, it is advisable to include a 'dispute resolution clause', especially if the parties wish to refer any disputes arising under, out of, or in relation to their Sports Marketing Agreement to the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, in relation to which there are standard clauses provided by the CAS for such purposes.

Another point: use so-called 'boiler-plate' clauses carefully and only where, according to the particular circumstances of the case, they are appropriate and add something to the meaning and effect of the agreement.

For example, the so-called 'Entire Agreement' clause, which expressly excludes from the agreement, *inter alia*, any and all representations or warranties (both oral and written) given before the agreement was signed and which may have induced one of the parties to enter into the agreement in the first place. In this connection, the High Court decision in the case of *White v Bristol Rugby Club*<sup>7</sup> is instructive. White, a professional rugby player, signed a three-year contract to move from his previous club to Bristol. The contract expressly stipulated that it was subject to an 'entire agreement' clause, so that no oral representations made in the course of negotiations applied in respect of its express terms and conditions. White subsequently decided not to join Bristol and asserted that he had been told during the pre-contract negotiations that he could opt out of the contract on the repayment of the advance made to him by Bristol. The Court held that the 'entire agreement' clause precluded White from relying on an oral opt-out term.<sup>8</sup>

Furthermore, take care of express warranties and conditions - distinguishing between the two of them for legal purposes - especially when

acting for the grantor of the rights being licensed. A warranty, if breached, gives rise to a claim in damages only, whereas a condition 'goes to the root of the contract' - in other words, is a fundamental term of the contract - and, if breached, entitles the other party to terminate the contract and also claim damages.<sup>9</sup> Expect to find in a Sports Licensing and Merchandising Agreement, the following mutual warranties:

- both parties are free to enter into the Agreement and have all the necessary rights and title to do so;
- neither party has entered into any conflicting/competing arrangements;
- neither party shall hold itself out as representing the other or binding the other;
- neither party will do or omit to do or allow anything to be done to impair the rights; and
- the use of the rights granted in accordance with the terms of the Agreement shall not cause the infringement of any intellectual property rights of any third party.

The so-called 'severance' clause is particularly useful in the case of a Sports Merchandising Agreement containing territorial restrictions on the exploitation of the rights granted (especially when part of a wider geographical licensing programme), in order to avoid the whole of the Agreement being held to be void on National or European Competition Law grounds. The standard 'severance' clause runs as follows:

*"If any provision or term of this Agreement shall be become or be declared in conflict with Law or Public Policy or otherwise illegal invalid or unenforceable for any reason whatsoever such term or provision shall be divisible from this Agreement and shall be deemed to be deleted from this Agreement provide always that if such deletion substantially affects or alters the commercial basis of this Agreement the parties shall negotiate in good faith to amend and modify the provisions and terms of this Agreement as may be necessary or desirable in the circumstances and the validity of the remainder shall not in any event be affected by any severance taking effect pursuant to the terms of this clause."*

Likewise, the so-called 'waiver' clause, which usually runs as follows:

*"No failure or delay by either party to enforce at any time any one or more of the terms of this Agreement shall be a waiver by the said party of the term or right therein or prevent that party at any time subsequently from enforcing all the terms of this Agreement."*

A general point: be careful of using the phrase 'best endeavours' in relation to obligations undertaken in the agreement. This phrase has been interpreted by the Courts quite onerously as: 'leaving no stone unturned'! This, according to the particular circumstances, could turn out to be quite a heavy financial burden to discharge. In view of its importance and also the variations on theme - 'best endeavours', 'reasonable endeavours' and 'all reasonable endeavours' - and the need to avoid sloppy and traditional drafting, the legal meaning of these expressions are summarised later in the Book.

Another important and sport-specific provision to be included in Sports Licensing and Merchandising Agreements - and, indeed, in all events-related Sports Marketing Agreements (for example, Sports Sponsorship Agreements) - is the one making the Agreement subject to the general and commercial/marketing rules and regulations of the Sport's Governing Body concerned.

For example, in the case of the Olympics, the Olympic Charter (the latest version of which dates from 11 February, 2010) includes a number of articles dealing with the question of the marketing of the Games. See, for example, the provisions of Rule 7 of the Charter, which deals with the rights over the Olympic Games and the so-called 'Olympic Properties' and their commercialisation. Paragraphs 1 & 2 of this Rule provide as follows:

*"1. The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.*

*2. The Olympic symbol, flag, motto, anthem, identifications (including but not limited to "Olympic Games" and "Games of the Olympiad"), designations, emblems, flame and torches, as defined in Rules 8-14 below, shall be collectively or individually referred to as "Olympic properties". All rights to any and all Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC Executive Board."*

Note, in particular, the inclusion of data rights in paragraph 1 of Rule 7.

A standard Sport's Governing Body compliance clause runs as follows:

*"This Agreement is expressly subject to the rules and regulations of [the Governing Body] wherever relevant and for the avoidance of doubt in the event that any of the said rules and regulations in any way conflicts with any obligation arising pursuant to this Agreement that rule and/or regulation shall prevail over the conflicting obligation arising pursuant to this Agreement and such obligation shall be suspended during any period such conflict exists."*

Two other 'boiler-plate' clauses that may usefully be included in a Sports Marketing Agreement are the following:

#### 'Good Faith' Clause

*"The Parties hereto hereby mutually agree and declare that both during and after the termination of this Agreement for whatever cause they will act at all times and for all purposes towards one another in the utmost good faith with a view to giving full legal and practical effect to the terms and conditions whether express or implied of this Agreement and any amendment or amendments thereto."*

#### 'Covenant for Further Assurance' Clause

*"The Parties hereto hereby mutually agree and declare that both during and after the termination of this Agreement for whatever cause they will at their own expense and in a timely manner sign and execute any and all such further documents and deeds and do any and all such further acts and things as may be required to give full legal and practical effect to the terms and conditions whether express or implied of this Agreement and any amendment or amendments thereto."*

These two clauses are discussed in more detail in a later Chapter of the Book on 'Boiler Plate' Clauses.

Also, having drafted your Agreement, do not forget to read it through as a whole to make sure that it makes sense and there are no contradictions, inconsistencies or conflicts in the document. In other words, that it all hangs together and makes sense. Self-editing of legal documents is absolutely essential in all cases. In any case, the basic canon of interpretation of contracts is that "the contract must be read and construed as a whole".<sup>10</sup>

The other canons of construction, which should always be borne in mind when drafting Agreements, are as follows:

*"Secondly, a contract must be construed objectively, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurs. Thirdly, a commercial contract must be given a commercially sensible construction; a construction which produces a sensible result should be preferred over one which does not. This means that when a court is faced with competing constructions, it should consider which meaning is more likely to have been intended by reasonable businessmen. Fourthly, ...in construing a formal commercial con-*

<sup>9</sup> See, respectively, the English cases of *Bettini v Gye* (1876) 1 QBD 183 and *Poussard v Spiers* (1876) 1 QBD 410.

<sup>10</sup> Per Lord Drummond Young in *Emcor Drake and Scull v Edinburgh Royal Joint Venture* 2005 SLT 1233, who set out seven canons of construction as follows:

*"[13] First, a contractual provision must be construed in the context of the contract in which it is found. The contract is construed as a whole and, if possible, all the provisions of the contract should be given effect."*

*tract, which lawyers have drafted on behalf of each of the parties, the court would normally expect the parties to have chosen their words with care and to have intended to convey the meaning which the words they chose would convey to a reasonable person. Fifthly, ...the Court must be alive to the position of both parties and to the possibilities (a) that the provision may represent a compromise and (b) that one party may have made a bad bargain. ...Sixthly...the parties must give effect to the parties bargain and must not substitute a different bargain from that which the parties have made. Seventhly, it is permissible... to have regard to the circumstances in which the contract came to be concluded for the purpose of discovering the facts to which the contract refers and its commercial purposes, objectively considered...".<sup>11</sup>*

One final point: be careful when, as is often the case, of including a general clause in Sports Marketing Agreements, usually insisted upon by Sports Governing Bodies, especially in Sports Sponsorship and Sports Licensing and Merchandising Agreements, making the Agreement subject to the general prohibition of not doing anything which “*may bring the Sport of..... into disrepute*”. This is a difficult provision to inter-

<sup>11</sup> Para. [13] *Ibid.*

<sup>12</sup> *Richardson v Mellish* (1824), 2 Bing. 229, 252, 130 Eng. Rep. 294, at page 303.

pret and apply, in practice, as it is essentially subjective in nature. It is rather like including a general provision on ‘public policy’, which has been described by one English Judge, namely Mr. Justice Burroughs, as: “*a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*”<sup>12</sup>

#### 4. Concluding Remarks

Included throughout the Book are a number of Precedents - general/standard forms - for a wide range of Sports Marketing Agreements that will need to be negotiated and drafted.

But beware! Precedents should be used only as a general guide or checklist and should not be blindly and slavishly followed.

All Sports Marketing Agreements are the result of a particular commercial deal that has been negotiated between the parties to them and need, therefore, to be individually tailored and customised to fit and reflect the particular facts and circumstances of each case. In other words, when drafting Sports Marketing Agreements it is not a case of ‘*one size fits all.*’ Drafting, to be legally and practically effective, needs to be contextual in all cases and should never be carried out in a vacuum. Furthermore, drafting and interpretation go hand in hand and should always be considered as two sides of the same coin.

You have been warned!

The International Sports Law Journal

## The governance network of European football: introducing new governance approaches to regulate football at the EU level\*

by **Arnout Geeraert, Jeroen Scheerder and Hans Bruyninckx\*\***

### Introduction

Sport originally was a self-regulating activity. The highest governing bodies of sport, global sport organisations (GSOs) like FIFA and the IOC, regulated their sports or events autonomously through self-governing networks with their own rules and regulations. This meant that sport generally fell outside the law, thereby escaping to a large extent the normal application of e.g. labour or fiscal law. At the same time, sport is increasingly relying on public services. A pertinent example of this are the police forces, which have to be deployed by governments in order to ensure a safe environment for sporting events. In recent years, we have also witnessed the growing commercial nature of sport organisations. Sport has largely become an economic activity, influenced by powerful commercial actors. This evolution has urged central and local governments to question the autonomous status of sports. Political entities now try to get a grip on sport bodies from a rule perspective, but encounter great difficulties in doing so. Sport organisations are very reluctant to give up their cherished autonomous status and point to the ‘specificity’ of their sector to justify this.

In addition, due to its growing economic nature, sport in general has been subject to a series of high profile difficulties in recent years. Henry and Lee (2004) mention different types of failure in governance in many GSOs. In football for example, we have witnessed cases of corruption, bribery, gambling scandals, money laundering, malicious players’ agents, etc. Most recently, FIFA came under fire after some senior officials had been accused of taking bribes (BBC News 2010, Gibson 2010). These abuses clearly indicate a failure of governance in the football sector. At the same time, however, governments seem to grant sports a special status. Football in particular is often treated with economic and legal excep-

tionalism by governments. At the European level, ever since the *Bosman* case, FIFA and UEFA adhere to a strong protectionist vision of sport governance, even arguing that they should be afforded complete decision-making autonomy by the EU institutions (Parrish 2011). In the light of the many governance failures in the football sector, this claim does not seem legitimate. On the other hand, because of its limited legal competences regarding sports and because of the recognised autonomous status of sports governing bodies at the European level, the EU does not have the power to intervene too strongly in the sector. This means that at the EU-level, a difficult balance has to be found between allowing total autonomy and establishing an extensive government intervention. In this article, the authors make an attempt at identifying the structures of the governance network of European football in order to assess if the current balance can be considered democratically legitimate.

Whilst a lot has already been written on the emergence and empowerment of new stakeholders in professional football, the authors of this article feel it is now time to assess the governance structures of professional football; in particular how they function, and more specifically to what extent they can be considered democratically legitimate and what can be done to improve the latter. Our work builds up on the excellent work of García (2007a, 2007b, 2008, 2009) and Holt (2007, 2009). This article aims at introducing a new approach in the academic debate on governance failures in professional football, but does not claim that our research is definitive. Rather, our goal is to present a broad, theoretically informed analysis on the governance structures in professional football, suggesting possible avenues for analysis. To this end, we use the Democratic Anchorage Model developed by Sørensen and Torfing (2005). It is our sincere hope that this article will open a new agenda for further research on this topic, based on modern governance approaches.

### Theoretical framework

The evolution from a traditionally autonomous sector to a sector with government interference seems somewhat atypical from the perspective of modern governance theories. According to the latter, the public sector has seen an erosion of government in order to deal with today’s multi-

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layered society. In the sports sector, however, traditionally autonomous sport bodies are now subjected to attempts by governments to regulate their sector. Thus, there is no erosion of government intervention in the sector, but rather an increase. However, there is certainly an erosion in the power of the central regulatory bodies, i.e. the GSOs, due to the increasing government interventions on the one hand and the rise and empowerment of stakeholders on the other.

In this article, we summarise how the evolution from a self-governing network into a multi actor, multi-level governance network took place at the European level in the field of professional football and begin with definitions of the relevant terms.

### Government

In Anglo-American political sciences, the concept 'government' refers to the formal institutions of state and their monopoly on the use of coercive power. 'Government' is characterised by its ability to unilaterally make decisions and implement them. The term thus refers in particular to the formal and institutional top-down processes which (mostly, but not exclusively) operate at the nation state level (Stoker 1998).

### Governance

In the last two decades, a significant body of governance literature has emerged. This has led to some considerable theoretical and conceptual confusion regarding the concept. Van Kersbergen and van Waarden (2004) for example, distinguish no less than nine different meanings regarding 'governance'. Therefore, it is necessary to strictly define this concept for the purposes of our analysis.

Society is becoming increasingly complex, fragmented and layered. In order to govern efficiently, there is a need for negotiation and interaction between the different kinds of organisations and groups of state, market and civil society (See Figure 1; Sørensen and Torfing 2005). The concept civil society refers to a multitude of organisations, ideally initiated and maintained by the voluntary activities of citizens (Dekker 2001).

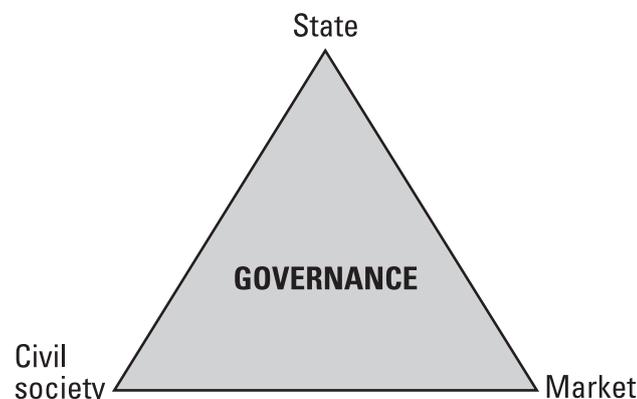


Figure 1: Governance triangle

However, this does not mean that central and local governments are being hollowed out (Hirst 1994). States still play a key role in local, national and transnational policy. Yet at the same time, their powers are steadily eroding, since they no longer monopolise the governing of the general well-being of the population (Rose 1999, Sørensen and Torfing 2005). Governments increasingly control society by involving different groups of citizens, professionals, voluntary organisations, unions and private actors in their decision-making (Rose 1996). In other words, governments are gradually controlling society in a horizontal or networked way. This new horizontal form of governing is called 'governance'. It can be viewed as the counterpart of the formal, classical and vertical or top-down 'government'.

### Governance networks

In the light of the many examples of government and market failures, governments are increasingly governing society through self-governing networks. Within these networks, different kinds of citizens, profes-

sionals, voluntary organisations, unions and private actors are being involved in policy-making. This allows authorities to govern 'at a distance' (Rose 1996). The concept 'governance networks' thus refers to the upcoming forms of interactions between government, civil society and market actors regarding public policy issues. These interactions are usually characterised by high degrees of self-regulation and a relatively small degree of external regulation (Klijn and Koppenjan 2004, Torfing 2005). The concept 'governance networks' in fact combines the concept 'governance' and the policy network as an organisational framework.

One might ask whether it makes sense to talk about governance networks in a generic sense. Because there are 'a number of distinctive features of network-types of governance that permit us to define governance networks as a general category that captures different forms of public-private interaction', Sørensen and Torfing (2009, p. 284) believe that this does make sense. They define the term as follows:

'A relatively stable horizontal articulation of interdependent, but operationally autonomous actors, who interact through negotiations, which take place within a regulative, normative, cognitive and imaginary framework that to a certain extent is self-regulating and which contributes to the production of public purpose within or across particular policy areas' (Sørensen and Torfing 2005, p. 197).

The authors of this article agree with the arguments of post-liberal theorists that governance networks are an essential part of today's society. We should therefore focus on the opportunities they give us. Sørensen and Torfing (2005, p. 201) state on this note that 'we should rather ask ourselves how we can improve the democratic performance of governance networks, instead of writing them off for being inherently undemocratic'.

### Evolution in the governance of European football: from autonomous self-governance to mixed governance

#### Political, legal and economic driving forces leading to a governance network

Since there already exists a large body of literature on how the current situation in football governance has emerged, we limit ourselves in this section to a summary of the political, legal and economic driving forces that are gradually leading to the emergence in European professional football of a governance network as defined by Sørensen and Torfing (2005).

The hierarchic pyramid network of football (Crocì and Forster 2006, García 2007b) can be characterised by the concept of 'government' in the sense that football's governing bodies use coercive power to unilaterally make and implement decisions. This highly undemocratic network (Siekman 2005, 2006) first came under pressure due to a changing media landscape and increased merchandising (Andreff and Staudohar 2000, Holt 2007, Szymanski 2006). Football became increasingly commercial and more and more the target of, and integrated with, transnational business interests. It created a complex network with growing interdependence between business interests and the football world (Sugden 2002). This process of commercialisation also made clubs and national competitions powerful stakeholders, who were no longer satisfied with their lack of participation in the hierarchical pyramid network. The richest clubs and leagues in particular therefore started contesting the legitimacy of football's governing bodies (Holt 2007).

Commercial factors have largely contributed to the growing internationalisation of sport, making it a cross-border activity for which sports bodies have established rules (Parrish 2003b). Many of these rules are captured by EU's Internal Market competences, making the Court of Justice of the European Union (ECJ) a suitable venue for unsatisfied stakeholders to challenge the decisions made at the top of the governing networks of their sports. In *Walrave*<sup>2</sup>, the first ECJ case concerning sport in 1974, the ECJ ruled that EU law is only applicable to the economic aspects of sports. It is however very difficult to define non-economic sporting regulations, which in principle fall outside the scope of EU law. The *Meca-Medina*<sup>3</sup> ruling in 2006 anchored the approach followed by the Court in sports issues since 1974 that restrictive effects on competition that are inherent in the organisation and activities of sports bodies are not in breach of EU law, provided that these effects are pro-

portionate to the legitimate genuine sporting interest pursued. The assessment of the latter can only be made on a case-by-case basis (European Commission 2007b).

In the *Bosman case*, the ECJ ruled that certain restrictions on the mobility of professional football players in FIFA's transfer rules were not proportionate to the legitimate interest pursued. As García (2007b) describes, the long and intense negotiations between UEFA and the European Commission on new FIFA transfer rules eventually resulted in a strong partnership. The *Bosman case* proved to be a watershed in the sense that it established a definitive EU involvement in sports, placing it on the 'high politics' agenda (García, 2007a). The Declarations on sport, added to the Treaty of Amsterdam and issued at the Intergovernmental Council of Nice, which called on the institutions to take into account the social significance of sports, are the most obvious manifestations of the latter (Niemann and Brand 2008, Parrish 2003c). These non-binding documents are also an expression of the lobbying power at the highest EU level of the so-called 'football community', generally aimed at minimising EU intervention in the sector (Niemann and Brand 2008).

On the occasion of the conclusion of the agreement in 2001 between FIFA, UEFA and the European Commission on new FIFA transfer rules following the *Bosman* judgement, the involved Commissioners invited FIFA and UEFA to encourage clubs to start or pursue social dialogue with the representative bodies of football players, and they offered the Commission's assistance in this matter. Ever since, the Commission has been supporting projects for the consolidation of social dialogue, not only specifically in the football sector, but also in the sport sector globally.<sup>4</sup> The 2007 White Paper on Sport (European Commission 2007b) further encouraged social dialogue in professional football, which in 2008 resulted in the creation of a EU sectoral social dialogue committee in the Professional Football sector. The White Paper furthermore acknowledged the emergence of new stakeholders in the governance of professional football and implicitly questioned the traditional hierarchic pyramid structure of football governance (García 2009).

Figure 2 depicts the emergence of the governance network in European professional football. The intertwined political, legal and economic driving forces are assumed to be enduring. Therefore, the model shown below has a dynamic nature, as we can expect that the evolution

from a hierarchic pyramid network to a governance network will continue in the future.

### The stakeholders in the governance network of European football

The intertwined political, legal and economic driving forces led to the empowerment of certain stakeholder organisations in European football. Besides this, it is also important to emphasise the role of the European Commission in the emergence of representative organisations with the organisational capacity to influence the governance of football. The Commission's promotion for the establishment of a EU sectoral social dialogue committee in professional football necessitated the presence of valid representative organisations for workers and employers in the sector. This has certainly benefited the representative organisations for players and leagues, respectively the International Federation of Professional Footballers Associations- Division Europe (FIFPro) and the Association of European Professional Football Leagues (EPFL). The latter was founded only in 2005 (EPFL 2010). In 2008, European Club Association (ECA) was founded as a result of the dissolution of the G-14, which was an association of 18 of the leading professional football clubs in Europe, constituted in 2000 but originating from an informal network founded in 1997 (García 2008).

FIFPro, EPFL and ECA are now officially recognised by UEFA as the representative organisations for their members (UEFA 2007, 2008, 2009a). Since 2007, they have received a place on UEFA's Professional Football Strategy Council (PFSC), a purely consultative body created to build a network for (social) dialogue and consultation with other stakeholders in the governance of professional football. The PFSC informs the Executive Committee, the actual decision making body of UEFA (UEFA 2010, art. 7bis).

In March 2008, a new sectoral social dialogue committee was created at the EU-level, bringing together FIFPro (employees), EPFL and ECA (employers). The aim of the committee was to improve employment relations for all players and reduce disputes through dialogue (European Union 2008).

The rise of stakeholder organisations FIFPro, EPFL and ECA (hereafter: 'the stakeholder organisations') is consolidated by their official recognition by UEFA and the EU. Together with these two organisations, they operate within a network with, at least *prima facie*, the same

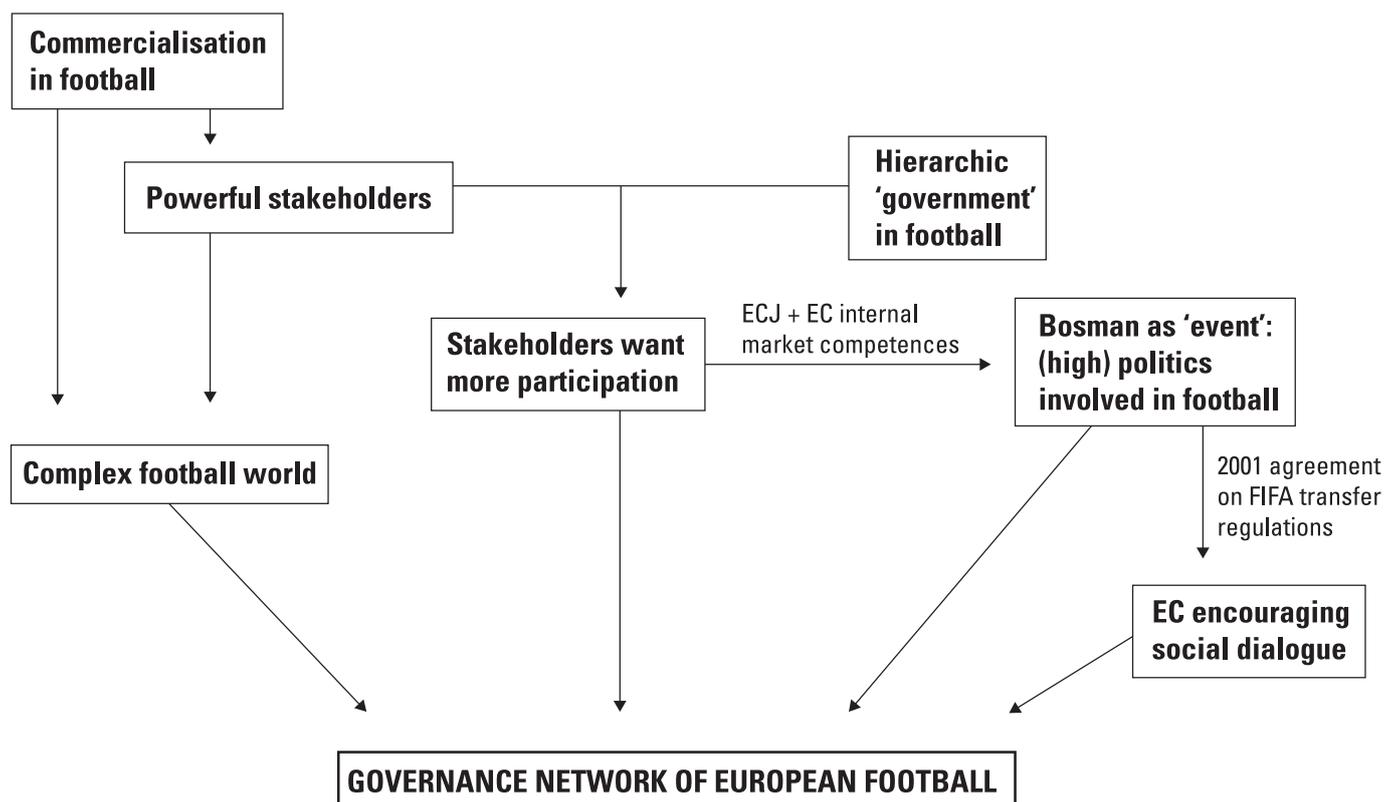


Figure 2: The driving forces behind the emergence of the governance network of European football

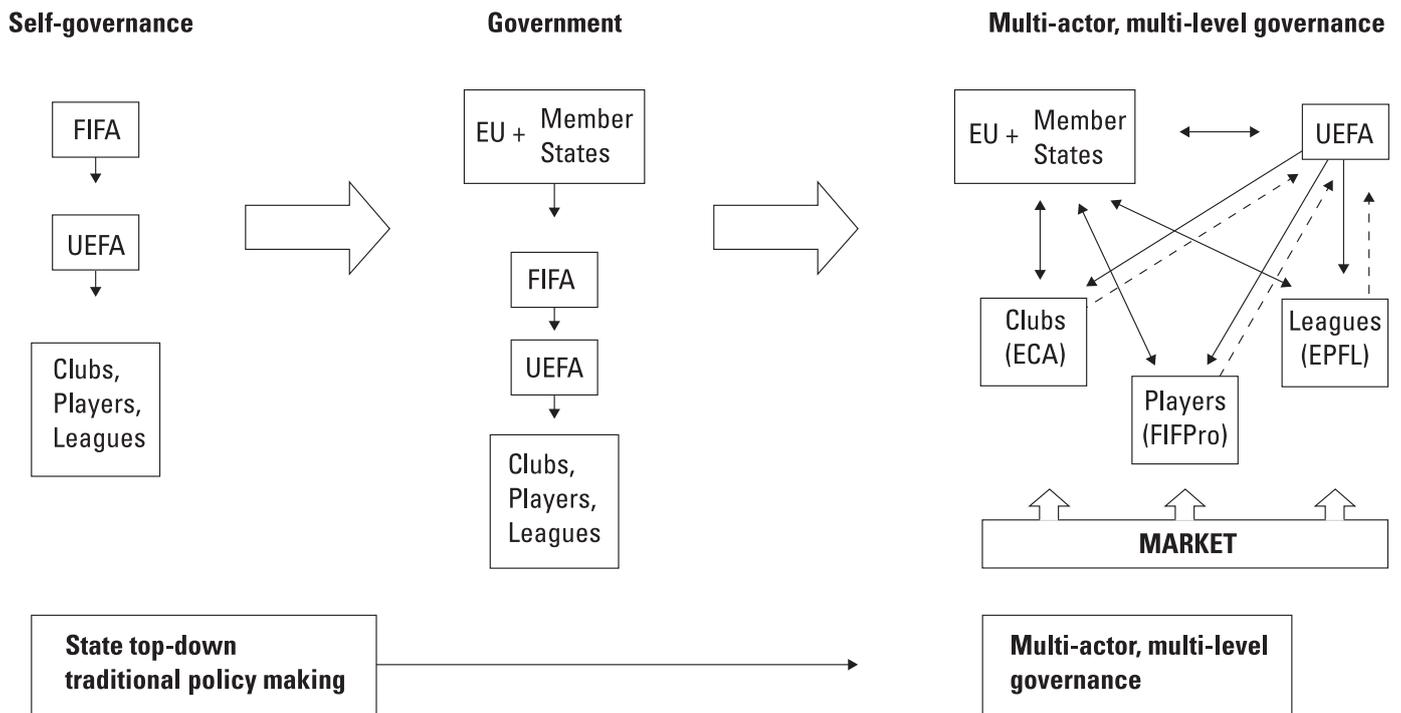


Figure 3: The governance of European football: from self-governance to multi-level, multi-actor governance

characteristics as a multi-actor, multi-level governance network. The strict application of EU law by the Commission in the period right after the ECJ's *Bosman* ruling can be described as the exercise of government. Extensive lobbying by the football community and the Council declarations of Amsterdam and Nice swiftly averted this threat to the football bodies' autonomy (Niemann and Brand 2008). Yet, at the same time, the emergence of the stakeholders organisations and the involvement of high politics in the football sector prevented FIFA and UEFA from returning to the initial situation of self-governance. Figure 3 depicts these transformations in European football governance.

As can be witnessed, FIFA is not included in the multi-actor, multi-level governance model pictured above. However, because FIFA still imposes general rules and regulations on UEFA (e.g. the transfer regulations), its importance in the governance of European professional football cannot be underestimated. It is nevertheless obvious that especially UEFA has an important place in the governance network of European football (GNEF).

#### The governance network of European football compared with governance networks in the traditional sense

Economic driving forces have created a complicated web of interrelationships in the professional football sector, making it increasingly complex (Henry and Lee 2004). As stressed by Holt (2007), this mirrors the events in modern society that have caused governments to govern more horizontally in order to deal with the complex reality in today's society. The current abuses in professional football are embedded in a complex football sector that can no longer be efficiently governed by one central governing body. Thus, there is a strong similarity between governance networks in the traditional sense and the governance network in European football (GNEF) in terms of their *raison d'être*.

When comparing the characteristics of the GNEF with the definitions of governance networks by Sørensen and Torfing (2005), more similarities arise. First, one can definitely recognise a relatively stable horizontal articulation of interdependent, but operationally autonomous, actors in the relationship between UEFA and the EU. However, when we consider the stakeholder organisations' role in the network, this can certainly not be said about the GNEF as a whole. The stakeholders' lack of real decision power within UEFA's structures definitely creates asymmetrical power relations that lead to formal, hierarchical patterns. It is clear that the different actors in the network are interdependent. The

European Commission, for example, has a coordinating and supportive competence in the field of sport, making a collaboration with UEFA necessary to ensure an effective policy. UEFA in its turn is dependent on the Commission firstly to consolidate its legitimacy which came under pressure due to the emergence of new stakeholders (García 2007b); and secondly because football's regulations are subject to European law. ECA and UEFA are in their turn interdependent since clubs cannot leave UEFA because they would no longer be allowed to play in UEFA's competitions (e.g. the Champions League) and because UEFA obviously cannot exist without clubs. Due to the interconnectedness of professional football (Holt 2007), a similar logic applies to the relationships between the other actors.

Second, due to the venues for (social) dialogue with and between stakeholders created in recent years, and UEFA and the European Commission's good relationship, interactions within the network are increasingly conducted through negotiation.

Third, interactions in the GNEF take place within a framework with regulative, normative, cognitive and imaginary aspects. According to Sørensen and Torfing (2004, 2005), the regulative aspect provides rules, roles and procedures; the normative aspect creates norms, values and standards; the cognitive aspect ensures shared concepts, codes, discourses and specialised knowledge; and the imaginary aspect creates collective identities, ideologies and visions. The problem within the GNEF is that interaction takes place in different institutional frameworks, each with their own normative, cognitive and imaginary aspects. These are, for instance, the PFSC, the EU social dialogue committee and the European Sport Forum under the umbrella of the EU, and finally the informal interactions between actors (e.g. the lobbying by UEFA). Needless to say, these institutional frameworks and the roles that the actors play in them, differ greatly.

Fourth, the self-regulatory effect of horizontal networks is lost if the formal authority regulates the network too much. If we consider the EU as the regulatory body in the network, there can be no question of an excess of rules in the network because of its limited powers in the field of sports. However, the atypical sports sector is historically -and still mostly- regulated by sports bodies. Within UEFA's structures, the stakeholder organisations have a mere consultative role and therefore, UEFA still strongly regulates the GNEF. This probably results in an excess of rules and procedures in the network.

Altogether, we state that the relationship between UEFA and the EU largely corresponds with Sørensen and Torfing's (2005) definition of a

Governance networks definition	Resemblances	Differences
A relative stable horizontal articulation of interdependent, but operationally autonomous actors;	Is the case for the relationship between UEFA and EU	Is not the case for the relationship between UEFA and FIFPro, ECA, EPFL
Who interact through negotiations;	True, especially for UEFA and EU	Not all actors always involved in negotiations
Which take place within a regulative, normative, cognitive and imaginary framework;	Partly true	Different institutional frameworks with various regulatory, normative, cognitive and imaginary aspects. Only UEFA has a place in all of them
That to a certain extent is self-regulating and which contributes to the production of public purpose within or across particular policy areas.	EU as formal authority is unable to unilaterally regulate the network due to its limited competences in the field of sport	UEFA as central body of authority likely gives an excess of rules and procedures within the network

Table 1: Comparison of the GNEF with the governance networks definition given by Sørensen and Torfing

governance network. The principal differences that emerge when comparing the GNEF as a whole with the latter definition are to be found in the lack of a real horizontal relationship between UEFA and the stakeholder organisations. Table 1 summarises these and other differences as well as the resemblances between the GNEF and the governance networks definition given by Sørensen and Torfing. It can be expected that due to the above described driving powers, the number of similarities will further increase over the next years.

#### Democratic legitimacy of the Governance Network in European Football

Policy makers consider the use of governance networks more and more as a legitimate and effective governance tool, and social scientists and politicians praise their contribution to 'efficient governance'. The scientific literature on the subject thus focuses mainly on the advantages of the networks rather than discussing the potential lack of democratic legitimacy they may entail (Sørensen and Torfing 2005). Only in recent years, a second generation body of governance network literature has emerged, focusing on the democratic performance of governance networks (see e.g. Bogason and Musso 2006; Edelenbos, Steijn, and Klijn 2010; Pierre 2000; Skelcher, Mathur and Smith 2004; Sørensen and Torfing 2005; Wolf 2002). This new field of theory mainly focuses on the anchorage of governance networks in traditional democratic institutions and generally accepted principles of democratic procedures.

Sørensen and Torfing (2005) claim that in order to improve the democratic performance of governance networks, we must enhance their democratic anchorage in elected politicians, the membership basis of the participating groups and organisations, a territorially defined citizenry and a democratic grammar of conduct. Their 'Democratic Anchorage Model' is the first holistic proposition in governance network theory for a ready-made model, applicable to any specific governance network in order to measure its democratic legitimacy. In this model, the discussion about the democratic character of the governance networks comes down to the level of 'democratic anchorage' of the network: how does the network relate to traditional democratic institutions on the one hand; and to the generally accepted principles of democratic procedures on the other hand (Edelenbos *et al.* 2010). More specifically, it assesses four dimensions that re-invoke classical themes in liberal theories of democracy, which assures a rather innovative holistic approach on democratic legitimacy that, in our opinion, stands out in the recent academic literature on the subject. For instance, the centrality and density model by Rowley (1997), used by Holt (2009) in a recent study on football governance, focuses merely on the intra-network relations and their functioning and therefore necessarily fails to assess the (democratic legitimacy of) the network as a whole.

Sørensen and Torfing further refined their Democratic Anchorage

Model by offering operational definitions of the four dimensions of the model, and by demonstrating how the assessment criteria can be applied in an empirical case study of a governance network involved in the recent decision to build a bridge between Denmark and Germany (Sørensen and Torfing 2009). This recent study is used in this article as a signpost in the application of the Democratic Anchorage Model to the governance network of European football.

#### Application of the democratic anchorage model to the governance network of European football

The Democratic Anchorage Model claims that governance networks are democratically anchored to the extent that they:

- 1 are controlled by democratically elected politicians;
- 2 represent the membership basis of the participating groups and organisations;
- 3 are accountable to a territorially defined citizenry; and
- 4 facilitate interaction in accordance with a commonly accepted democratic grammar of conduct' (Sørensen and Torfing 2005, p. 201).

It is assumed that none of the above anchorage points alone can assure the democratic performance of the governance network. In fact, the four anchorage point compensate each others' shortcomings and combined, they provide a strong source of democratic legitimacy (Sørensen and Torfing 2009).

#### First anchorage point: democratic anchorage in elected politicians

The first anchorage point expresses the need of a close linkage between representative democracy and a specific governance network. It is important to ensure that democratically elected politicians are capable of monitoring and influencing the policy-making that takes place in the network. This way, it is ensured that the structure, procedures and decisions of the network are in line with the popular will expressed by the political majority of elected assemblies. To this end, elected politicians must have access to information about the governance network's processes, outputs and outcomes. They must assume the role of meta-governors, define the objectives of their meta-governance and combine different meta-governance tools to achieve these objectives (Sørensen and Torfing 2009).

Meta-governance can be broadly defined as 'the governance of governance'. It creates conditions in which the network must operate and involves the attempts of politicians and administrators to construct, structure and influence the game-like interaction within particular governance networks (Sørensen and Torfing 2005). This 'steering' of the network should not be confused with 'government'. Sørensen and Torfing (2009) state that public metagovernors should avoid regulating governance networks in ways that eliminate their capacity for self-reg-

ulation, but instead, via a series of more or less subtle and indirect forms of governance, seek to shape the free actions of the network actors in accordance with a number of general procedural standards and substantial goals defined by the metagovernors.

The governance network of European football was not voluntarily initiated by elected politicians. Rather, the *Bosman* ruling involved the EU in football-related issues as a mediator in an internal labour-related dispute between stakeholders (García 2008). Therefore, as a consequence we state that elected politicians at the EU-level were never really aware of the presence and role of the governance network, although it is nevertheless highly visible. Lobbying by football's governing bodies focused on the concept of 'autonomy' (García 2007a), expressed in e.g. the Declarations on sport, and also the EU's limited legal competence regarding sports, have clearly made the EU wary of intervening in the sector. As a result, politicians at the EU level clearly failed to realise the meta-governance potential in the network and no clear meta-governance objectives were defined. Apart from the stimulating of (social) dialogue in the professional football sector, the EU has a very passive role in the network and as a consequence, it is UEFA that steers the network. This is clearly demonstrated by UEFA's proactive dialogue/lobbying strategy to introduce its new rules on locally-trained players to European institutions as described by García (2007b).

Over recent years, UEFA has consolidated its meta-governance over the GNEF by building up a pragmatic relationship with the EU institutions, more specifically with the Commission (García 2007b), the Parliament through the creation of the Parliamentary Group 'Friends of European Football' (Holt 2007) and the Member States via the European Sports Forum (Willis 2010). The stakeholder organisations on the other hand have been integrated in UEFA's system, yet at the same time they did not receive genuine decision-making power. This has averted the threats to UEFA's legitimacy as the governing body for European football and certainly also strengthened its control over governance developments (Holt 2009).

One direct consequence of UEFA's meta-governance of the GNEF is the 'special status' of football, which some find 'exaggerated' (Van den Bogaert 2006, pp. 18-19). The redefinition of football from a mere economic activity to an activity including social values and an accepted specificity can be considered as a great success for football's governing bodies (García 2008). However, finding the right balance between treating football (and sports in general) as 'normal' economic activity and taking into account the notion of 'specificity' is important yet very difficult. The recognition of too few 'specificities of sport' may lead to an ineffective sports market, while the recognition of too many will undermine the fundamental rights of stakeholders within the sector (Van den Bogaert 2005; Siekmann, Parrish, García and Miettinen 2010). The increase in labour related legal disputes in professional football, often concerning contractual stability issues (see e.g. Van Megen 2010), indicates that the right balance in this matter has not yet been found. With UEFA's meta-governance of the GNEF, the balance has certainly been tipped in favour of the specificity of the sector.

Concluding, from a democratic point of view, UEFA's meta-governance of the GNEF and the EU's lack of it is problematic. Therefore, democratic anchorage in this dimension is weak. In its recent (January 2011) Communication 'Developing the European Dimension in Sport', the European Commission seems to demonstrate a more proactive approach to professional football. Remarkably, where in the White Paper the Commission praised the 2001 FIFA transfer system as 'an example of good practice that ensures a competitive equilibrium between sport clubs while taking into account the requirements of EU law' (European Commission 2007b, p. 15), it now states that 'the time has come for an overall evaluation of transfer rules in professional sport in Europe' (European Commission 2011a, p. 12). The Commission will launch therefore a study on the economic and legal aspects of transfers of players and their impact on sport competitions. Also, in the search for ways to improve the situation with regard to the activities of sports agents, the Commission will organise a conference bringing together representatives of the sport movement; and finally, the Commission plans an evaluation of the rules on locally trained players. While this approach by the Commission is certainly positive for the network's democratic

performance, the proposed actions do not yet indicate a comprehensive meta-governance approach.

#### *Second anchorage point: democratic anchorage in participating groups and organisations*

In order for the governance network to obtain democratic legitimacy, the network actors must advance valid claims to represent specific groups and/or organisations (Sørensen and Torfing 2009). The relationship between the network representatives and the constituency which they claim to represent, should be evaluated in terms of the degree to which those represented identify with the representatives (Saward 2005). To this end, the concrete performance of the representatives and the conditions of the possibility for the represented to critically evaluate this performance should be scrutinised (Sørensen and Torfing 2009). More specifically, represented groups and/or organisations must have the capacity and opportunity to critically evaluate the pursuit of their interests and the representatives must be sensitive to any criticism on this subject (Sørensen and Torfing 2009). The rationale behind the anchorage in this dimension is that the represented groups and/or organisations constitute a 'demos' of directly affected people that the different network actors must represent (Sørensen and Torfing 2003).

In recent years, the GNEF has made great progress regarding its anchorage in this dimension. UEFA, like FIFA, claims that it represents the concerns of all football's stakeholders and that it defends the interests of football as a whole (Holt 2007). With the rise of the stakeholder organisations, the legitimacy of football's governing bodies was increasingly being questioned. Today, FIFPro, EPFL and ECA all recognise UEFA as the European governing body for association football at all levels in exchange for a place in its PFSC (UEFA 2007, 2008, 2009). UEFA itself has changed its attitude towards the EU from hostility to cooperation (García 2007b). Despite the fact that the EU territory does not cover the whole UEFA territory, which comprises 53 member associations, UEFA now recognises the consequences and impact EU law can have in professional football and as a result it recognises the EU as the elected political body in the governance network.

Progress has also been made regarding the validity of the stakeholder organisations' claim to represent the particular groups and organisations in the network. At the time of the negotiations on new FIFA transfer regulations after the abolition of the old rules because of *Bosman*, FIFPro was severely struggling with representativeness issues, both internally and externally. These difficulties were actually one of the reasons for its eventual lack of involvement in the new regulations of 2001. First, British officials argued that most English footballers had never heard of the organisation, while other trade union organisations even reported that FIFPro was not the universal representative of all players; and second, there were strong internal divisions regarding the contractual stability issue between player unions from bigger and smaller leagues (Irving 2002). Today, FIFPro is recognised by both UEFA and the EU as the organisation that defends the interests of all professional football players and together with the improvement of its organisational strength - thanks to the European Commission's (financial) support (see *supra*)-, this has certainly benefited the perception of FIFPro by the represented players and unions as their representative organisation in the GNEF.

The ECA was founded as a result of the dissolution of the G-14, an organisation that claimed to defend the interests of all European clubs, which was rather questionable considering that its members were the richest and most successful European clubs. ECA membership however is not restricted to a small number of successful clubs, which makes its claim of being the sole representative body for all football clubs at European level more legitimate than that of its predecessor. Still, its membership is based on the UEFA ranking of its member associations so that wealthy and powerful clubs are clearly overrepresented. Thus far, however, there have not been any significant protests against ECA's conduct in the GNEF from smaller clubs.

Finally, thus far, EPFL has not experienced any protests from its constituent organisations regarding its validity which is only natural, considering its origin and membership composition. The organisation was created in 2005 out of its predecessor EUPPFL (Association of European Union Premier Professional Football Leagues), an organisation created

on the initiative of the English and Italian football leagues, as there was a need for an organisation to represent the views and positions of Leagues and clubs on matters of mutual interest and concern. EPFL is thus an umbrella organisation for the national football league organisations that organise national competitions.

As we do not have extensive information about the opinions and views of the represented organisations and groups, a thorough evaluation of whether they accept the validity of the stakeholders organisations' claim to representativeness cannot be made here. However, it is clear that a lot of progress has been made in this dimension. It seems that at present, the GNEF has a rather strong anchorage in participating groups and organisations.

*Third anchorage point: democratic anchorage in a territorially defined citizenry*

The rationale behind the introduction of this dimension is that in order to obtain democratic legitimacy, the governance network should be accountable to the citizens who are directly affected by its decisions (Sørensen and Torfing 2009). This prevents the network from becoming a closed and secret club, 'operating in the dark' (Dryzek 2007, Fox and Miller 1995, Newman 2005). In order to ensure democratic anchorage in this dimension, the tasks, remit and composition of a governance network must be fully visible to concerned publics, the governance network must produce regular narrative accounts that seek to justify its decisions, actions and results in the eyes of the broader citizenry and it must engage in a constructive dialogue with those who are publicly contesting their decisions, actions and results. Finally, the governance network must display some level of responsiveness towards criticisms and alternative proposals raised in the public debate (Sørensen and Torfing 2009).

The emergence of the GNEF has certainly benefitted UEFA's transparency (García 2007b; Holt 2009). In its 2011 Communication 'Developing the European Dimension in Sport', the European Commission stresses that its respect for the autonomy of the sports sector -within the limits of the law- is 'conditional on the commitment of the sector to democracy, transparency and accountability in decision-making' (European Commission 2011a, p. 10). Should UEFA not respect to a certain degree these principles of good governance in its internal functioning, its autonomy might quickly be contested by the EU and the stakeholders organisations. However, according to Holt (2009), the chronology and process of decision-making within UEFA remains hard to detect for the stakeholders. The overall process of decision-making within UEFA remains vague, making it impossible to track down the influence of stakeholder input (Holt 2009). Considering our lack of extensive data on UEFA's decision making procedures, we cannot make a thorough evaluation of UEFA's openness and decision-making transparency. Therefore, we restrict ourselves on this note to the assumption that improvements have been made in recent years, but as decision-making within UEFA still goes through convoluted and unclear processes, there still is a need for greater transparency in UEFA's functioning.

We can also make a few comments on the openness of the network as a whole. As stressed above, interactions within the GNEF take place in different institutional frameworks, so that the remit and composition of the network is not fully visible to concerned publics. Moreover, UEFA's relationship with the EU institutions is to a high degree characterised by lobbyism, which is illustrated by its strategy to promote new rules regarding locally trained players (García 2007b). These rules were finally implemented without much opposition and without a narrative account that seeks to justify why they were not scrutinised for a possible breach of EU law, i.e. an indirect restriction on the freedom of movement. Altogether, it is very hard to see where and how decisions are made in the GNEF and it does not produce regular narrative accounts that seek to justify its decisions, actions and results.

The GNEF does not display an acceptable responsiveness towards criticisms and alternative policy proposals raised in the public debate, nor does it engage in a constructive dialogue with its critics. We have already stressed the EU's passive role in the network and UEFA's metagovernance of it. UEFA as the metagovernor of the network has decided to show only a very limited -and if it did a rather slow- responsive-

ness towards criticism. In the past, journalists who were critical to the policy or decisions of FIFA or UEFA were reportedly sometimes banished from their events (Blanpain 2009). Football is very attractive to politicians. They often use it to win votes and they want to be seen at major football events. People within the football community are well aware of their power (García 2007b). As a consequence, football's governing bodies were not put under sufficient pressure by governments to encourage them to take actions against certain abuses. The increased commitment of UEFA to good government principles has in principle improved this. A recently created Club Financial Control Panel, aimed at improving financial fair play in the UEFA club competitions, illustrates this (UEFA 2009b). However, football's governing bodies are bound by their own and stakeholders' commercial interests, which certainly has an impact on its responsiveness towards criticism. Because of UEFA's metagovernance of the GNEF, the lack of responsiveness towards criticism reflects on the network as a whole.

Our conclusion is that again, improvements have been made in recent years regarding the anchorage of the GNEF in this dimension. Although we lack the necessary data to evaluate this dimension more thoroughly, we can nevertheless assume that, because of the described issues, these improvements will not prevent the network from having a rather weak anchorage in this dimension.

*Fourth anchorage point: democratic anchorage in democratic rules and norms*

In order to ensure the democratic performance of the governance network, it must be anchored in a set of democratic standards regulating the processes and interactions proceeding within the network. To this end, inclusion and exclusion must be subject to explicit criteria for admittance. Also, the degree of inclusion in the network should be a function of the intensity and extent to which actors are affected. Included actors should be able to influence decisions and participation in the governance network must contribute to the enhancement of the political empowerment of the participating actors. Interactions within the network should be based on democratic deliberation, that is on openness; agonistic respect for other people's opinions; commitment to reach a rough consensus; and a relatively transparent decision-making process (Sørensen and Torfing 2009). Network actors with conflicting views and interests should not regard each other as enemies to be eliminated by all possible means, but rather they should respect each others' right to voice and pursue their opinion (Mouffe 2005) and they should aim an inclusive compromise in the form of a 'rough consensus'. Finally the governance network must stimulate democratic innovation through self reflexive and experimental processes. Democracy must be constantly developed and governance networks should be judged on their ability to spur such a development (Sørensen and Torfing 2009).

The stakeholder organisations are now part of UEFA's structures through their membership of the PFSC and they are involved in its decision making procedures. Their participation in the GNEF has certainly led to their political empowerment and this is especially the case for FIFPro. However, according to UEFA's statutes, UEFA is not obligated to involve the stakeholders in its decisions (UEFA 2010, art. 3bis). As UEFA's decision-making procedures are quite obscure, it is not clear to what extent the stakeholders organisations can influence decisions.

There are no explicit criteria for admittance to the network. The specific nature of the driving forces behind the GNEF led to the empowerment of certain -very important- stakeholders. These, if you like, officially EU and UEFA sanctioned stakeholders are however not the only stakeholders in European professional football. Other stakeholders including referees, TV companies, corporate partners, football agents associations such as European Football Agents Associations (EFAA), supporters organisations such as Supporters Direct (SD) and the Football Supporters' Federation (FSF) are currently excluded from the GNEF. If the intensity to which actors are affected should be considered as the determining factor for participation in the network, supporters organisations especially deserve their place within the GNEF.

Interactions within the network are too often conducted in an atmosphere of hostility, often without the eventual goal of a broad consensus. The events within the context of the EU sectoral social dialogue com-

mittee are exemplary in this sense (see Colucci and Geeraert 2011). Recently, the committee was at a serious impasse, following the refusal from UEFA, EPFL and ECA to sign an agreement on minimum requirements for professional football players (FIFPro 2011). The impasse revealed a suspiciousness towards FIFPro's increasing influence in the GNEF and this is mostly connected to divergent views on contractual stability. A recent letter from FIFPro Division Europe president Philippe Piat (2011) to the ministers of sport of the EU Member States, despite displaying a one-sided view on matters, reveals less than friendly relations between FIFPro and the other stakeholders. There can be no doubt that this has a very negative impact on the functioning of the GNEF.

Since the Amsterdam Treaty, the European institutions see sports as a tool for a social and cultural policy. Through the educational, social and cultural role of sport the network can contribute to a democratic improvement of society (European Commission 2007a). In that respect, the EU sees the GNEF as a part of a broader democratic process. However, the network completely fails in producing policy outcomes that reduce social and political injustice. Although it must be said that a lot of the current abuses in professional football can directly or indirectly be linked to FIFA, it is clear that governance failures in European and world football have very negative socioeconomic consequences. Unscrupulous players agents who benefit from illegal circuits of African and South American footballers (Tshimanga 2001, Blanpain 2009), financial abuses, players who are not paid, laundering and corruption are only a part of the long list of abuses in professional football. Moreover, in the absence of financial redistribution, European football is increasingly dominated by a small number of elite clubs which creates great inequalities within and between European professional leagues. Some scholars therefore advocate a greater redistribution of revenue in European professional football (Findlay, Holohan and Oughton 1999; Conn 2005).

Overall, the GNEF has certainly contributed to a greater amount of democratic innovation in European professional football. However, there still remains a large body of issues related to the anchorage of the GNEF in democratic rules and therefore, the overall score of the GNEF on this criterion is weak.

## Conclusion

A lack of extensive data requires us to be cautious when drawing conclusions on the democratic legitimacy of the GNEF. Further research is necessary to provide more detailed and empirically supported evidence which will ensure that more concrete recommendations can be made and specified. Although we are very much aware of this, we nevertheless feel that we can already make some general conclusions and recommendations.

The overall democratic anchorage of the GNEF is clearly weak, which is not surprising. First of all, Sørensen and Torfing admit they 'set the bar high' (2009, p. 294) and second, one must not forget that the governance of European football has come a long way. The recent shifts in European football's governing structures most definitely proved to be beneficial for its democratic legitimacy. Moreover, much unlike FIFA, which is absent from the network and still faces considerable challenges regarding its democratic functioning (Jennings 2006), UEFA has an improved commitment to good governance. The driving forces behind this shift to a governance network still have to work through, so that democratic legitimacy might increase even further. This organic shift will in itself however not suffice to enhance the democratic legitimacy of the GNEF to an acceptable level. Hereunto, actions must be taken in the network.

The unclear decision making structures in the network need to be clarified. More transparency from UEFA is an important precondition to this end, but the variety of forums in which negotiations are conducted is also problematic. Negotiations within the network are in serious need of more structure. A suitable solution could be a structured

dialogue at the EU level, specifically intended for the European professional football sector with clear criteria of accession so that no stakeholders are excluded from the negotiations. Structured dialogue would also be an excellent tool of meta-governance for the EU.

There is also a strong need to ameliorate the current hostile relations between FIFPro and UEFA, EPFL and ECA. As these are mostly constructed around contractual stability issues, a full collective bargaining agreement between employers and workers in the professional football sector could be the solution to this problem. There are however many problems in this matter. For instance, such an agreement would concern FIFA's transfer rules, which means that UEFA as a continental affiliate of FIFA has no mandate to conclude such an agreement (FIFA 2010, art. 20(3) a).

As we have shown, UEFA's metagovernance of the network is in many ways problematic for the democratic legitimacy of the GNEF. Sørensen and Torfing (2009, p. 235) state on this note that politicians and public managers at different levels of government, charged with defending public interests, have 'a special responsibility for unleashing the potentials of governance networks'. Democracy forces them to justify their rule and legitimise the overall system of governance because public governance should be both effective and democratic (Sørensen and Torfing 2009). Therefore, we state that the EU, as the political body in the network, should seize the opportunity to steer the GNEF. The attempts of the public authorities to steer the self-regulating governance networks are ultimately backed by the threat of replacing the horizontal network governance with hierarchical rule, thus returning to a situation of 'government' (Sørensen and Torfing 2004). The EU has no legal competence to regulate sports, but it does have very strong Internal Market powers. Because of the enduring uncertainty regarding the conformity of football's transfer regulations with EU-law (see e.g. Egger and Stix-Hackl 2002, Drolet 2006, Olfers 2008), the Commission -as guardians of the treaty- in theory still has the power to threaten a return to the situation of 'government' as was the case right after the Bosman ruling. However, it must be said that regulation through Competition policy is difficult, as the ECJ -as mentioned- only rules on a case by case basis regarding the conformity of (international) sport regulations with EU (Competition) law, which might lead to an uneven regulation in the sector.

Much has already been written on the possible and/or desired role of the EU in the field of sports. According to Foster (2000), there are three possible models for the regulation of sport by the EU: regulation through the enforcement of private rights by the ECJ, self-regulation by sporting bodies or supervised autonomy. Currently, the latter model prevails. The Commission maintains a constructive dialogue with sports bodies with a view to striking the right balance between the specificity of sport and full compliance with EU law as interpreted by the ECJ (European Commission 2011b). However, the existence of a governance network in European football offers the EU new methods of policy steering within the model of supervised autonomy, using its new supportive and coordinative competence in the field of sport.<sup>5</sup> Foster recognises that sport authorities are best positioned to regulate their area of activity and ensure that sport, as a business, 'is still run partly for the love of the game' (Foster 2000, p. 64). We claim that this is only partly true, because we do not believe that sports authorities can do this unilaterally. Rather, sport bodies should be given an important role within sport governance networks. In the case of football, more openness, stakeholder participation and metagovernance by the European Union should help the network deal with the growing complexity of the football world. Football's governing bodies are not capable of dealing with this complexity unilaterally, just like governments are not able to deal with an increasingly complex society unilaterally. This way, governance networks in sport can be the solution to the failure in governance in the GSOs, just like governance networks were the solution to many examples of government and market failures.

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## Hague Joint Proposal on the Definition of Sports Law

Whereas in the Jakarta Declaration on Lex Sportiva of 22 September 2011 the public and private dimensions of Lex Sportiva as well as the significance of both national and international perspectives in defining this concept is recognized;  
Whereas it is obvious that international academic consensus on the definition for "sports law" - with regard to its content as well as with regard to the terminology used - still is missing;

Convinced that the study of sports law needs a clear, workable definition of the concept of "sports law" in both respects (content and terminology);

We, the undersigned, propose to the sports law community to distinguish between the private and public parts of "sport law" - the public part referring to all sport(s)-related national and international legislation (laws and treaties and decision-making of intergovernmental organisations, customary law and case-law, etc.). and the private part referring to the rules and regulations of the national and international sport(s) governing bodies, their customary law practice and the jurisprudence of their arbitral tribunals and disciplinary organs, etc.;

And propose to use the following accompanying terminology - in the lingua franca of international sport relations: sports law ("umbrella" term)/public part: sporting law (lex sportiva); and private part: sportive law (lex ludica).

**ASSER International Sports Law Centre, The Hague, 21 June 2011**

# Towards a 'Lex Sportiva'\*

by Ian Blackshaw\*\*

## Introductory

Is there such a thing as 'Sports Law'? Opinion on this subject is divided amongst academics and practitioners alike.<sup>1</sup>

According to the late Edward Grayson, the doyen of authors on sport and the law, jurisprudentially speaking, there is no such thing as 'sports law'. He argues that:

*"As a soundbite headline, shorthand description, it has no juridical foundation; for common law and equity creates no concept of law exclusive-ly relating to sport. Each area of law applicable to sport does not differ from how it is found in any other social or jurisprudential category..."*<sup>2</sup>

Likewise, Charles Woodhouse, CVO, the former legal adviser to the Commonwealth Games Foundation, a pioneer legal practitioner in the field of sport and a founder member of the British Association for Sport and the Law and the UK Sports Dispute Resolution Panel, is adamant that there is no such thing as 'sports law'. In a reflective valedictory article, he expresses his opinion as follows:

*"I have often said there is no such thing as sports law. Instead it is the application to sport situations of disciplines such as contract law, administrative law (disciplinary procedures), competition law, intellectual property law, defamation and employment law."*

And adds in a slightly contradictory manner but then correcting himself:

*"I hope the next generation of sports lawyers will enjoy it as much as I have over the past 25 years. But do remember there is no such thing as sports law."*<sup>3</sup>

Again, according to Hayden Opie, of the University of Melbourne, Australia, 'sports law' is one of those fields of law which is applied law as opposed to pure theoretical law:

*"Rather than being a discipline with a common legal theme such as criminal law, equity or contract law, sports law is concerned with how law in general interacts with the activity known as sport. Hence, the label applied is law. Yet there is an increasing body of law which is specific to sport. This produces debate among scholars over whether one should use the term sports law, which indicates a legal discipline in its own right or 'sport and law' which reflects the multifarious and applied nature of the field."*<sup>4</sup>

On the other hand, Beloff, Kerr and Demetriou, all practitioners, recognise the emergence and importance of 'sports law':

*"..... the law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport, differently from other activities or*

*bodies. Discrete doctrines are gradually taking shape in the sporting field.....English courts are beginning to treat decisions of sporting bodies as subject to particular principles."*<sup>5</sup>

In other words, sport is 'special' and, as such, is deserving of 'special treatment' from a legal point of view. This is certainly true at the EU level reflecting the views of the European Commission and the European Court of Justice, where the term the 'specificity of sport' (also referred to, particularly by Sports Governing Bodies, as the 'sporting exception') has been coined and is widely used in various Commission rulings and Court decisions in sports cases.<sup>6</sup> This term refers to the special characteristics and dynamics of sport recognised in the EU Council of Ministers Nice Declaration on Sport of December 2000.<sup>7</sup> And further recognised in the European Commission 'White Paper' on Sport of July 2007.<sup>8</sup>

Likewise, Lewis and Taylor, both academics and practitioners, have the following to say on the subject of 'sports law':

*"..... the editors share the belief of many writers in the field that in at least some areas, for example where international institutions such as the Court of Arbitration for Sport review the decisions of sports governing bodies, a separate and distinct body of law inspired by general principles of law common to all states is in the process of development."*<sup>9</sup>

So, leaving aside the argument whether there is such a thing as 'sports law' (a 'Lex Sportiva') - the author of this Paper, incidentally, takes the view that there is - which, Lewis and Taylor consider is a matter of academic rather than practical interest,<sup>10</sup> we turn now to consider the contribution of the Court of Arbitration for Sport to the development of a 'Lex Sportiva'.

## CAS and a 'Lex Sportiva'

During its 26 years of existence, the CAS has dealt with a substantial number of cases covering a wide range of sports related legal issues. For example, a contractual dispute concerning the organisation of a particular sport's world championships;<sup>11</sup> the equivalent of a 'judicial review' of a decision of a particular sports governing body;<sup>12</sup> a challenge to the UEFA Rules restricting the multiple ownership of football clubs (the so-called ENIC case)<sup>13</sup>; as well as an increasing number of football transfer cases on appeal from the FIFA Dispute Resolution Chamber, following the acceptance by FIFA in 2002 of the CAS as the final 'court of appeal', especially compensation disputes.<sup>14</sup>

More recently, the CAS, on appeal from a ruling of the IAAF, dealt with the interesting case of Oscar Pistorius, the South African double leg amputee, and his claim to take part in the 2008 Beijing Olympics as if he were an able-bodied athlete. Although he won his appeal before

\* Paper presented at the Ithaca College Europe Olympic Law Conference, London, 19 May 2011

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1 See Gardiner, James, O'Leary, Welch, Blackshaw, Boyes and Caiger, *Sports Law Third Edition* (2006), London: Cavendish Publishing, pp 88 - 91 for a review of the arguments for and against a distinct/discrete body of law called 'sports law' (under the section title of 'Viva Sports Law - Sport and the Law RIP') and the general conclusion of the authors as follows: "As an area of academic study and extensive practitioner involvement, the time is right to accept that a new legal area has been born and is thriving in the 'bloom of its youth' - Viva sports law."

2 Grayson, Edward F, *Sport and the Law* (1999), London: Butterworths, p xxxvii.

3 Woodhouse, C, 'The lawyer in sport: some reflections' (1996), 4(3) *Sport and the Law Journal*, p 14.

4 Opie, H, 'Sports associations and their legal environment', in McGregor-Lowndes, M, Fletcher, K and Sievers, S (eds), *Legal Issues for Non-Profit Associations*, Sydney: LBC, pp 74-94.

5 Beloff, M, Kerr, T, and Demetriou, M, *Sports Law* (1999), Oxford: Hart, p 3.

6 See the EU 'White Paper on Sport' published on 11 July, 2007 (COM(2007) 391 final); see also the European Court of Justice Decision in *David Meca-Medina and Igor Majcen v Commission* (C-519/04 P) defining the limits of the so-called 'sporting exception' to EU Law in general and EU Competition Law in particular. See also Blackshaw, Ian, 'The Specificity

of Sport and the EU white paper on Sport', 10 October 2007, at pp 14-16.

7 'Declaration on the specific characteristics of sport and its social function in Europe', Presidency Conclusions, Nice European Council meeting, 7-9 December 2000; see <http://europa.eu.int/comm/sport/index.html> for the text of this Declaration.

8 There is now also a so-called 'Sport Article' in the TFEU (Article 165).

9 Lewis, Adam, and Taylor, Jonathan, *Sport: Law and Practice*, (2nd edition 2008) London: Bloomsbury Professional, p vii.

10 Ibid..

11 *International Triathlon Union v Pacific Sports Corpn.*, CAS 96/161.

12 *FFSA v FISA*, CAS 97/168. In that case, the FFSA challenged the adoption by an Extraordinary Congress of the FISA to

adopt a new By-law relating to "Commercial Publicity, Sponsorship and Advertising". The CAS rejected the arguments of the FFSA that the Extraordinary Congress did not have jurisdiction to make such a decision, but accepted that the procedure followed in adopting the amendment without allowing for a considered discussion of an important change to the By-laws was in breach of the FISA Statutes, and, accordingly, the CAS declared the decision void.

13 *AEK Athens and Slavia Prague v UEFA*, CAS 98/200.

14 For two recent important examples of football cases - interestingly, the second CAS decision overruling the first (and, in the opinion of the author of this Paper, quite rightly so!) - on compensation for unilateral premature termination by a football player of his contract of employ-

CAS, in the event, he did not, in fact, qualify for a place in the Beijing Olympics. However, it should be noted that the Decision does not create a legally binding precedent as the President of the CAS Panel, Professor Martin Hunter, pointed out in the Ruling as follows:

- “3. It is emphasised that the scope of application of this Ruling is limited to the eligibility of Mr Pistorius only and, also, only to his use of the specific prostheses in issue in this appeal.  
4. It follows that this Ruling has no application to the eligibility of any other amputee athletes, or to any other model of prosthetic limb; and it is the IAAF’s responsibility to review the circumstances on a case-by-case basis, impartially, in the context of up-to-date scientific knowledge at the time of such review.”

Although CAS arbitrators are not generally obliged to follow earlier decisions and obey the sacred Common Law principle of ‘*stare decisis*’ (binding legal precedent),<sup>15</sup> in the interests of comity and legal certainty, they usually do so. As a result of this practice, a very useful body of sports law is steadily being built up.<sup>16</sup> But, see the conflicting approaches taken by two different CAS Panels on valuing an anticipatory breach of a player’s contract in the CAS Appeal Cases of *Andrew Webster* and *Matuzalem*.<sup>17</sup> The approach taken in the second Case, in the opinion of the author of this Paper, being the correct and preferred one!

The extent to which the CAS is contributing to a discrete body of sports law (‘*lex sportiva*’) is a complex and controversial subject and also, as we have seen in relation to ‘sports law’, also divides academics and practitioners alike. For example, Ken Foster, who is generally credited with coining the term ‘*lex sportiva*’, argues that the CAS, as an institutional forum, is not yet:

“...globally comprehensive...[but] has improved by becoming more independent of the International Olympic Committee and thus satisfying Teubner’s criterion of externalisation.”<sup>18</sup>

And, according to Professor Jim Nafziger, the CAS ‘*lex sportiva*’ although “still incipient”, the general principles and rules derived from CAS Awards are becoming clearer on such issues as:

“... the jurisdiction and review powers of the CAS; eligibility of athletes; and the scope of strict liability in doping cases..... A truly effective body of jurisprudence generated by CAS awards, however, will require more development before the emerging *lex sportiva* can become a truly effective regime of authority.”<sup>19</sup>

In Nafziger’s view, if there is not yet a ‘*lex sportiva*’ as a result of CAS Awards, which, as he also points out, in any case, like Arbitral Awards generally, are legally binding on and only have legal effects between the parties (*inter partes*), there is certainly, in his opinion, a ‘*lex specialis*’ being established through CAS Decisions.

One area of sports law in which the CAS is developing a particular body of jurisprudence is, sadly, in doping cases. Indeed, in its Award in *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)*,<sup>20a</sup> a doping case, the CAS Panel held that the CAS has a distinct jurisprudence, expressed in the following terms:

“CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed as part of an emerging ‘*lex sportiva*’. Since CAS jurisprudence is largely based on a variety of sports regu-

lations, the parties’ reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations.”<sup>21</sup>

The legal challenges and limitations facing CAS in developing a consistent approach to such cases is well covered by Frank Oschutz, a German Attorney, in his study entitled ‘Doping Cases before the CAS and the World Anti-Doping Code’.<sup>22</sup> According to Oschutz:

“The Court of Arbitration for Sport offers a unique opportunity of international decision making in the world of sport.... The awards rendered by the various arbitrators prove that the CAS can provide effective protection for the rights of the accused athlete and is likewise able to ensure that the fight against doping will be upheld unremittingly.... the CAS has developed a quite impressive body of decisions which deal with all kinds of challenges.”<sup>23</sup>

Oschutz has some very interesting observations to make on certain disparities on the interpretation by CAS of the legal nature of the doping offence itself as follows:

“On the one hand, there are Panels which have stressed that the nature of a doping offence is one of pure strict liability, that is, a liability without fault. Consequently, there is no need to address the issue of intent or negligence at any stage of the proceedings. If an athlete is found with a forbidden substance he has to be sanctioned for a doping offence - period. However, some Panels, which applied the rules of strict liability, also felt the need to soften the harsh consequences of such a regime for athletes who committed the offence neither intentionally or negligently. In the eyes of these arbitrators, the athletes should enjoy the right to escape liability by providing evidence that the violation of the anti-doping rule was committed without their fault. So, the intentional element - that does not exist in a strict liability offence - sneaked in by the back door. On the other hand, there are more and more awards in which the Panels applied a rebuttable presumption of guilt if an athlete is found with a forbidden substance in his body. This athlete may adduce evidence that he or she did neither act intentionally, nor negligently. Consequently those Panels would not apply the concept of strict liability. However, one may also perceive a certain degree of misunderstanding of those two different legal concepts in some CAS decisions.”<sup>24</sup>

To a certain extent, the question of mitigation in doping cases has been clarified by the WADA Code and its recent revision, which came into force on 1 January, 2009, and this should perhaps lead to a more consistent approach in CAS doping decisions in future.

In any case, as Oschutz further points out, the CAS is not in a position to create its own rules in the fight against doping but must interpret and apply the rules of the relevant Sports Governing Body:

“The CAS is a judicial authority, limited to the control of decisions, which are based on the rules of the sports governing bodies. The CAS is bound to apply existing bodies of rules and the law to certain facts, cf Art R58 of the Code. In doing so, the arbitrators may interpret these rules according to certain standards, but they must refrain from rewriting them.”<sup>25</sup>

To the knowledge of the author of this Paper, some CAS arbitrators consider - quite wrongly - that they can ignore the rules in doping cases and decide cases on the basis of fairness alone, justifying this point of view on the basis that in appeal cases they can deal with the case *de novo*, pur-

ment with his Club, see *Wigan Athletic FC v Heart of Midlothian*, CAS 2007/A/1298; *Heart of Midlothian v Webster & Wigan Athletic FC*, CAS 2007/A/1299; *Webster v Heart of Midlothian*, CAS 2007/A/1300 (the Webster Case); and *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*, CAS 2008/A/1519 (the Matuzalem Case).

15 See *UCI v J. 7NCB*, CAS 97/176 Award of 28 August 1998, 14; and also the Webster and Matuzalem Cases cited in footnote 13 above.

16 See further on this, Nafziger, J., ‘Arbitration of Rights and Obligations in the International Sports Arena’, (2001) 35(2) *Valparaiso University Law Review* 57; Nafziger, James A.R., *International Sports Law*, Second Edition (2004), Ardsley, NY, Transnational Publishers, Inc. (ISBN 1-57105-137-6), pp 48-61; and Blackshaw, I, Siekmann, R.C.R. & Soek, J (Eds.), *The Court of Arbitration for Sport*

1984-2004, (2006) The Hague, The Netherlands, TMC Asser Press (ISBN 978-90-6704-204-8), pp 409-454. See also Blackshaw, I, *Mediating Sports Disputes: National and International Perspectives*, (2002) The Hague: TMC Asser Press.

17 Commentaries on these CAS Appeal Cases by Juan de Dios Crespo Perez, ISLJ 2010/3-4.

18 Foster, K, ‘Is there a Global Sports Law?’ (2003) 2 (2) *Entertainment and Sports Law Journal*, 1. Teubner’s criterion of externalisation applied to CAS is represented by an ‘external arbitrator’ who is

able to make decisions amounting to ‘official and organised’ law.

19 Nafziger, J, ‘The Court of Arbitration for Sport: the emerging *lex sportiva*’ in Blackshaw, Siekmann & Soek, op cit, pp 409-419.

20 CAS 02/O/372.

21 *Ibid.*, para 65, n 15.

22 See pp 246-265 in Blackshaw, Siekmann & Soek, op cit.

23 *Ibid.* at p 264.

24 *Ibid.* at pp 252-256.

25 See fn 16 supra.

suant to the provisions of Article R57 of the CAS Code of Sports-related Arbitration, which provide that “[t]he Panel shall have full power to review the facts and the law...” and also relying on the fact that the CAS has become the ‘Supreme Court of World Sport’. In effect, such CAS Panel members are claiming to be free to rewrite the applicable legal rules in the interests of what they consider to be fairness in the circumstances of the particular case. This is a dangerous course of action and not conducive to legal certainty. Or put another way, is contrary to a so-called ‘rule of sports law’. Fortunately, such CAS members tend to belong to the so-called ‘old guard’ of sports lawyers! The so-called ‘blaser-azzzi’. It should perhaps be added that other sports organisations also suffer - to some degree or another - from the same phenomenon!

So, what are the general principles that CAS should and generally does follow?

### General Principles of CAS Jurisprudence

Ken Foster, Emeritus Professor of Law at Warwick University, who is generally credited with having coined the phrase ‘*Lex Sportiva*’, has identified the following general principles, which he considers to underscore the emerging jurisprudence of the CAS.<sup>26</sup> And they are worth setting out *in extenso* as follows:

“..... [these] principles [fall] into five main categories:

1. *Lex ludica*: these are the rules of the game. There is a self-imposed reluctance on the Court of Arbitration for Sport to interfere with what it considers to be purely sporting matters. This covers not only the obvious refusal to reopen decisions made by match officials, but issues that are essentially about the nature of sport in a wider sense.
2. *Good governance*: this covers the proper standards that are legally required of decision making within a private organisation that has disciplinary power over athletes. Specifically, it encompasses having clear authority in the rules to make a decision (the *ultra vires* principle); avoiding arbitrary decision making by decreeing that a sporting federation cannot be the sole arbiter of the interpretation of its rules; not acting in bad faith; not making such unreasonable decisions that no reasonable body could have reached them; and using transparent and objective criteria in reaching its decisions.
3. *Procedural fairness*: these are a set of minimum standards that sporting federations must follow in hearing disciplinary matters.
4. *Harmonization of standards*: as an international body, the Court of arbitration for Sport tries to ensure consistency. The general principles that it formulates should apply to all federations. So it harmonises standards. This policy also entails formulating the principle that international sporting federations have primacy over national federations, and exercising a supervisory function over the rulebooks of federations, suggesting amendments where necessary.
5. *Fairness and equitable treatment*: the Court of Arbitration for Sport has a major function to achieve fairness in individual cases. This has been especially evident in its approach to penalties. It has disapproved of automatic fixed penalties; followed the principle of proportionality; and required sanctions to ‘fit the crime’. It has also, where appropriate, followed the principles of legitimate expectation and of estoppel.”

All these principles identified and enunciated by Foster have been distilled from Decisions rendered over the years by the CAS, several of which he cites and discusses in his contribution to the *Court of Arbitration for Sport 1984-2004* Book, of which the author of this Paper is one of the Editors, and which principles continue to influence CAS Decisions at present and in the future. Thus, providing for all those involved in sports disputes a useful body of legal precedents.

<sup>26</sup> Foster, Ken, ‘*Lex Sportiva* and *Lex Ludica*: The Court of Arbitration for Sport’s Jurisprudence’ in Blackshaw, Siekmann & Soek, op cit, pp 422 & 423.

<sup>27</sup> CAS JO 96/006, *M v AIBA*.

<sup>28</sup> Erbsen, Allan, ‘The Substance and Illusion of *Lex Sportiva*’ in Blackshaw, Siekmann & Soek, op cit, pp 422 & 423.

<sup>29</sup> Cagier, A and Gardiner, S (eds), *Professional Sport in the European Union*:

*Regulation and Re-regulation*, (2000), The Hague: Asser, pp 301 & 302.

<sup>30</sup> Gardiner, James, O’Leary, Welch, Blackshaw, Boyes and Caiger, *Sports Law* Third Edition (2006), London: Cavendish Publishing, p 93.

<sup>31</sup> CAS 98/200 *AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA)*, p 102.

<sup>32</sup> Kolev, Boris, ‘*Lex Sportiva* and *Lex Mercatoria*’, ISLJ 2008-1/2, pp 57-62.

For example, a landmark CAS ruling on the application of the rules of the game/rules of law principle involving a boxer who challenged the referee’s decision on a disqualification for a punch below the belt and whether such a dispute was arbitrable or not, the Panel limiting itself to the question whether the referee’s decision violated the ‘general principles of law’.<sup>27</sup>

As Allan Erbsen, of the University of Minnesota Law School, Minneapolis, USA, concludes in his contribution to the same Book:<sup>28</sup>

“CAS’s jurisprudence fills what until recently was a disturbing legal vacuum in international sports. Before the creation of CAS, the rights and obligations of athletes and officials were ill-defined and were enforceable - if at all - only through costly and lengthy litigation in national courts or in arbitration before tribunals staffed by the same sports federations whose actions the tribunals were asked to judge. Legal claims were thus difficult to frame, difficult to pursue, and, for political outsiders, difficult to win. CAS has thus made litigation a more viable remedy and deterrent....., spotlighting legal norms on a stage where law previously played a more marginal role.”

### Lex Sportiva compared with Lex Mercatoria

In an endeavour to define the nature of ‘sports law’, the *Lex Sportiva* has been compared and contrasted by several academics and commentators on ‘sports law’ with the *Lex Mercatoria* - the ‘Law Merchant’. The body of rules developed in the Middle Ages and derived from the established customs of merchants in their dealings on a global basis and recognised and enforced in the ordinary civil courts.

According to Andrew Caiger and Simon Gardiner:

“The relative autonomy of sports is perhaps most closely mirrored by the *Lex Mercatoria*..... This analogy with the *Lex Mercatoria* allows sports law to develop distinctiveness and an incremental formation. It encourages sports organisations to reconsider their own rules and mode of governance in the light of dominant legal norms. This process of acculturation allows and promotes a convergence between the *Lex Sportiva* and the dominant legal norms.”<sup>29</sup>

Again, according to Gardiner:

“The analogy between *lex mercatoria* and a *lex sportiva* or sports law is germane: both respect a degree of autonomy, both acknowledge cultural specificities, both are part of a pluralist and complex normative rule structure, and both acknowledge the need for international emphasis in terms of legal regulation. *Lex mercatoria*, or the Law Merchant, was the legal doctrine developed in the Middle Ages by special local courts in Britain and elsewhere. These Merchant Courts had judges and jury who were merchants themselves and would apply the *lex mercatoria* as opposed to local law. An analogy can be made with the Court of Arbitration for Sport and the view that it is developing a specific doctrine of international sports law.”<sup>30</sup>

Another similarity between the Law Merchant and the Court of Arbitration for Sport is that both bodies may settle disputes *ex aequo et bono*; in other words, applying a general principle of fairness or equity.

The CAS itself expressed the position well in 1998 in the so-called ENIC case, mentioned above, as follows:

“Sports law has developed and consolidated along the years, particularly through the arbitration settlement of disputes, a set of unwritten legal principles - a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* - to which national and international sports federations must conform, regardless of the presence of such principles with their own statutes and regulations or within any applicable national law.”<sup>31</sup>

An extensive and comparative review on the relationship between the *Lex Sportiva* and the *Lex Mercatoria* has been undertaken and published in The International Sports Law Journal (ISLJ) by Boris Kolev, Co-chairman of the NGO, Bulgarian Legal Society, which conducts research on the rights of sportsmen, and also a Member of the Advisory Board of the ISLJ.<sup>32</sup> Although there are a number of similarities between the two legal systems, there are also several important and practical differences. Kolev writes:

“Sports law is highly potential to become a world law similar to mercantile law. The universally accepted rules of more than 200 games and universally accepted principles governing competitions at world level, significance of sport for demonstration of individual and national values, globalization of sport, are part of the conditions precedent for this to happen. However, the comparison with *Lex Mercatoria* reveals some important differences which might be relevant for the future development of sports law as a world law.

A statement saying that the community of merchants is held together by common traditions and common trust does not seem to be applicable to contemporary sport, which, especially in recent years, departs from the Corinthian values of playing a game because of the love of that game. Nowadays, the result of the competition does not have only sporting implications but further determines who is going to get the better sponsor. Commercialization of sport invokes the need for protection of different and very often conflicting interests of the stakeholders in sport. Sports federations are often criticised for pursuing their own commercial interests without taking into account and sometimes even to the detriment of the interests of sportsmen.

However, in view of the conflicting interests in sport, the role of CAS is very important and the consistent resolving of disputes might significantly contribute to the idea for the creation of an independent body of law capable of restoring and maintaining justice in sport. Evidence of the increasing role of CAS are the more frequent use of arbitration clauses in the contracts between sponsors, federations and clubs; the trend for increasing the volume of cases reaching CAS; and the number of sports federations admitting the authority of CAS to resolve the disputes in their particular sports.

On the other hand, CAS is an institution for settlement of civil law disputes; it is not an administrative or constitutional court, before which provisions of sports regulations could be challenged on the ground of contradiction with acts staying higher in the hierarchy of the legal instruments. Furthermore, CAS is not entitled to review the substance of the decision-making process but only the procedure and the power of the particular bodies to pass the decision in issue. Although CAS has a lot of common characteristics with an international court it is not a court. An opinion has been expressed that CAS could develop into an instrument of “constitutional” review and standard-setting in the realm of international sports law; however, this is still not the case and the regulations of sports associations may be scrutinized on the basis of national laws. The incentive for clubs and sportsmen to refer their cases to the courts as well as their mistrust and suspicion of the federations will remain present until their interests are adequately safeguarded through their participation in the decision-making process especially as regards matters of primary concern for them. The lack of democratic rule-making process and credibility in respect of the actions of sport governing bodies further handicaps the possibilities for recognition of *Lex Sportiva* by the national laws of the States.

Another difference with *Lex Mercatoria* is the fact that CAS cannot apply *Lex Sportiva* through the application of the national law of a particular State as could be the case with *Lex Mercatoria* due to the fact that national laws usually have not incorporated *Lex Sportiva*. Very often, certain cases would have diametrically opposite outcomes under national laws in comparison with their potential outcomes under the law of international sports federations based on the principle of freedom of association due to conflicting provisions of national sports or employment laws. *Lex Sportiva* may apply to relations in sport also as an autonomous body of law, which is to be recognized as such by national laws; however, this is still not the case either. A review of modern court practices would show a third option for enforcement of *Lex Sportiva* - if the rules of *Lex Sportiva* constitute mandatory rules reflecting a public policy so commanding that they must be applied even if the general body of law to

which they belong is not competent by application of the relevant rule of conflict of laws.”

Kolev concludes his review with the following pertinent remarks:

“However, being a private arbitration system and not a universally recognized court including by the EU Member States by virtue of an international treaty, the CAS awards will be subject to enforcement proceedings in the countries where the enforcement is sought and, therefore, their conformity with the public policy and mandatory rules in operation in such countries will be reviewed by the national courts.<sup>33</sup> In countries like Bulgaria and Hungary, for example, employment related disputes are not subject to arbitration at all and national courts have exclusive jurisdiction over employment disputes. It is true that FIFA ensures the compliance of the parties with the award not through the assistance of national courts but rather through threatening the parties with disciplinary sanctions. The latter, however, together with the already mentioned deficits of *Lex Sportiva* as a concept, as well as the mandatory reference to arbitration of players and clubs imposed through the by-laws of their federations, could threaten the recognition of CAS as a valid arbitration system and do not in any manner contribute to the idea of an objective, just, transparent, self-integrated and universally accepted international sports law or *Lex Sportiva*.”

### Lack of Publicity

However, one of the difficulties faced by the CAS in developing a ‘*Lex Sportiva*’ stems from the fact that, generally speaking, CAS proceedings and decisions are a matter of private law and confidential to the parties. CAS by its nature is a private arbitral body. And therein lies the paradox - the need, on the one hand, of the sporting community ‘not to wash its dirty sports linen in public’; and, on the other hand, the need of a wider public to know how cases are being decided, including details of the evidence adduced to the CAS, particularly for future guidance and reference.

However, one of the difficulties faced by the CAS in its desire to develop a ‘*Lex Sportiva*’ and provide some degree of legal certainty and consistency stems from the fact that, generally speaking, CAS proceedings and decisions are a matter of private law and confidential to the parties. CAS by its nature is a private arbitral body. And therein lies the paradox - the need, on the one hand, of the sporting community ‘not to wash its dirty sports linen in public’; and, on the other hand, the need of a wider public to know how cases are being decided, including details of the evidence adduced to the CAS, particularly for future guidance and reference. As regards the confidentiality of CAS Ordinary Proceedings, 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.”

However, the last sentence of this Article provides the following exceptions to the general rule of confidentiality:

“Awards shall not be made public unless all parties agree or the Division President so decides.”

However, as regards the confidentiality of CAS Appeal Proceedings, Article R59 of the CAS Code of Sports-related Arbitration 2010 provides in para.5 as follows:

“The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential.”

Thus, in CAS Appeal cases, the emphasis is more on publication of the Awards and less on confidentiality, unless both parties agree otherwise, and, therefore, in this particular respect, this provision goes some way towards encouraging the development of a ‘*Lex Sportiva*’ (see below).

In practice, more CAS Awards are being published,<sup>34</sup> especially on the CAS official website.<sup>35</sup> In fact, the CAS itself is interested in developing a *Lex Sportiva* as the following extract at page xxx from Volume II of the CAS Digest of Awards makes clear:

33 It should perhaps be added here that ‘*ex-quantur*’ proceedings to enforce a CAS Award, which is considered to be an International Arbitral Award, will, generally speaking, only be required in those countries that have not acceded to the New York Convention of 1958.

34 The Secretary General of CAS, Matthieu Reeb, has edited and published three Digests of several CAS cases covering the periods 1986-1998; 1998-2000; and 2001-2003. A further volume in the series is expected shortly.

“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.”

Furthermore, as the work of the CAS continues to expand and becomes more widely known and discussed, especially in press reports and articles, the need for such publicity also increases. In fact, a ‘public interest’ argument comes into play and needs to be satisfied in appropriate cases.<sup>36</sup> But, in this context, what interests the public is not necessarily the same as what is in the public interest.<sup>37</sup>

<sup>35</sup> ‘www.tas-cas.org’. The CAS official website under the title ‘Jurisprudence’ contains a new section, entitled, ‘Archive’, which, at the time of writing is still being developed and expanded. Once this section is completed, it will be interesting to see how comprehensive it is and what it covers.

<sup>36</sup> See, for example, the Decision in the Gaia Bassani Case (CAS 2003/O/468), where the author of this Paper was the Sole Arbitrator and, because of the par-

ticular circumstances of the case and the need for a wider audience to know about the case and its outcome, directed that the Decision be published.

<sup>37</sup> On this point, see the discussion in the English case of *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417.

<sup>38</sup> Nafziger, James A R, *International Sports Law*, (2004) Second Edition, Ardsley, New York: Transnational Publishers, Inc., p 61.

## Conclusions

It is clear from the above discussion that the CAS is in the process of developing a useful ‘Lex Sportiva’ based on its many Awards rendered to date and the general principles derived from them. And, with its increasing work load, this should lead to consistency and certainty in the future regarding such matters as the jurisdiction and review powers of the CAS and, in turn, lead to a timely, fair, effective and relatively inexpensive settlement of sports-related disputes for the benefit of the sporting world and its various stakeholders and constituents.

But, as Professor Nafziger points out:

“A truly effective body of jurisprudence generated by CAS awards, however, will require more development before the emerging *lex sportiva* can become a truly effective regime of authority.”<sup>38</sup>

Much will depend, however, as has been noted above, upon the transparency and availability of CAS Decisions/Awards and a willingness of CAS arbitrators to lay down clear principles and also follow them in future similar cases in a clear and consistent manner. Some inconsistencies have been observed in certain doping cases, for example, as noted above. Equally, the competence and independence of CAS arbitrators is a crucial ingredient in the process of achieving these laudable aims and results. With, in the words of the first ICAS/CAS President, the late Judge Keba Mbaye: “a stature that inspires confidence and respect” to match.

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# Foundations of the United States Sports Law Model: Structure and Key Issues

by Karen L. Jones\*

*This article provides an overview of the United States sports law model and reviews some of the important cases that helped develop the foundations of the United States sports law model. Key issues, cases and legislation that impact sports law in the United States today are also discussed. A brief comparative between United States sports law and European sports law on specified key issues is included in the review.*

## 1. Introduction

Attempting to provide an overview of the United States (also referred to as, “US”) sports law model is at best an optimistic undertaking. This is the case for several reasons: to fully address the United States sports law model would require an in-depth understanding of the structure of the United States laws, in both a historical and practical sense, including an understanding of the court systems. Further, such an undertaking would also require a fundamental understanding of the United States sports structure, the games and how the sports structure fits within the legal environment. Finally, to really understand the United States sports law model, would require an understanding of the social and economic environment that has a substantial impact on the way sports are played,

the structure of sports law, and the sports governance model in the United States, as a whole. Therefore, to achieve some level of success in addressing this topic, this article will focus on providing an overview of United States sports, a cursory review of the foundations of the United States sports law model with some comparatives between the United States and the European sports law models, and a look at some of the prevailing legal issues that impact United States sports today.

## 2. United States Sports Law Defined

The question of “What is Sports Law?” has been addressed quite a bit by United States academics.<sup>1</sup> Nonetheless, there are those who still question whether or not a separate area of law, sports law, actually exists; there are those who see the area of sports law as developing into an independent discipline, and finally, there are those who feel that the area of sports law has sufficiently developed in the United States to sustain the autonomous title of *sports law* as an independent discipline.<sup>2</sup> Since Professor Davis wrote his article in 2001, and in a more recent analysis of the question of “What is Sports Law?” By Professor Rob Siekmann in his Inaugural lecture at Erasmus Rotterdam University in June 2011, the discussion and debate on the topic has continued. Perhaps the scholarly inquiry and debate in and of itself can help sustain the existence of sports law as a legal discipline, as such limited debate at the time of Professor Davis’ article was determined to be a basis for concluding that sports law was not a separate and distinct discipline.<sup>3</sup> Although the debate continues, for purposes of this discussion, this article will assume that sports law is a distinguishable legal discipline.

Like many other countries, United States sports law, or *Lex Sportiva*<sup>4</sup>, is largely comprised of various areas of substantive law, in addition to the governance structures (ex. CAS<sup>5</sup>) and legislation derived as a result of the specificity of sport. United States sports law has not traditionally been an independent identifiable legal discipline within itself. Instead, it has comprised the more traditional areas of labor law, antitrust, tort

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<sup>1</sup> Davis, Timothy, What is Sports Law?, *Marquette Sports Law Review*, Spring 2001.

<sup>2</sup> Id.

<sup>3</sup> Davis (2001) p. 216

<sup>4</sup> The definition of “sports law” remains highly debated. The Hague Joint Proposal on the Definition of Sports Law, 21 June 2011, Siekmann, Soek, Van der Harst, Jones, and Branco Martins, Asser International Sports Law Center, The Hague, The Netherlands. The proposal includes the defining of *Lex Sportiva* as international and national public law rel-

law, contracts law, and others. Similar also to other areas of the world, US sports law has evolved, to consideration in the development of a specified area of law and study. However, in the United States, sports law is often wrapped under the umbrella of entertainment law, although more recently, over the past two (2) decades, the unique aspects of sports law cannot be ignored. The emergence of sports law into its own distinct legal discipline has allowed more focus to be given to the special characteristics that comprise sports law. Further, guidelines and regulations that specifically address sports related legal issues have emerged. For example, under the guise of non-discrimination, there is specific legislation that addresses non-discrimination in collegiate sports.<sup>6</sup>

By far, football (US soccer) has the most fans around the world. Because of the difference in focus in the United States on types of sports played and viewed by fans, as opposed to the rest of the world, the United States tends to stand alone in the types of sports that attract the biggest crowds. US football, basketball, baseball and Ice Hockey tend to garner the largest numbers of fans, while US soccer (European Football), tennis and other sports tend to follow in popularity and support. This is relevant because United States sports laws are highly centered on addressing the game relative to the big four (4) sports in the United States (football, basketball, baseball, and Ice Hockey) and much of the legal history is clearly biased towards these four areas of sport. Therefore, I will not undertake to review all of the sports that are played in the United States, as there are many, but instead provide a few representative areas of sports from which to establish a reasonable picture of the applicable framework for demonstrative and comparative purposes.

Another important area of sport is sometimes referred to as *Lex Ludica*<sup>7</sup>, or the rules that apply to the game of sport. Some consider this to fit most appropriately under amateur sport, while others feel that *Lex Ludica* comprises (or should comprise) the entire field of sports and sports law.<sup>8</sup> The grassroots sports efforts that are often seen and referred to in European dialogue on sports law are most closely associated with this idea of *Lex Ludica*. This is comparable to the area of *recreational sports* in the United States. Recreational sports occur in neighborhood parks, company softball or basketball teams, church leagues, charitable games and many other types of competitive sports activities that are not associated with the professional or amateur sports governance structures or leagues, but do follow the basic rules of the sport. This is an important aspect of United States sports, and although it could (and should) be included within the area of amateur sports, it will not be addressed in this paper, but nonetheless deserved mentioning.

### 3. Overview of United States Sports Structure

In Professor Nafziger's article, *A Comparison of the European and North American Models of Sports Organization*<sup>9</sup>, he compares what he terms the North American model of sports organization with that of European. In doing so, he identifies six (6) characteristics of the North American model. Those six (6) characteristics are:

- A. Sharp Distinction Between Amateur and Professional Sports
- B. The Role of Schools and Colleges
- C. A Closed System of Competition
- D. Commercialization of Sport
- E. An Extensive System of Team and Player Restraints
- F. Collective Bargaining System<sup>10</sup>

In his article, Professor Nafziger identifies commonalities between the two models: European *pyramid*<sup>11</sup>, and the North American model, and ultimately concludes that the two models are converging (rather than diverging). Professor Nafziger's article deals with an analysis of the sports "organization" models. In this discussion, I will focus on the foundational aspects of the United States sports law model and the legal issues that are prevalent within this model. However, Professor Nafziger's article will provide a valuable point of reference to some of the key issues that are highlighted throughout.

In the United States, there are three main categories of sports to note, and often each has its own fan base. These categories are professional sports, amateur sports and collegiate sports. Most professional sports teams has an amateur and/or collegiate counterpart that represents that sport; although they are not often affiliated or associated by a common

organizational or governance structure, as often exists in the European *Pyramid* model. Additionally, some sports (but not all) have a female counterpart representing that sport; which can include professional, amateur (including collegiate) or both. The sports structure in the United States is not necessarily an integrated one connecting professional, amateur, collegiate, or even male/female games and competition for that matter. Each category (professional and amateur) has its own distinct set of rules. In his paper, Professor Nafziger points out the sharp distinction between amateur and professional sports in North America<sup>12</sup> and the un-integrated framework that exists between the two.<sup>13</sup> The third category, collegiate sports, is a subset of amateur sports, but has its own very distinct and extensive governance structure and guidelines that has no European comparison. Because the rules and governance surrounding collegiate sports is so definitive, this area of amateur sport is best addressed separately. Each category is reviewed below.

#### 3.1. Professional Sports

The U.S. sports structure consists of many sports leagues that represent each of the major sports. The most notable and recognizable national sports leagues include: Major League Baseball (MLB), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL), Major League Soccer (MLS), and Women's National Basketball Association (WNBA).

National League	Year Founded
MLB	1876
NHL	1917
NFL	1920
NBA	1946
MLS	1994/1996
WNBA	1996

Each of the major national leagues maintains policies and rules for their members. Leagues that are affiliated with an international organization (ex. Major League Soccer and International Football Federation) tend to adopt the rules of the international organization, only identifying any additional rules that should be added at the national level. The policies and rules are significant in the structure of sports law in the United States. They are often impacted by the laws of the country to help ensure that members are operating within the law.

There are sports governing bodies in the United States and each governing body is responsible for creating rules that players must abide by in order to comply with that sports organization. The major leagues tend to have franchises primarily in the larger cities in the United States with some states having two major league teams for the same sport. There are also instances where sports teams have left one city (or state) and moved to another; however, this is somewhat rare.

ative to sport, and *Lex Ludica* representing the private law relative to sport, with recognition of the Jakarta Declaration on *Lex Sportiva* of 22 September 2010 the public and private dimensions of *Lex Sportiva* as well as the significance of both national and international perspectives in defining this concept. See also, [http://www.asser.nl/Default.aspx?site\\_id=11&level1=13914&level2=13931&textid=39391](http://www.asser.nl/Default.aspx?site_id=11&level1=13914&level2=13931&textid=39391).

5 Court of Arbitration for Sports (CAS), which was established to specifically address sports related disputes.

6 Civil Rights Act of 1964, Title IX Education Amendments of 1972

7 See footnote 4 supra.

8 Id.

9 Nafziger, James, *A Comparison of the*

*European and North American Models of Sports Organization*, International Sports Law Journal (ISLJ), 2008/3-4

10 Id. at pp. 102-103; for comparison purposes, Professor Nafziger similarly identifies six (6) characteristics of the European sports model. Those characteristics are:

- A. Pyramid Structure - four integrated, interdependent levels of professional and non-professional organizations, in each country, for each sport.
- B. Promotion and Relegation
- C. Grassroots Involvement
- D. National Identity
- E. International Competitions
- F. Negative Aspects of competition

11 Id. at pp. 102-103

12 Id. at p. 102

13 Id. at p. 102

### 3.2. Amateur Sports

Amateur sports in the United States consist primarily of international amateur sports, minor leagues and camps, high school and college level sports. Different from many countries, high school and college sports are a major part of the United States sports culture, and for this reason college sports will be addressed separately. Professor Nafziger also points out the importance of schools and colleges in the North American sports organization model.<sup>14</sup> He further comments on the limited "(...) attention the comparative legal commentary has given to this feature of North American sports culture."<sup>15</sup> Amateur sports are a key part of the structure of sports in the United States. Although amateur sports are not so obviously intertwined with the ultimate development of future professional players, none-the-less there is a very close and even dependent relationship between the two.

#### 3.2.1. High School

Most children participate in some type of sports activity at the grade school and high school levels in the United States. However, over the past few decades, sports programs across the United States have been the victim of cut backs due to the weakened economy; so many sports programs that use be in the public schools are no longer offered. Nonetheless, physical education or fitness class is a required part of grade school and high school, public and private education. Often incorporated in physical education and fitness classes are many American sports. Flag-football, basketball, soccer, and softball are often part of a co-ed sports curriculum in the United States. Some schools incorporate sports such as tennis, lacrosse, swimming, field hockey and even bowling. Even if not part of an organized sports competition, there is early education in the area of sport.

There are private youth organizations that offer summer and seasonal sports both recreationally and competitively, primarily in the big four areas of sport, but often in many other areas of sport as well, so long as there is an interest recreationally; and so long as there are other associated teams with which to play competitively. Nonetheless, many children who excel at sports have the opportunity to engage in recruitment for recognition of their talent to play sports at the college level, perhaps somewhat comparable to the amateur leagues of the professional sports in other countries.

#### 3.2.2. Minor Leagues and Camps

Many of the big four sports leagues do have minor league teams that they sponsor. However, these minor league teams are not as popular as they once were (specifically baseball). Recruitment for new major league players is often done at the college level and during the "draft". Some of the minor league players also participate in the draft process as well. Most of the major leagues sponsor camps for talented players, which provides would be professional athlete's visibility to the leagues and scouts. Additionally, there are independent leagues that offer competition and awards comparable to a minor league type of organization; without the major league affiliation.

#### 3.2.3. Olympics

There is a national governing body (NGB) for each of the Olympic sports. The United States Olympic Committee (USOC) governs the activities in the United States associated with the Olympic and Pan-American Games. In addition to the USOC the law that governs amateur sports is the Amateur Sports Act of 1978.<sup>16</sup> In 1998 the Amateur Sports Act was revised and became The Ted Stevens Olympic and Amateur Sports Act of 1998.<sup>17</sup> This Act is now codified in the United States Code (USC)<sup>18</sup>.

Although the Olympics is an important part of the landscape of ama-

teur sports, the rules governing Olympic sports activities is primarily established at the international level; and the rules are then adopted at the national level. Therefore, the remainder of the discussion in this section will be focused on the area of collegiate sports in the United States and the comparison with the European sports structure. To help achieve this, the following case study is provided:

### 3.3. Case Study in Amateur Sports in the United States

Taylor Simone Johnson was born into an upper middle class family. From a very young age she excelled at sports. As a youth, she played soccer and quickly became a star player. By the age of 12 she was already getting a lot of attention from coaches and would be talent scouts. She played on neighborhood teams and competed in local and regional games. She also achieved most valuable player status. In junior high school she caught the attention of coaches who thought she might be good at track and field. She was getting a little tired of soccer so she decided to give track and field a try, while also developing an interest in basketball. Once again, she quickly excelled at track and field, primarily in the 400 meter and shot put throwing. Although she enjoyed track and field, and placed well at state competitions, this was not her passion. She decided to focus instead on basketball. From junior high school through high school basketball was her sport of choice. Due to her unique talent, she began playing with a regional youth team and touring around the country competitively. She received a lot of attention from coaches, scouts and gained a small fan base. As a freshman in high school she was immediately recruited to the varsity<sup>19</sup> team. She continued to play in leagues outside of school and excelled at both. The summer before her senior year of high school, she was Loyola University's top pick as point guard for the women's basketball team. In 2012, when she graduates from high school, she can look forward to playing on the women's basketball team, at Loyola University in Chicago, a division one school, with a full scholarship. What's next, the WNBA?

This case study provides an appropriate backdrop to the preceding sections on amateur sports and the remainder of this section. In the case of Taylor Johnson and many young athletes in the United States, youth sports teams and clubs can serve as a way to develop talent and possibly be identified by talent scouts and coaches that can offer opportunities that may lead to educational opportunities, university sports exposure or even a professional sports career.

#### 3.3.1. Collegiate Sports

The National Collegiate Athletic Association (NCAA) was founded more than 100 years ago to protect the student-athlete.<sup>20</sup> The NCAA governs the rules for college sports, sportsmanship, competition and recruitment for all college level sports. There are more than 1000 colleges and universities in three (3) divisions that are part of the NCAA in the United States. More than 400,000 student-athletes participate in more than 23 sports sponsored by the NCAA. Each year the NCAA oversees 300 sports competitions.<sup>21</sup>

Collegiate Sports in the United States is often a phenomenon that many (especially those in other countries) do not fully understand. In the spring of each year, many spouses lose their significant others to a phenomenon known as *March Madness*. March Madness is the NCAA Men's Division basketball championship held in the spring each year in the United States. Essentially, it is 4 weeks of a single elimination college basketball tournament. This year, 2011, there were 68 teams that faced off, resulting in a final victory for University of Connecticut over Butler University, which took place at Reliant Stadium in Houston, Texas.

Collegiate sports often provide a training ground for future professional league players. Recruitment of prospective student-athletes is governed by the NCAA Operating Bylaws in Section 13 of the NCAA Manual. Recruitment of college/university players often begins when the athletes are in high school. NCAA defines recruitment as, "any solicitation of prospective student-athletes or their parents by an institutional staff member or by a representative of the institution's athletics interests for the purpose of securing a prospective student-athlete's enrollment and ultimate participation in the institution's intercollegiate athletics program."<sup>22</sup> There are strict rules with regard to when and how a

14 Id.

15 Id.

16 Amateur Sports Act of 1978, later, The Ted Stevens Olympic and Amateur Sports Act of 1998, codified at 36 U.S.C. Sec. 220501 et seq. United States Code.

17 Id.

18 U.S.C. Sec. 220501 et seq. United States Code.

19 In the United States the highest level of a particular sport that represents a high school is the varsity team.

20 <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa>.

21 Id.



minor or the student-athletes' parents can be contacted by a college or university interested in recruiting that individual to play for their school; however, the student-athlete is allowed to contact schools of potential interest. All aspects of recruitment process, guidelines and requirements are covered under the NCAA rules. Often students seek to play for those schools that have a strong team, provide support and training, and will offer the student the greatest opportunity to showcase his/her skills, in addition to providing the student with a free education. The better players can end up with a full scholarship (tuition, books, fees, housing, and meals) and a monthly stipend. This can save the student and his/her family hundreds of thousands of dollars over the 4 - 5 year commitment. For many students, an athletic scholarship may be their only opportunity to go to college or university. For others, it is an opportunity to showcase their athletic talent in a way they might otherwise not be able to. Violations of the NCAA guidelines are enforced via the NCAA enforcement process, which involves investigation, hearing, and possible penalties.<sup>23</sup>

### 3.4. Legal Structure Applicable to Sports

As is the case in most countries, there is a document or constitution that establishes the basic foundation of the laws in that country. In the United States, the United States Constitution establishes not only how the political system in the United States operates, but also the way laws are established and the basic rights of its citizens. It is well established that under the United States Constitution, powers that are not specifically given to the federal branches of government are reserved for the states. Thus states have a significant amount of power to enact laws. Both the federal and state governments have legislative branch (enacts laws), executive branch (administrative), and a judicial branch (interprets laws).

Most of the issues that involve sports in the United States are addressed within the structure of the United States legal system applying civil and criminal laws, federal or state laws, as applicable. There is no distinguishable substantive area of law that is referred to as sports law, in the courts. Looking at some of the academic characterizations of sports law,

22 [www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting+Overview](http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting+Overview)

23 [www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/](http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/)

24 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) C-415/93

25 The CAS is active in the United States; also, the AAA handles a lot of the commercial arbitration issues, although the AAA is not exclusive to sports.

26 The Sherman Act; Congress derived its powers to pass the Sherman Act through its Constitutional power to regulate Interstate Commerce, (when the activity in questions restrains or substantially affects interstate commerce). When the US courts found certain activities to fall

outside of the Sherman Act, the Congress passed the Clayton Act of 1914 to further broaden Congress' powers. In 1936, The Robinson-Patman Act was passed to amend the Clayton Act of 1914.

27 *Id.*

28 These Antitrust cases are interesting because we see that two major league sports franchises are being treated differently; MLB and NFL. Nonetheless, the courts uphold this action despite the somewhat contradictory outcomes and applications.

29 *Flood v. Kuhn*, 407 U.S. 258 (1972). In *Flood v. Kuhn*, 407 U.S. 258 (1972), the U.S. Supreme court addresses the lawfulness of unilateral trades for players.

this would support the idea of sports law as the law of sport or the law as applied to sport. However, increasingly there are specific laws and legislation that has developed due to the specific characteristics of sport, similar to the European concept of "specificity of sport" affirmed in the *Bosman* case.<sup>24</sup> Likewise, in certain situations, the United States courts have identified the need to develop laws that are specifically applied to the area of sport. This will be discussed more later in this paper.

On the national level, there are no special courts or tribunals per se that are established specifically to address sports related matters in the United States.<sup>25</sup> Therefore, for purposes of this review, there are certain areas of United States law, including applicable state laws that have more direct application to the area of sport. Those relevant areas of law include the following:

- Antitrust
- Labor
- Employment
- Tort
- Criminal
- Dispute Resolution

Each of these areas of law and their relevancy to sports law will be discussed briefly.

#### 3.4.1. Antitrust

Antitrust plays a central role in the formulation of sports law in the United States. Due to a fear of monopolies (a single entity - or small group of entities - that dominate a specific economic market sector) and the potential economic impact, in the late 1800s the United States Congress passed the Sherman Act.<sup>26</sup> The purpose of the Sherman Act was to combat anti-competition and maintain the free market.<sup>27</sup> In the case of *Radovich v. National Football League (NFL)*, 352 U.S. 445, in a third U.S. Supreme court decision ruling, the court determined that the game of Football is subject to antitrust laws, even though previous rulings showed that professional baseball is not subject to antitrust laws. In *Toolson v. New York Yankees*, 346 U.S. 356, the U.S. Supreme Court upheld the antitrust exemption granted to Major League Baseball (MLB) three (3) years earlier.<sup>28</sup> This is interesting, not only because it establishes sport as being "in the stream of commerce" and in many ways help to set the foundation for the commercialization of sports, but secondly it is interesting because two sports (baseball and football) were addressed very differently by the Court. By granting baseball an exemption to the anti-trust laws, and denying the same exemption to football and other sports, the court seemed to be sending a clear message. Since the MLB was established in 1876, before the Sherman Act and well before the Clayton Act of 1914, the Court may have taken that into consideration when granting the exemption to MLB. However, the other less subtle message may have been grounded in the fact that baseball is (and certainly was then) considered the "all American sport". In the early decisions of the Court, there seemed to be some favoritism at work.

#### 3.4.2. Labor Law

In the United States, the substantive area of labor law deals with the inequity of bargaining power between employers and workers. Labor laws relative to sports, allows for the collective bargaining of players and ensures certain rights for players as employees. Many of the labor law issues tend to cross over into other substantive areas of law such as employment, contracts and even antitrust. A case that dealt with the transfer rights of players came when a baseball player, Curt Flood wrote to the Baseball Commissioner objecting to being treated like "a piece of property" when he was traded to the Philadelphia Phillies after the 1969 season without his consent.<sup>29</sup> When the Baseball Commission failed to act, Flood filed an antitrust lawsuit challenging the reserve clause, which was standard in the Major League Baseball contract at that time. The challenge to the baseball antitrust exemption including challenges to the reserve clause in the MLB contract) was overturned by the Supreme Court. With much of the controversy surrounding the MLB antitrust exemption, contract reserve clause, transfer of players, etc., moved the National Labor Relations Board (NLRB), in 1967, to determine that players have a right to form unions or players associa-

tions, essentially to safeguard the rights of sports players and to provide them with a stronger position and greater bargaining power. This ushered in the era of collective bargaining and set the stage for establishing the collective bargaining system that Professor Nafziger refers to in his article, as one of the six (6) characteristics of the United States sports organization.

#### 3.4.3. *Employment Law*

The substantive area of employment law in the United States deals with laws that affect the employer/employee relationship, including employment discrimination laws. These employment and discrimination laws serve to protect player/employee rights. One of the foundations of United States employment law is The Civil Rights Act.<sup>30</sup> The Civil Rights Act and subsequent amendments are applicable to all employee/employer relationships, including sports players and leagues.

#### 3.4.4. *Tort Law*

The substantive area of tort<sup>31</sup> law in the United States deals with laws that involve a personal injury to another. Primarily this is dealing with injuries to players on the field. This issue arises both in professional and amateur sports. Perhaps it is a bigger issue in collegiate sports, especially when trying to determine liability for the injury, because you not only have the issues of player or league liability, which is often largely answered under the terms of the contract, but with collegiate sports you also have the issues of coach or school liability.<sup>32</sup> However, now many coaches escape liability for injuries to student-athletes through contractual release, simply by the athlete agreeing to participate in the sport and releasing the coach and the school from any liability even when ordinary negligence might be involved. In the United States, it has proven very difficult (almost impossible) for a coach or a school to be found guilty of a tort offense resulting in injury to student-athlete.<sup>33</sup>

#### 3.4.5. *Criminal Law*

The substantive area of criminal law in the United States deals with wrongful acts that are committed by a person. It is the law of crimes and punishments.<sup>34</sup> These include, such offenses as theft, serious assault, battery, fraud, murder, etc. Sports figures, both professional and college athletes, tend to be in the news a lot for committing serious criminal offenses. It has even been said that college athletes commit an even higher percentage of serious criminal offenses than professional athletes. However, it is not clear whether the relative percentage of athletes in general that commit more criminal offenses is greater than the percentage of non-athletes in the general community that commit criminal offenses. It may be that the perception is that athletes commit more criminal offenses because when they commit an offense it generally receives greater attention, thus raising the perception.

#### 3.4.6. *Dispute Resolution*

Although I will not cover a discussion of dispute resolution relative to sports in this session, it is certainly due a mention in the context of this related discussion on the United States sports law model and key issues. Dispute resolution relative to sports law cases in the United States is pri-

marily handled in the civil and criminal courts, depending on the nature of the dispute. However, in many of the individual contracts and certainly in the collectively bargained contracts between the national leagues and players, there is often an arbitration clause that requires the contracting parties to resolve disputes either by mediation or arbitration. The main arbitral tribunal at the national level in the United States is the American Arbitration Association (AAA)<sup>35</sup>. The AAA handles most of the arbitrations relative to sports disputes in the United States, primarily because the AAA is the premier arbitration association, trusted, respected and with a long history of providing arbitration services. Many sports contracts and collectively bargained agreements specifically name the AAA as the arbitral tribunal for any disputes that may arise under the contract, even though there are other associations and firms that can provide arbitration services. Also, the AAA has been the designated arbitrator for many types of sports disputes since the Amateur Sports Act was signed in 1978.

#### 3.4.7. *Specific Laws*

In addition to the broader areas of law above, there are specific laws that have direct or significant applicability to sports that should be mentioned. These include:

- Civil Rights Act, Title IX Educational Amendments of 1972 - addresses discrimination in sports.
- Amateur Sports Act of 1978; Ted Stevens Olympic and Amateur Sports Act, codified in USC. - provides the rules for engaging in amateur sports.
- Sports Broadcasting Act of 1961- affects the televising rights for professional sports.
- Uniform Athlete Agents Act - standard agreement, including compensation, for sports agents.

Title IX Educational Amendments of 1972; Amended Title IX of the Civil Rights Act to provide that there must be no discrimination on the basis of sex in sports. So Title IX bans gender discrimination in school academics and in athletics. A three (3) part test is used to determine whether or not an educational institution is in compliance with Title IX. Compliance is determined by, "1) providing athlete opportunities to male and female students that are substantially proportionate to their respective full-time undergraduate enrollment; 2) Demonstrating a history and continuing practice of program expansion of athletic opportunities for the underrepresented sex; or 3) demonstrating that they are fully and effectively accommodating the interests and abilities of the underrepresented sex in the institution's athletic offerings."<sup>36</sup>

The Civil Rights Act, including the Title IX Educational Amendments of 1972, is similar to the European Union directive, on non-discrimination and equal opportunity in sports; including, European Committee on Sports for People with Disabilities (ECSPD) as part of EU policy. The EU also has directives concerning non-discrimination including the European White Paper on Sport, addressing opportunities for people with disabilities and inclusion of "...all citizens regardless of gender, race, age disability, religion and belief, sexual orientation and social or economic background."<sup>37</sup>

The Amateur Sports Act of 1978 provides specific requirements for engaging in Amateur sports of all kinds in the United States, including rules of competition. The Ted Stevens Olympics and Amateur Sports Act essentially amended the 1978 Act and added the specific provisions relative to the National Olympic Games. Although these individual Acts are still referenced, the amateur sports acts have been codified in the United States Code.

The Sports Broadcasting Act of 1961 as amended, affects the rights for televising professional sports. The Act overrides an earlier decision of the Supreme Court which held that the "pooling" of broadcasting rights between all of the major league teams was a violation of the United States Antitrust laws. The Sports Broadcasting Act of 1961 allows certain joint agreements for purposes of televising sports events; it further allows major league teams to join in the sale of a television package to networks. The Sports Broadcasting Act also includes certain blackout rules, so a team's regular season home games are blocked out from television viewing.

30 The Civil Rights Act of 1964, Title IX Amendments of 1972

31 Tort Law is defined as: "a wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction." Merriam-Webster Free Dictionary, <http://www.merriam-webster.com/dictionary/tort>.

32 See, *Can Coaches be Liable for Injuries to Student-Athletes*, April 6, 2009, Connecticut Sports Law, <http://ctsportslaw.com/2009/04/06/can-coaches-be-liable-for-injuries-to-student-athletes/>; and Davis, Tim, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*. Sports Law Blog, June 19, 2008,

<http://sports-law.blogspot.com/2008/06/article-on-coach-liability-in-pro.html>.

33 *Id.*, Davis, *Tort Liability of Coaches*

34 [www.merriam-webster.com/dictionary/criminal+law?show=0&t=1314797211](http://www.merriam-webster.com/dictionary/criminal+law?show=0&t=1314797211)

35 [www.adr.org](http://www.adr.org)

36 Title IX of the Education Amendments of 1972, 20 U.S.C. sec. 1681 - 1688. See, United States Commission on Civil Rights, Title IX Athletics: Accommodating Interests and Abilities, a Briefing before the United States Commission on Civil Rights, 2005.

37 European Commission, White Paper on Sport, 11 July 2001 (COM 2007), 391 Final, [http://ex.europa.eu/sport/white-paper/white-paper\\_en.htm](http://ex.europa.eu/sport/white-paper/white-paper_en.htm).

<b>Chart of US Sports Law Structure</b>						
<b>Applicable International Laws</b>						
<b>International Sports Structure</b>						
<b>ISFs</b>	<b>IOC</b>	<b>IPC</b>	<b>IWGA</b>	<b>PASO</b>		
<b>Applicable International Federations and Organizations Guidelines</b>						
<b>National - US Sports Structure</b>						
<b>Applicable Laws</b>						
<b>US Constitution</b>						
<b>US Civil</b>			<b>US Criminal</b>			
<b>State Law</b>						
<b>Regulations, Statutes, Acts, Codes</b>						
<b>Sports Broadcasting Act of 1961</b>	<b>Title IX of the 1972 Education Amendments, Pub. L. 92-318</b>		<b>Uniform Athlete Agents Act</b>		<b>Drug Testing in Sports (2005 proposed legislation)</b>	
<b>National - Major Sports Leagues</b>						
<b>MLB</b>	<b>NFL</b>	<b>NHL</b>	<b>MLS</b>	<b>NBA</b>	<b>WNBA</b>	<b>PGA</b>
<b>Applicable League Guidelines</b>						
<b>MLB Guidelines</b>	<b>NFL Guidelines</b>	<b>NHL Guidelines</b>	<b>MLS Guidelines</b>	<b>NBA Guidelines</b>	<b>WNBA Guidelines</b>	<b>PGA Guidelines</b>
<b>Other Ad Hoc Guidelines</b>						
<b>Amateur Sports (Minor Leagues, Camps, etc.)</b>						
<b>Applicable Laws</b>						
<b>Amateur Sports Law Act of 1978 (later Ted Stevens Olympic and Amateur Sports Act - codified at 36 U.S.C. Sec. 220501 et seq. United States Code)</b>						
<b>Amateur Sports - Collegiate</b>						
<b>Applicable Laws</b>						
<b>(See amateur sports laws above)</b>						
<b>NCAA</b>						
<b>NCAA Guidelines</b>						
<b>Amateur Sports - High School/Youth<sup>41</sup></b>						

Table 1

Under the Uniform Athlete Agents Act, an athlete-agent is someone who represents a student-athlete. The Uniform Athlete Agents Act was completed in 2000 and is a model law that all agents who represent students must follow. It has been adopted by 40 states. California has actually enacted UAAA legislation, and along with Michigan and Ohio, has non-UAAA laws regulating athlete-agents. Seven states and one territory have no existing laws that regulate agent-athletes.<sup>38</sup>

Similarly, the European Union has addressed the issue of sports agents for athletes. The European law is directed primarily at professional sports agents; not collegiate. Five EU countries and four (4) international federations have developed regulations for sports agents.<sup>39</sup> The EU provides guidelines for sports agents as well, primarily geared toward licensing, regulation and registration of sports agents to provide private placement services.<sup>40</sup>

<sup>38</sup> Uniform Athlete Agents Act, U.S.C.  
<sup>39</sup> Bulgaria, France, Greece, Hungary and Portugal are the five countries that have developed regulations for sports agents; FIBA, FIFA, IAAF and IRB as well as many national organizations have also developed guidelines affecting sports

agency. See also, Study on Sports Agents in the European Union, A Study Commissioned by the European Commission, November 2009.

<sup>40</sup> Id.

<sup>41</sup> This chart was created by the author with all rights reserved.

This section has provided a very small portion of the overall structure of sports law in the United States. By way of depiction of the previously discussed legal framework that establishes the United States sports law structure, table 1 is provided as a representative snapshot of some of the key aspects of the legal structure supporting sports law in the United States.

The chart does not address the complexities within the United States legal framework. Instead it is a simplistic look at the different aspects of the United States sports framework to provide a basic understanding of the United States sports law structure.

#### 4. Key United States Sports Law Issues and Comparisons

There are several issues that can be considered key or re-occurring in the area of United States sports law. Some of these are at the forefront due to recent history, others because of the reoccurring nature of the issue. The key issues in United States sports law tend to center around contract disputes, doping and substance abuse, criminal behavior including sexual misconduct by athletes, recruitment issues especially at the collegiate level, and commercialization relative to image rights and endorsements. Each of these issues is somewhat intertwined at times, however here each will be addressed individually.

#### 4.1. Contract Law

Contract disputes and negotiations are not uncommon in the world of sports. However, in the US, largely due to free agency, contract disputes and negotiations can take on a character of its own. In sports, a “free agent” in the United States (and in professional sports in general) is one whose contract has expired and the player is now eligible to sign with another team. For many decades, the reserve clause in contracts kept players from being able to sign with other teams. The reserve clause was standard in every sports player’s contract which reserved rights to the player in the team. This meant that even though the contract had expired, the player was not “free” to go to another team. The player was bound to either negotiate a new contract with the current team or ask the current team for a release from the contract or to be traded to another team. The first challenge to the reserve clause came to the U.S. Supreme Court in 1953, in the case of *Toolson v. New York Yankees*.<sup>42</sup> In 1975 the “reserve clause” was abolished in baseball contracts (and other sports soon after). When the release clause was abolished in 1975 the concept of free agency was established. At the end of a player’s contract they were free to negotiate another contract with another team.<sup>43</sup>

The contract law area relative to sports law is not as relevant in recent history. Now, most sports leagues have standard player contracts that set-out model provisions for the contracting parties. There is also a Standard Representation contract that defines the duties and compensation of the agents.

Another contracts related issue that is worth mentioning is salary caps. Salary caps limit the amount of salary that a team can pay a player. The limit can be either per player or per team. In the major leagues, three (3) of the four (4) major league sports (NFL, MLB, NBA, NHL) baseball is the only one that does not have a salary cap. Some proponents of salary caps feel that they help to keep the cost of high profile players down as well as increase competition amongst teams. The cost of a player can be driven quite high, considering for example, the 2003 American League Most Valuable Player, Alex Rodriguez, who signed a 10-year MLB contract with the New York Yankees for \$275 million dollars.

The reserve clause in United States sports contracts history touches on some of those issues that are similar and arise in the context of European sports law surrounding transfer rights of players. The reserve clause was an impediment to the free movement of players from one team/club to another. Free agency and the abolishment of the reserve clause in player contracts allows for greater movement of players across teams and teams across states in the United States.

#### 4.2. Contract Disputes (NFL and NBA Lockouts)

Collective bargaining is a labor issues but it is also a contracts issue. A recent very public example of this was the recent NFL player lockout. Earlier this year, just after the highest viewed annual sports event in the United States - The Super Bowl - the NFL and players stepped-up nego-

tiations on the collectively bargained agreement between the NFL and the National Football League Players Association (NELPA). The key issues in the negotiation included the following:

- How to split \$9 billion in marketing rights;
- Creating a salary cap for rookies;
- Adding two (2) games to the regular season;
- Building stadiums.

At the point where negotiations seemed to stall the NFL instituted a lockout, creating the first NFL work stoppage in 24 years.<sup>44</sup> The lockout is a device that is often used in labor law and contract negotiations in the United States to increase bargaining power; employees have a comparable device called the “strike” that they can use in a similar manner. Essentially, a lockout entails “the withholding of employment by an employer, and the whole or partial closing of the business establishment in order to gain concessions from or resist demands of employees.”<sup>45</sup> In the case of the NFL lockout management refused to let the players work (and refused to pay them) with the expectation that this would encourage a faster settlement. The lockout lasted eighteen (18) weeks, but finally resulted in agreement between the NFL and NELPA.

Another example is the NBA, whose contract negotiations eroded to the point of management instituting a lockout that is still in place at the writing of this article, which has led to the cancellation of the 2011-2012 professional basketball season in the United States.

#### 4.3. Drugs/Alcohol Abuse

Many professional players have been in the news due to improprieties such as drug and alcohol use and abuse. This issue is separate from the doping issues, as these improprieties are with the use or possession of illegal recreational drugs. These types of issues are primarily addressed in the civil and criminal courts of the United States. The impact on sports is not so much a legal impact but instead raises some sociological questions such as:

- Are sports figures above the law?<sup>46</sup>
- Do sports figures disproportionately engage in such inappropriate and illegal behaviors (drinking and driving, excessive use of recreational drugs, lude behavior, etc.)?<sup>47</sup>
- The erosion of the image of sports figures as role models
- The Cost of fame and fortune on sports figures

These negative aspects of players and sports are often countered by sports players endorsing human rights related causes, establishing a foundation or youth camp, or being the spokesperson against some of the ills to which they themselves fell victim.<sup>48</sup>

#### 4.4. Doping

Doping and cheating, in professional and amateur events has received a lot of attention worldwide. This remains enough of an issue to at least mention it here. Internationally and nationally, the issue of doping is addressed by WADA.<sup>49</sup> In 2005, US Congress proposed legislation on drug testing in sports. There is federal legislation mandating the random drug testing of professional athletes. Student-athletes are also subject to random drug testing. One key issue with random drug testing whether professional or amateur is to ensure that drug testing is not conducted in a discriminatory manner. See, *NCAA v. Tarkanian* 109 U.S. 454 (1988) - state action a factor in mandatory drug testing.

#### 4.5. Violence and Sexual Misconduct

Many sports figures are often caught up in violence that often lands them in a lot of legal hot water as well as a tarnished image. These acts of violence occur in nightclubs, bars or at home. They include assault and even murder. Criminal offenses involving players is a common issue between the U.S. and European sports players. However, the profile of sports players in general tends to be a bit more prominent in the United States, so therefore, the perception may be that United States players are more likely to commit a criminal offense, when in fact, this conclusion has not been proven.

An area where a lot of major league sports figures often get entangled in is the area of sexual assault. A few fairly recent examples include:

42 346 U.S. 356 (1953).

43 There are many different types of free agency. There are also many variations between the references to free Agencies in the United States. (more info on the different types).

44 In 2004-2005 the NHL lost an entire season due to an industry lockout. See, Staudohar, Paul D., *The NHL Lockout 2004-05, “The epic lockout resulted in the loss of the entire 2004-05 National Hockey League season and produced an outcome slanted largely in favor of the owners; a salary cap, a pay cut for players, new free-agency rules, a new drug-testing policy, and changes in the rules of play were among the agreements reached in the settlement.”*

45 Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/lockout>.

46 See, *The Sportsmeister Cheap Shot: Are Athletes Above the Law?*, 16 August

2009, <http://bleacherreport.com/articles/237377-the-sportmeisters-cheap-shot-are-athletes-above-the-law>, and *Athletes Are Above the Law - The Colbert Report*, 2006, <http://www.colbertnation.com/the-colbert-report-videos/68927/may-10-2006/the-word-athletes-are-above-the-law>.

47 Crasnick, Jerry, *Alcohol-Related Issues Spark Debate*, 6 May 2011, ESPN, [http://sports.espn.go.com/mlb/columns/story?columnist=crasnick\\_jerry&cid=6515822](http://sports.espn.go.com/mlb/columns/story?columnist=crasnick_jerry&cid=6515822).

48 An example: in 2004 NFL Running Back, Jamal Lewis, was charged with conspiracy to distribute 5 kilos of cocaine; Diez, Martinez, Warner, *A History of Drug-Dealing Athletes*, 26 August 2011, *Complex Mag*, <http://www.complex.com/sports/2011/08/a-history-of-drug-dealing-athletes>.

49 www.WADA-ama.org

- In 2010, Pittsburgh Steeler Quarter Back Ben Roethlisberger, was accused of sexual misconduct with a 20 year old at a nightclub in Georgia;<sup>50</sup>
- In 2008, NBA player Eddie “Fast” Johnson was convicted of breaking into an apartment in California and sexually assaulting an 8 year-old girl;<sup>51</sup>
- In 2007, MLB player Mel Hall was convicted of sexually assaulting his 12 year-old girl that he coached on a basketball team a decade earlier;<sup>52</sup>

There are many more examples of players across the sports arena being accused and convicted of sexual assault.<sup>53</sup> These convictions have resulted in sentences from probation to life sentences.

#### 4.6. Recruitment (Collegiate)

On a different note, another area of sports law, that is more specific to the collegiate level of sport is the issue of recruitment of players. This issue begins around the recruitment of college players, so often recruitment is focused on high-school students. In the United States, colleges cannot approach high school students about playing a sport for their school until the summer before the high school student’s senior (or final) year in high school. The student may reach out and inquire about schools, but the school cannot randomly telephone the student or make any offers prior to that time.

There is also the issue of recruitment of professional players which then tends to focus efforts on college players. In *Haywood v. National Basketball Association*, 401 U.S. 1204, the U.S. Supreme Court decision that ruled against the former NBA requirement that a player wait four (4) years after high school before being eligible for drafting by the NBA. This issue is somewhat controlled by the fact that in the United States college football tends to provide a showcase for possible talent for the professional leagues. So, players that are recruited from within the United States most often play or played the college sport. This is a little different than in Europe where professional training camps provide an opportunity for would be professional players to showcase their talent, or more specifically, to prepare them to play for the professional league associated with the training franchise, or another team that may obtain them.

#### 4.7. The Draft (Professional Recruitment)

The professional recruitment effort that occurs in the United States is called “The Draft”. The Draft was instituted in 1935 by then NFL President, Joseph Carr. Over the few decades the other major national sports leagues also adopted the draft.<sup>54</sup> The major leagues engage in this recruitment activity each year with the hopes of obtaining the best talent for their team. The Draft is the process that is used in the United States to allocate players to the various sports teams.<sup>55</sup> There are different types of drafts<sup>56</sup>, but perhaps the best known or most common type of draft is the entry draft. The entry draft is used for allocating players who have just become eligible for the draft. The entry draft draws from a wide range of players that come from high school, colleges and universities, junior teams, or even other countries. The idea behind the

draft is to create a degree of parity so that no one or small groups of teams have all of the best players, leaving the league uncompetitive, and to avoid bidding wars. One feature of the Draft is that the teams that do not do well in the previous season are the ones that choose first in the postseason Draft picks. Since the Draft is included in collective bargaining agreements between the leagues and player labor unions, they are permissible under US anti-trust laws.

There are some parallels that can be drawn between the draft system in the United States and the transfer<sup>57</sup> system in Europe. Both methods are used as a means of allocating players amongst various sports teams. Also, the rules that are put in place for both the draft and the transfer system<sup>58</sup> are, at least in part, intended to create a more equal opportunity for the various sports teams to acquire quality players and maintain competition between the sports clubs. The merits of the transfer system, and to some degree the draft, have been questioned as to whether or not they actually help or hinder competition.<sup>59</sup> In the United States when a player is traded, the existing contract is moves with the player. However, in the European transfer system, when a player transfers from one club to another, the existing contract is terminated and the player must negotiate a new contract with the new club.<sup>60</sup>

#### 4.8. Commercialism

As the previous discussion suggests and as the legal structure of sports law in the United States supports, with much of sports law being based on anti-trust laws, commercialism and capitalism play a significant role in the industry and business of sports. This is important to mention because commercialism is not only a feature of US sports law, in many ways it is the foundation of US sports law. The commercialization of sports occurs in many areas including, ticket sales, broadcasting rights, merchandizing, endorsements, image rights, etc. Professor Nafziger notes *Commercialization of Sport* as one of the six (6) characteristics of the North American sports organization. Professor Nafziger also mentions the fact that major league teams in the United States are referred to as *franchises*, which is a business or commercial term.<sup>61</sup> Perhaps the most disturbing fact that Professor Nafziger mentions in his article is the Europeans position that North American “sports” are a product of commerce, not of grassroots social activity.<sup>62</sup> To this point, although understandable and to some degree valid, I must take issue. Although commercialism is a significant part of the foundation of US sports law with anti-trust laws and collective bargaining as it pillars, commercialism is not at the genesis of sports in the United States. There is a complex history and important social context for sports in the United States that explains (even if it does not quite justify) the evolution and ultimate commercialization of sports.

### 5. Conclusion

Understanding the foundations of the United States sports law model provides insight into the existing legal framework. The United States sports law model has developed significantly over the past century. With its roots firmly planted in antitrust law, it is only natural that many of the prevailing issues tend to be antitrust related; as this was a major component of the development of sports law in the early part of the last cen-

<sup>50</sup> Woman in Georgia Alleges Assault, 8 March 2011, ESPN News Services, <http://sports.espn.go.com/nfl/news/story?id=4970050>.

<sup>51</sup> Hard Time: A History of Sexual-Assault Convictions in Sports, 8 March 2010, Complex Mag, [www.complex.com/sports/2010/03/hard-time-a-history-of-sexual-assault-convictions-in-sports](http://www.complex.com/sports/2010/03/hard-time-a-history-of-sexual-assault-convictions-in-sports).

<sup>52</sup> Hard Time: A History of Sexual-Assault Convictions in Sports, 8 March 2010, Complex Mag, [www.complex.com/sports/2010/03/hard-time-a-history-of-sexual-assault-convictions-in-sports](http://www.complex.com/sports/2010/03/hard-time-a-history-of-sexual-assault-convictions-in-sports).

<sup>53</sup> This does not just occur with US sports figures: 2009, English football player, Marlon King, was convicted of sexual assault and bodily harm when he broke

the nose of a 20 year-old woman who resisted is groping in a London nightclub; English football player and former coach, Graham Rix, was convicted and sentenced to one year for indecent assault and unlawful sex with a 15 year-old daughter of a family friend; See, Hard Time: A History of Sexual-Assault Convictions in Sports, 8 March 2010, Complex Mag, <http://www.complex.com/sports/2010/03/hard-time-a-history-of-sexual-assault-convictions-in-sports>.

<sup>54</sup> Precursor to the NBA adopted the draft in 1947; NHL adopted the draft in 1963; MLB adopted the draft in 1965, although they have used a form of the draft system in baseball since the 19th century.

<sup>55</sup> The Draft process is also used in other

countries including Canada, Japan, Australia, Russia and the Philippines.

<sup>56</sup> Other types of Drafts include, expansion draft where a new team selects players from other teams in the league, and the dispersal draft, where a team or teams leave the league and the remaining teams select players from the teams that have left or disbanded.

<sup>57</sup> Transfer system in Europe started around 1885 when football players were required to engage in registration. The transfer system is when a player who is registered with one club, moves or *transfers* to another club and is then required to register as a player with the new club.

<sup>58</sup> See FIFA Rules on the Status and Transfer of Players, <http://www.fifa.com/mm/>

document/affederation/administration/01/06/30/78/statusinhalt\_en\_122007.pdf.

<sup>59</sup> See, UEFA to discuss Bosman drawbacks, BBC Sport Football, 5 Dec 2005, <http://news.bbc.co.uk/sport2/hi/football/4528822.stm>.

<sup>60</sup> Unlike the practice in Europe, Canada, Australia and other American countries tend to transfer the contract along with the player. A major issue in European sports law is the payment of transfer fees and establishing the correct basis and criteria for calculating transfer fees to be paid by the player or the receiving club. See Bosman.

<sup>61</sup> Nafziger, A Comparison, Id. at 103  
<sup>62</sup> Id.

century. Certain areas of the law such as labor (collective bargaining), contracts law, dispute resolution and employment law have helped in the development of the field of sports law either by application of existing sports issues to the law or development of specific laws that apply to the unique aspects of sports. As sports in the United States have evolved, sports law has begun to catch up with the changing arena of sports and with the ever increasing focus on commercialism, merchandizing, and broadcasting. This evolution and perhaps the changing focus of sport has also given rise to legal issues relative to sports, and specifically involving athletes, that may not have been anticipated, such as criminality in the areas of drug abuse, sexual misconduct and violence. Sports in the

63 Nafziger, A Comparison, Id. *supra*.

United States have evolved from that of a “game” to play, into more of the “business” of sport. Professor Nafziger addresses this phenomenon in his six (6) characteristics of the North American sports organization, specifically in point D. Commercialization of Sport, and in commentary throughout his paper.<sup>63</sup> Regardless of whether sports in the United States is a game or a business, there is still a legal environment in which sports exists. A review of some of the key cases, legislation and legal issues that helped to establish the foundations of the United States sports law model, also provides a glimpse into the legal framework that exists. As the United States and European sports law models continue to develop, and according to Professor Nafziger, *diverge*, comparatives between the models will help in the mutual development of both as well as contribute to the overall development of international sports law.

The International Sports Law Journal



## Karen Jones at IASL in Moscow

Karen Jones, Academic Programme Coordinator of the ASSER International Sports Law Centre, participated in the 17th Annual Congress of the International Association of Sports law (IASL) in Moscow, 27-30 September 2011. She contributed presentations on “The United States Sports law Model” and “What is Sports Law?”.

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# The Etymology of the Termini Technici *Lex Sportiva* and *Lex Ludica*: Where Do They Come From?

by Robert C.R. Siekmann\*

In 2001, MacLaren wrote that the term 'lex sportiva' was coined by the acting Secretary General of the Court of Arbitration for Sport, Matthieu Reeb, at the time of the publication of the first Digest of CAS decisions stretching over the period from 1986 to 1998.<sup>1</sup> Other than in the Introduction to Digest I which is silent on the matter<sup>2</sup>, in the introduction to the Digest of CAS Awards II 1998-2000, Reeb writes that the Digest of CAS Awards 1986-1998 recorded the creation of a *lex sportiva* through the arbitral awards of the CAS.<sup>3</sup> The neologism 'lex sportiva' is not a pure Latinism, since the adjective 'sportiva' is not Latin, the term 'lex sportiva' obviously was created by analogy with the medieval *lex mercatoria* (merchant law).<sup>4</sup> Apart from that, Prof. Klaus Vieweg of the University of Erlangen-Nuremberg (Germany) and Vice-President of the International Association of Sports Law (IASL), informed me as follows: "Indeed, the history of the term 'Lex sportiva' is somewhat obscure. Looking at my sports law files I found that the first person to use the term 'Lex sportiva' probably was the first president of the IASL, Michael Stathopoulos (please, see page 23 of the Proceedings of the 5th IASL Congress on "Sport & European Community Law" in Nafplio (Greece) which took place on 10-12 July 1997. Matthieu Reeb was one of the speakers at the congress and he possibly picked up the term "Lex Sportiva" from the speech of our colleague Stathopoulos."

In 2005, Beloff argued that the proponents of the proposition that there is such a coherent entity as sports law, clearly adopt the Latin phraseology to endow the subject with a spurious antiquity - sometimes using the alternative term *lex ludica* - "although that carries with it in mistranslation unhappy overtones of ludicrousness".<sup>5</sup> [In mistranslation? As we shall see below "ludicus" in fact is a neologism which was meant by its author to be cognate with "ludus" so it would not mean "playful", but 'sporting' or 'sportive'.]

In 2006, the T.M.C. Asser Institute and T.M.C. Asser Press published the book *The Court of Arbitration for Sport 1984-2004*<sup>6</sup>, including Ken Foster's contribution on 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence'.<sup>7</sup> Foster says that a further set of principles that can be distinguished, and separated from the concept of 'lex sportiva', are what can be termed the *sporting law* (italics added; RS), or rules of the game: "I propose to call these principles 'lex ludica'."<sup>8</sup>

Now I wondered what the origin of this term is. By whom was the term *lex ludica* invented and when (cf., *lex sportiva* and Reeb)? In my further research, it turned out that Foster did not have a precedent or source when inventing it. He was trying to follow up a suggestion that he had made in a previous article where he had distinguished various types of international sports regulation from the 'internal' law of sport. There he distinguished the technical rules of sport from the 'ethical spirit of sport'. In the chapter for the CAS Book<sup>9</sup> he used the term 'lex ludi-

ca' and then employed it to cover both the formal rules of a sport and the equitable spirit of the sport.<sup>9</sup>

"Ludus" in classical Latin meant *inter alia* 'game', but if one looks in the Latin dictionaries, one will not find the adjective "ludicus", which must be derived from the substantive "ludus" (in Medieval Latin it neither existed.) I asked Prof. Joan Booth, Latin Language and Literature, Department of Classics, Institute of Cultural Disciplines, Faculty of Humanities, Leiden University, The Netherlands, for confirmation whether the words "ludicus" already existed in classical Latin as an adjective derived from "ludus". She replied as follows: "The short answer is 'no'. The classical Latin adjectival form cognate with *ludus* is *ludicer*, -*era*, -*rum* (the masculine form *ludicer* is in fact not attested), but it does not mean what you would like it to mean. It means 'sportive' in the sense of 'jesting', 'fun'. See the entry in *The Oxford Latin Dictionary*." So, in the standard dictionary of classical Latin, *The Oxford Latin Dictionary*, the word "ludicus" is missing. Also a quick online scan in the "Library of Latin Texts" which does not only contain classical texts, but also a number of medieval ones, the word cannot be found. Johann Ramming's online-database "Neulateinische Wortliste" [Neo-Latin Vocabulary] does not list the word. Of course the term *lex ludicra* (with an "r") would have been possible as to form, but not as to content (meaning). so, in fact the term *lex ludica* is a neologism of modern times, like *lex sportiva*!

Now there is a famous substantial paragraph on what sports law is, in the CAS award of 20 August 1999 in AEK Athens and SK Slavia Prague v. UEFA<sup>10</sup>, which reads as follows:

"The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles - a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* - to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national 'public policy' (*ordre public*) provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such *lex ludica* (...)"

In particular, the use of the words "so to speak, a *lex ludica*" in the CAS award would point into the direction of the verdict's *auctores intellectuales*, who were the Panel's Italian President Prof. Massimo Coccia (Rome) and his German co-arbitrators Dr Christoph Vedder, who is now Professor of Public Law, European Law, Public International Law and Sports Law at the University of Augsburg, and Dr Dirk-Reiner Martens (Munich). In my further research it finally turned out that Prof. Massimo Coccia in this, from an EU competition law perspective crucial, so-called ENIC case concerning multiple ownership of professional football clubs<sup>11</sup> in fact invented the term *lex ludica*.

To put it simply, while he was writing the award he realized that the expression "lex sportiva" did not make any linguistic sense, given that "sportiva" is an Italian word (not Latin) coming from the English word "sport" coming from the French original "desport". So he tried to substitute *lex sportiva* with something more accurate from a Latin point of view. *Ludi* (singular *ludus*) were the "Games" which were held in ancient

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1 Richard H. McLaren, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes', in: Valparaíso University Law Review (2001) p. 379, footnote 11.

2 Matthieu Reeb, Recueil des sentences du TAS / Digest of CAS Awards 1986-1998, Berne 1998.

3 Berne 2002, at p. XX.

4 see generally, Boris Kolev, 'Lex Sportiva and Lex Mercatoria'. In: The International Sports Law Journal (ISLJ) 2008/1-2, pp. 57 and 60-62.

5 Michael J. Beloff Q.C., 'Is There a Lex Sportiva?', in: Sweet & Maxwell's International Sports Law Review (ISLR) 2005 Issue 3, at p. 49.

6 Edited by Ian s. Blackshaw, Robert C.R. Siekmann and Janwillem Soek.

7 Pp. 420-440.

8 At p. 421.

9 Ken Foster, "Is There a Global Sports Law?", in: Entertainment Law, Vol. 2, No.1, Spring 2003, at p. 4.

10 CAS 98/200, para. 156. Explicit reference to the *lex ludica* in this CAS award is made in CAS 29009/A/1768, Hansen v. FEI, which by the way was presided by Beloff.

Rome on various occasions and, besides the *ludi* with gladiators (a minority of them and mostly in the imperial age), there were *ludi* with equestrian competitions, wrestling competitions, human races and the like. For example the *Ludi magni* (also known as “Ludi capitolini”) were held every year since 389 b.c. around mid-October and included competitions of physical strength, runs, equestrian races, musical and poetry contests. So he thought that “*lex ludica*” could be more accurate but he used it exactly as a synonymous of *lex sportiva*, not meaning something else (while he saw in the literature an attempt to identify different notions).

However, at the time he did not do any Latin research; he was too busy finishing the award (which was already very complex in itself) and

11 See, Commission decision of 25 June 2002 in Case 37806, ENIC/UEFA.

he simply relied on his classical studies in the high school (in the Italian “Liceo Classico” many hours are devoted to Latin and ancient Greek and he excelled in those subjects). In any event, the attempt to have a new term used failed and in his subsequent awards and scholarly writings. He also started using the expression “*lex sportiva*”. When something has gained widespread use there is no point in contesting it. It is much more interesting discussing on *what actually is or is not*, rather than on how to call it. However, I think that para. 156 of the CAS award remains of fundamental importance for all students of sports law. It may still be qualified as an essential (re)assessment of content and terminology regarding sports law, in a nutshell.

My conclusion is that the term “*lex ludica*” was invented by two different scholars, the first in Italy and the other in England, who - not knowing about each other’s deed - at different times coined the same term.

# The Severance of International Sports Law into a Separate Branch

by Aliaksandr Danilevich\*

Increased interest in the sphere of legal regulation of sport in our country over the past two years has caused a surge of scientific and academic activity in the publication of new articles and developing new programs in sports law for students of legal specialities. The development of the Belarusian sports law doctrine is based on the achievements of foreign legal science and domestic experience. During communication with colleagues, the author faced with the opinion of the need to single out so-called “international sports law” into a separate branch and a separate theme of the course at the university. As a lecturer of a special course at the Faculty of International Relations in the Belarusian State University, the author directly faced with the development of the range of problems of international legal regulation of sports relations. For some time the author used in his publications<sup>1</sup> a term without proper critical analysis, but the activity of colleagues urged him to write this article.

The term “international sports law” is used in modern legal literature in two ways - as a part of international law, the designation of a set of instruments of an international character governing international sports relations (conventions, acts of the IOC, etc.)<sup>2</sup> and as a legal regulation of the sport at the international level, in the broadest sense (typical common law system)<sup>3</sup>. In connection with the use of these concepts the question of the need to separate sports law into “domestic” and “international” and reasonability of the separation of international sports law as a separate science raises. As these two issues outlined in the most detailed manner by Professor Alekseev in his “International Sports Law”, the opinion given in this article is based largely on a critical analysis of Chapter 2 of this monograph.

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1 Данилевич А.С. Понятие национального и международного спортивного права / Актуальные проблемы международного публичного и международного частного права: сб. науч. тр. Вып. 1/ редкол.: Е.В. Бабкина, Ю.А. Лепешков (отв. Редакторы) [и др.]. - Минск: БГУ, 2009, - С. 250-264.  
2 Алексеев С.В. Международное спортивное право. С. 208.  
3 Nafziger J.A.R. The Future of International Sports Law. [Electronic

resource] Mode of access: [www.willamette.edu/wucl/pdf/review/42-4/nafziger.pdf](http://www.willamette.edu/wucl/pdf/review/42-4/nafziger.pdf). - Date of access: 24.10.2010.

4 См. Энциклопедический юридический словарь / Под. общ. ред. В.Е. Крутских. - 2-е изд. - М.: ИНФРА-М, 1999. - С. 220.  
5 “О физической культуре и спорте”: Закон Республики Беларусь от 18.06.1993 № 2445-XII // Национальный Интернет-портал Республики Беларусь [Электронный ресурс] / Нац. центр правовой информ. Респ. Беларусь. - Мн., 2010. - Режим доступа: <http://www.pravo.by>. - Дата доступа: 20.10.2010.  
6 Всемирный антидопинговый кодекс. /

Generally accepted criteria for differentiation between branches of law are subject and method of legal regulation<sup>4</sup>. What is the subject of international sports law? Obviously, these competitions of an international character and related relationships - are the basis of the subject of the international sports law. All other issues related to sports competitions of the international character are secondary - the activity of the subjects of the international sports law (IOC, international federations and WADA, sports arbitration courts, state). First of all sport is a competitive activity<sup>5</sup>. Competitive activity involves at least two subjects of competition. In practice a lot of participants are involved in the international competitive activities if, of course, we do not deal with the international unofficial match e.g. of two basketball clubs from different countries. At the same time one of the features of the sports law (or more exactly quasi law) is that the question of the participation of the club in an international competition of international sports activities is solved before taking part in the international cup tournament. National Federation for the sports games recognized by the international federation can “nominate” the club which has won some prize in the national championship to participate in an international competition. Practically, this means that the club participating in the national championship is also participates in the tournament matches and is a candidate for the international competition. In the individual sports disciplines, such as tennis, athletes participate in international rankings, which are formed on the basis of their participation in recognized international and national open tournaments. Here the author considers the competitive sports relationships - the relationships of the first level. Related relationships - doping control and responsibility for the use of doping, labour relations of athletes, violence in sports and civil legal relations in terms of “international aspect” have their own specifics.

Nowadays thanking to the existence of the World Anti-Doping Code (VADC) and international conventions, anti-doping fight takes a global character. Specific character of the VADC is that that it, being a pillar of the World Anti-Doping Program is not an act of the government does not constitute an international treaty but is a binding and a model instrument of an international non-governmental organization, established and recognized by the international sporting community. Simultaneously this document is not restricted to use only for the sport of international level. VADC is recognized by national sports federations and is the basis for national anti-doping agencies, i.e. applicable at all levels of sport - national and international. As a model for anti-doping rules, which are the sport rules<sup>6</sup> VADC indicates the absence of

fundamental differences in the application of anti-doping rules at the national and international sports level.

Participation of the club of certain athlete in international competitions does not affect the basic labour rights and duties of the athlete. The exception involves the use of general labour laws that provide features for all employees in connection with the foreign mission. The rules of international transfers of athletes are the basis for the settlement of the transitions of athletes at the national level.

The aspects of the fight against violence in sport at the international level are reflected in the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches August 19, 1985<sup>7</sup>. However, many provisions of the convention and acts of the Council of Europe perceived in Belarus even during non-participation of our country in the Council of Europe. This is in particular, standards for equipment of stadiums, as recommended by the comprehensive report on the combat with misbehaviour 89/2<sup>8</sup>. Anyone who was at the Dynamo stadium in Minsk, saw those barriers and fences separating the stands, which were installed after the adoption of these recommendations. These actions were carried out due to the fact that Belarusian clubs were receiving the European teams in the European Cup Tournament in this stadium, and our country has sought to meet the athletic standards adopted in Europe - the football centre.

International civil legal relations in the sport entirely fall within the scope of regulation of the international private law - choice of law in the licensing agreements of sports clubs does not differ from similar guidelines for the parties to the treaty on the transfer of know-how for the manufacture of engineering products. There are no private-law features of the subjects of the international sports activities as they are in the same legal framework as other private entities.

Formation of the rules of sports quasi law (acts of sport organizations) that make up the bulk of sports law, tends to be "international". Sports development keeps pace with the internationalization of world culture, but there is one significant difference from other cultural phenomena - the competitive nature of sports. Competitive nature involves the separation of the best, the winner. After analysis of the known sports we can say that the strongest athletes - are the best athletes in the world. In order to determine the best athlete or the best team in a global scale it is necessary to define the rules using which we can determine it (the rules of the sport). These rules have several properties: they are universal (universally recognized) created by the international sports federation, and can only be changed by it. Any variation of the rules of the game is already another game in which competition has been held otherwise, including those at the global level. International level of sport depends on the number of people who wish to practice this sports discipline or agree to pay-per-view matches. But there is no doubt that as a competitive activity, sport tends to be "international" because it is the only way to make a competition more spectacular and to determine the best athletes. At the same time the rules of the game (in the broadest sense) are also international, if the sport is actually developed.

Thus, competitive nature of the relationship determines the foreign element in the sport as a natural beginning, but not as specific characteristics of relationships, as for example in private international law or international environmental law. The very subject of regulation of sports

author criticizes the opinion of the Russian professor Alekseev, who states that "the international sports law" is "one of the most important areas of modern international law - it includes the norms of both public international law which governs relations between states and private international law covering relations between private individuals - organizations and citizens and citizens of different national origin". The concept of "the international sports law", as the complex branch of legislation and norms of quasi law of sports organizations do not fit into the classical structure of international law, because quasi law (such as the Olympic Charter or VADC) does not apply to international law, and the principles of choice of law applicable to the relations with foreign elements in the contractual commitments in sport and in international trade are the same.

Does the method of regulation change when the international of foreign element is introduced into sports relations? As the author has already noted above, in terms of regulation of private elements - it doesn't. Definitely, the presence of international treaties in the sphere of regulation of sport is using the principles and mechanisms of public international law. However, the method of legal regulation is not a qualificatory characteristic that allows us to single out international public law into a particular legal system<sup>9</sup>. It is also necessary to note that the sphere of regulation of international conventions on the fight against doping and violence in sport includes sports relations in general (national and international) but not the competitive activity itself and relations of international level related to it. It is possible to say whether several international conventions relevant to the sport can formulate the branch of public international law, only after analysing the question of the principles of sports law regulating international competitive activity. Prof. Alekseev defines three levels of principles of international sports law: 1) the basic principles of international law; 2) inter-branch principles; 3) their own specific guidelines<sup>10</sup>. The first two groups are quite abstract and are typical for each branch of international law. Special principles of international sports law do not include any specifics of "internationalism" absolutely all of them can equally be attributed to the principles of "internal" national law. Despite the fact that the author has his own point of view on the principles of sports law<sup>11</sup> the approach of prof. Alekseev to the uniform definition of the key principles regulating the sport in general should be considered as appropriate.

The principles of the branch of law or the branch of legislation serve as the basis of their structure. Neither norms of law, nor institutions and branches of law and legislation can contradict the principles of law. Only the most basic sources of legal disciplines may be considered as principles.

Within the sports law it is possible to single out the branch principles and the principles of its separate institutions.

### **The system of principles of sports law consists of general principles of sports law and special principles (principles of its separate institutions)**

The general principles of sports law are those principles that are typical for sports law with its specific subject of regulation. The specific principles are peculiar to the separate institutions of sports law, which are regulated by the rules of administrative, civil, labour, entrepreneurial and international law. Accordingly, the principles of these branches of law are used to regulate these institutions.

The general principles of sports law, regardless of the level of its sources include:

#### **1. The principle of the universal right to engage in physical culture and sports**

This principle involves two interrelated beginnings - the right to engage in physical culture and sports and non-discrimination in the exercise of such rights. The right to engage in physical culture and sports is set by national sports legislation. This principle is of the greatest value for amateur (mass amateur) sport. According to the article 6 of the Belarusian Law "On Physical Culture and Sport" (hereinafter - LoPCS):

1. Every citizen of the Republic of Belarus has the right to engage in physical culture and sports.
2. The right of citizens of the Republic of Belarus to engage in physi-

Под общ. ред. Н.Г. Кручинского. - Минск: «Альтиора - Живые краски», 2008. - С. 25

7 О предотвращении насилия и хулиганского поведения зрителей во время спортивных мероприятий и в частности футбольных матчей (ETS N 120): Конвенция Совета Европы от 19.08.1985/ Консультант Плюс: Беларусь. Технология Проф [Электронный ресурс] / ООО «ЮрСпектр», Нац. центр правовой информ. Респ. Беларусь. - Минск, 2010

8 Recommendation on comprehensive report on measures to counter hooliganism (89/2) [Electronic resource] / Council of Europe. -

Mode of access: [www.coe.int/t/dg4/sport/Resources/texts/sprec89\\_2\\_en.asp](http://www.coe.int/t/dg4/sport/Resources/texts/sprec89_2_en.asp) #TopOfPage. - Date of access: 24.10.2010.

9 Международное право: Учебник / отв. Ред. Ю.М. Кузнецов, В.И. Колосов. - М.: Междунар. Отношения, 1995. - С. 9.

10 Алексеев С.В. Указ. соч. - С. 217-231.

11 Данилевич А.С. Принципы международного спортивного права. // Беларусь в современном мире: Тезисы докладов III Республиканской научной конференции, Минск, 28-29 октября 2004 г. / Редкол.: А.В.Шарапов, Е.А. Достапко, В.М. Руденков и др. - Мн.: РИВШ, 2004. - С. 84-86.

12 Исключения из этого принципа могут

cal culture and sports is provided by the government agencies, organizations of physical culture and sport, other organizations working in the field of physical culture and sports”,...

The Article 7 of the Belarusian LoPCS establishes the principle of national treatment of foreign citizens and stateless persons in the sphere of physical culture and sport:

“Foreign nationals and stateless persons in the Republic of Belarus enjoy the same rights in the sphere of physical culture and sports as citizens of the Republic of Belarus, unless otherwise specified in the Constitution of the Republic of Belarus, this Law and other laws and treaties of the Republic of Belarus.”

In the absence of the exceptions to the Belarusian legislation on the treatment of foreigners, set forth in the Art. 7 of the LoPCS, any limitations imposed by national sports federations on the participation of foreigners in the national championships are illegal<sup>12</sup>.

At the international level the issues of freedom and equality in exercising the right to engage in physical culture and sports have been the subject of the activity of the UNO (it has adopted the International Charter of Physical Education and Sport on 21 November 1978<sup>13</sup>) and the Council of Europe, which adopted the European Charter on Sport for All (approved by the Committee of Ministers of the Council of Europe on September 24 1976), later revised and became the European Sports Charter on September 24 1992<sup>14</sup>. Section 1 Article 4 of the European Sports Charter 1992 emphasizes the principle of non-discrimination on any grounds in relation to access to sporting facilities or sports<sup>15</sup>.

## 2. The principle of legal protection of athletes

Athletes, as well as other individuals who possess the full range of rights given by the Constitution. However, the peculiarities of sports quasi law especially at the initial stage of commercialization of sports have led to the need to protect the rights of athletes. The best example is the development of sports law in the framework of the European Union. EU law, namely the jurisprudence of the European Court of Justice influenced the introduction of new rules into national legislations on the sport. The Bosman case<sup>16</sup> has shaken the foundations of the economic organization of professional club sport, bringing into question the legitimacy of the system of transitions. Undoubtedly, a direct parallel between the EU rules and national law is not correct from the viewpoint of different legal acts of various natures, but in terms of the measures for the protection of the rights of players, it is quite appropriate. In general, the system of paid transitions (compensatory payments) has some positive features, as it allows low-budget and amateur clubs, to train a good player, to receive additional funding as a result of compensation for the training of the player.

To protect their labour rights athletes and coaches are free to form trade unions and associations and to join social dialogue with the clubs and their associations, as employers.

## 3. The principle of relative autonomy of sport

As part of the culture, sport, cannot and should not be fully regulated by the state. The vast majority of the rules of the competitions are reg-

ulated by sports quasi law - acts of sporting subjects at different levels. To a greater degree it concerns professional sport.

In a broad sense, autonomy is an authority to arrange relationships within their own competence, following the established rules, in particular, in matters of doping or other liability<sup>17</sup>. However, the autonomy of sport is not absolute, since the state and supranational structure (in the framework of the EU, for instance) actively intervene in the regulation of sporting relations. Such interference occurs primarily in the form of the principle of protection of the rights of sportsmen, which is easily visible on the example of the European Court of Justice<sup>18</sup>.

On the other hand participation of the state in regulating of the sporting relations not always means the establishment of a restrictive legal framework for sports organizations. The legislation of the Ukraine and Russia, setting the features of the regulation of labour relations in professional sport, emphasizes the specific and autonomous character of sporting relations.

The autonomy of sport derives from certain autonomy of sporting federations, set out in legislation. The establishment of sporting federations is a realization of the rights of citizens to organize civic organizations (associations).

Section 3 of the Article 3 of the European Sports Charter 1992 specifies that “the voluntary sports organizations have the right to form autonomous decision-making mechanisms within legal boundaries. And the government and sports organizations should recognize the need for mutual respect of their decisions.”

However, as noted in the early studies of this principle the autonomy of sport is defined not only by a subjective criterion, but also by an objective one. Sport has a huge social and cultural importance. It is impossible to transfer automatically all the principles of legal regulation in administrative and civil law on the regulation of professional sport due to its special social status.

Balance of the principles of autonomy of sport and the principle of protecting the rights of athletes is the basis of the progressive development of sports law in general.

## 4. The principle of fair and equitable competition

On the face of it this principle concerns only the behaviour of athletes (fair play), although this is not true. Under the Code of Sports Ethics: “Fair play - is the path to the victory” adopted on September 24, 1992 by the Committee of Ministers of the Council of Europe, revised on May 16, 2001<sup>19</sup> fair competition (fair play) is defined as “something more than mere adherence to the rules of sporting activities: It includes the concepts of friendship, respect and veneration of the atmosphere, in which the recreational and sporting activities are exercised. Fair Game - is a way of thinking, not just behaviour. It eliminates cheating, doping, violence, abuse (physical and verbal), sexual harassment and abuse of children, youth, women, exploitation and unequal opportunities, excessive commercialization and corruption.”

The four basic principles characterize the approach as a quasi- and legal regulation of sports relations. These principles are specific and relate directly to the rules of sport, and not to other branches of law and/or legislation. Finally, these principles are universal for all levels of sport management - both national and international.

Separation of science of international sports law is unjustified step in

быть установлены законодательством для предоставления отечественным молодым игрокам возможности участвовать в играх с целью непрерывной подготовки резерва для формирования национальной сборной.  
13 Международная хартия физического воспитания и спорта (принята Организацией Объединенных Наций 21 ноября 1978 г.; с последующими дополнениями) / Алексеев С.В. Указ. см. - С.262-267.

14 Ранее в рамках СЕ были приняты следующие документы по этой тематике: Рекомендация № 588 (1970 г.) Консультативной ассамблеи по

развитию спорта для всех и созданию структур координирования; Рекомендация №682 (1972 г.) о Европейской хартии о спорте для всех. Об истории деятельности СЕ в области продвижения спорта для всех см. Marchand, J. Sport for All in Europe. - London: HMSO, 1990. - 73 p.  
15 в Хартию были внесены незначительные по объему изменения 16 мая 2001 г., см.: <http://cm.coe.int/dee/2001/752/x11.htm>.

16 Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union

des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-0492.

17 Vieweg, K. The legal Autonomy of Sport Organization and the Restrictions of European Law // Professional sport in the EU: Regulation and Re-regulation. / Caiger, A.; Gardiner, S. - 1st ed. - The Hague: T.M.C. Asser Press, 2000. - P. 89.

18 См. CJCE, 14 juill. 1976 Dona/Mantero, 13.76; CJCE 15 oct.1987, unectef/Heylens, 222/86; CJCE, 12 déc. 1974, Walrave et Koch/U.C.I.; Case C-265/03 Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol / EUR-Lex [Electronic resource]. -

2010. - Mode of access: [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0265:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0265:EN:HTML). - Date of access: 15.05.2010.

19 Recommendation No. R (92) 14 Rev of the Committee of Ministers To Member States on The Revised Code of Sports Ethics. / Council of Europe [Electronic resource]. - 2010. - Mode of access: [wcd.coe.int/ViewDoc.jsp?Ref=Rec\(92\)\\_14&Sector=secCM&Language=lanEnglish&Ver=rev&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](http://wcd.coe.int/ViewDoc.jsp?Ref=Rec(92)_14&Sector=secCM&Language=lanEnglish&Ver=rev&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75). - Date of access: 25.10.2010.

terms of artificial subdivision of sports law as an integrated discipline. We have examined specific subject of sports law, the definition of methods and general principles of a single legal discipline. The term “international sports law” is used and has the right to exist, as the definition of set of acts of sports law at the international level, as well as the “Olympic law” or “anti-doping law”. However, how can it be possible to consider the fight against doping in the framework of “domestic” sports law without analysis of the VADC and the Olympic Charter? Or procedure of appeal of the decision of the national federation, while it is impossible to do it without submitting and application to the inter-

national sports court of arbitration? There is no single transnational sports law, each country has its own national law on physical culture and sport, but the international legal and quasi-legal acts that are used by national actors, also form the sports law of the country through their direct application. The subject of regulation of the sports law is a global phenomenon, unlike other kinds of relationships and it does not fit into the usual legal framework of branches of law. Nowadays sports law is an example of unification of rules of conduct of the planetary scale - common rules that unite the participants of competitive activity - from the neighbourhood teams to the Olympics.

*The International Sports Law Journal*

## Practicing Sports - a Fundamental Human Right

by Alexandru Virgil Voicu, Augustin Fuerea, Daniel Florentin Visoiu, Zeno Daniel Sustac and Marcel Ionel Bocsa\*

*The theme of this article covers the benefits of sport for society in general, but also the provisions of Romanian Law no. 69/2000 on Physical Education and Sport, as subsequently amended, as well as all the relevant Romanian legislation arising from the provisions of European Union (EU) law on the subject, in particular The White Paper on Sport and the Charter of Fundamental Rights of the European Union, documents which entered into force pursuant to the Treaty of Lisbon. Last but not least, the article debates the possibility of enhancing the importance of practicing physical education and sport as an inherent human right.*

### The sporting phenomenon - a significant social phenomenon

Every individual is keen on developing speculations and debates regarding the causes, consequences and even the content itself of various phenomena and processes that he or she might encounter in daily life. The most probable outcome of such an endeavor would most probably be that of referring to these subjects from different perspectives that is, ascertaining different point of views - subjectivity owing, in this case, mainly to conditional experience and common sense. Therefore, one must position himself in a position that claims a prudent attitude - if not total rejection - towards intuition, speculation, horse sense (the fundamentals of common sense), and strive for the rigors of the scientific method.

It is thought that human rights are an ideological projection in order to justify certain social actions, a philosophy, a concept on the world and the existence. Human rights are, foremost, a sociology of contemporary life, inasmuch that they encompass facts, phenomena, social processes and relationships alike, mentalities, states of mind, imagery, representations, interests and perceptions. Max Weber spoke of the design of the world and man's place in it. The topic on human rights is often reduced to a legislative concept, and human rights education bears a technical nature - law articles, pros and cons debates in sustaining a certain idea, case analysis etc. In this particular context, one cannot ignore the existence of a sporting phenomenon, which has developed into an important social phenomenon. Its importance is foremost justifiable by man's dependence on his physiological and social needs to participate in organized or random sporting activities, also used - more recently - with the aim of satisfying a professional avocation (professional sports).

We see it imperative to remind ourselves that man “is not static, he is profoundly dynamic, he is a living reality in a tireless state of wanting, restless until reaching his goal”<sup>1</sup>. It is from this psychology-of-the-(dynamic)-person perspective that we will be able to appreciate the three forms of human development: biological, dynamic and psychological, reaching the conclusion that these are the working fundamentals of the motivational theories. Whether one agrees or not - ultimately confident in the social-cultural calling of the human nature - man is concurrently nature and culture. That is why one can argue that the need to exert physical activity - viewed as a means of physical education and sport, whether professional or amateur - is also a biological need that is integrated in man's various organic necessities, as are those “linked to the assimilation and dissimilation process, or anabolism and catabolism, such as hunger, thirst and breathing, on one hand, and the necessity to preserve the species, or sexual instinct, on the other.”<sup>2</sup>

Every single need-related work motivation theory drawn up by authors such as Maslow, Clayton Alderfer (ERG theory - Existence, Relatedness, Growth), McClelland<sup>3</sup> (Necessities theory), Faverge J.M<sup>4</sup>, states that until elementary necessities, more urgent and pressing, have not been fulfilled, all others remain in the background; as one category of needs is satisfied, another, superior one, is sought after.<sup>5</sup> This justifies our statement that human needs have been reevaluated, in time, as being inherent rights of the human being - transposed in generations of fundamental human rights<sup>6</sup>.

Therefore, if we take into consideration that *the need to practice sports is an inherent right of the human being*, we will be able to ascribe a *legal value* to this need - in order to appreciate it as a *fundamental human right*.

Human rights are inherent to the human being, “taken individually or as part of a predetermined social group”<sup>7</sup>. Human rights are fundamental to our nature. The deprivation or denial of these rights amount to the inability to exist as humans beings and open the path to political and social disorder. Exercising these rights freely can only be possible in a legal protection system that guarantees and implements human rights. In the preamble of the *Universal Declaration of Human Rights*<sup>8</sup> (para. 1) it is stated that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

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1 Mărgineanu Nicolae, *Psihologia persoanei (The Psychology of the Person)*, Editura Ştiinţifică, Bucureşti, 1999, p. 78 and ff.  
2 Mărgineanu, *Psihologia... (The Psychology...)*, p. 79  
3 Johns Gary, *Comportament organizațional (Organizational Behaviour)*, Editura Economică, Bucureşti, 1996, p.153 and ff.  
4 Faverge, J. M., *Introduction a la Psychologie professionnelle*, Presses Univ. de Bruxelles, 1976.  
5 For example, according to Maslow, the

needs hierarchy is as follows: 1. physiological needs 2. security needs 3. social needs 4. self-esteem needs 5. self actualization needs.  
6 Intangible rights (e.g. the right to life, the right to have a personal development), conditional rights (e.g. the right to education, the right to privacy), indirect rights (e.g. foreigner rights) and the so-called third generation rights (Augustin Fuerea, „Introducere în problematica dreptului internațional al drepturilor omului” (An

*Introduction into the Notion of International Human Rights Law)*, Editura Era, 2000).

7 Nicu, M. I., *Drept internațional public, (International Public Law)*, Editura SERVOSAT, Arad, 1997, p. 196.

8 Universal Declaration of Human Rights of December 10th, 1948 - issued by The General Assembly of the United Nations, published in the Brochure of December 10th, 1948.

## The functions and values of sports

It seems that the present day finds us witnessing an overturning of all values. We deny everything, even that which not long ago surrounded us with respect. Still, we must not forget that the struggle of values for preeminence is defined by a permanent contradiction. History shows us that the values which are imposed on everyone are only those that "completely satisfy the logical and psychological criteria of the human soul" - the foundation of a value needs to be based on logic and the theory of knowledge. The wideness and validity of value can only be established through logic. Two points of view are to be taken into consideration when discussing the issue of value, as follows: a. *subjective-psychological*, which induces a value-based psychology, and b. *objective-logical*, which determines the most profound and thorough research, *the logic of value*.<sup>9</sup>

The concept of sport is attributed numerous functions, more significantly: *conative function* (satisfaction of the desire to move, to act), *competition function* (stimulation and satisfaction of the desire to compete), *performance maximizing function* (performance capacity development in a biological, psychological and social scheme), *social function* (integration, social assertion, communication, emulation - also comprising the national identity representation, cultural and economic functions).

The sporting culture is an essential element of economic development and social regeneration and stands as an indicator of the quality of life and individual welfare. The law - seen as a normative phenomenon - is also entrusted to create the legal framework in an ample social phenomenon such as sports. It is imperative that all participants to sporting activities are guaranteed a legal reliability, in the sense that individual behavior needs to be influenced in the name of value requirements that encompass both legal values and positive values of sports - more so in the current context, marked by the excessive commercial nature of sports and its transformation into an instrument of political manipulation (which can lead to a legitimization of illicit behavior both in and off "the court").

The sporting phenomenon requires a prior understanding and embracing of meanings attributed to various notions and concept, such as: society and globalization, social system, state, culture, politics, deontology, law, rights and liberties, social values, interest groups etc. If we accept Warren Weaver's definition of communication - mainly relevant through its pragmatism - „Communication is *the totality of processes by which one mind can influence another*”<sup>10</sup> - then we can understand the importance of the functions served by all communicators<sup>11</sup> (medics, priests, pedagogues, psychologists, coaches, athletes, managers, science communicators, actors, artists, lawyers, magistrates etc.) - including mass-media which - not seldom - act as a social control tool, a source of social pressure on the individual.<sup>12</sup>

Communication made by sports communicators has a political dimension, but also a cultural conditionality. It is in this respect that cohabitation between systems of different cultures should be promoted - *cultural cohabitation* - truly a unity in diversity, more effective than multiculturalism seen as a prerequisite of a nation-state.<sup>13</sup>

Human rights should not form an enclosed philosophical, political, religious and social system. They should be kept open to diverse ways

of thinking, to diverse beliefs, cultures and social practices. Each person is a subject of law. This is a common feature which establishes the link with society. The human being has inalienable rights, irrespective of the will of the authorities. The concept of fundamental rights makes a direct reference to the natural rights philosophy, inspired from the European humanist movement.

Debates over natural rights are open as a result of new situations that arise in human life, of new claims - both on a national and international level. The international human rights law constitutes a summation of natural rights expressed in the present context of globalization, to which states must associate in order to transform them in positive rights - rights that establish common principles and can be applied by a concrete international jurisdiction. Contemporary legal papers on the protection of human rights provide a large number of philosophical notions that can constitute the basis for a consensus. These international law of human rights texts focus on the link between the individual and the authorities, on the legitimacy of the latter's actions and on the conditions under which individuals with equal rights coexist. Owing to the respect of each individual and the equality in rights and dignity, human rights constitute an open system for the peaceful coexistence of a multitude of cultures, beliefs, practices and social organizations.<sup>14</sup>

## Returning to natural law - starting point for promoting other (possible) fundamental rights

Research on human rights has developed a history of concepts related to them, as well as a history regarding the struggle to validate these rights. The philosophy of rights originates from individualist theories.<sup>15</sup> According to these theories, the legitimacy of power centers on human individuality. Power is legitimate only if it acknowledges the rights of the individual as an entity. Starting from here, we can question ourselves regarding the historic origins of individualism.

On a long term, human rights encourage self-interest to the prejudice of community spirit, because they favor individualism without balancing it with the community. It is a well-known fact that individualism is the fundament of human rights, hence the critic upon human rights transforms into a critic upon modernity, which, in turn, is based on individualism. First generation human rights arise from the affirmation of the individual, which has substantially marked the destiny of modernity up to present times.

The term "human rights" remained unknown until the French Revolution of 1789. That is why it has been said that it represents a construct meant to create a new authority, to replace the divine authority. The cause of this authority was found in *man* and his will power. It is extremely difficult now to renounce rights, if not impossible without creating insurmountable difficulties. What can and should be done is to bring individual rights in balance with the community spirit, considering the fact that individual rights cannot exist unless the *relationships* between humans change substantially - that is to say liberty - e.g. - cannot manifest without the background of a well organized society. Only a person with optimal relations with others can benefit from freedom. From here, a come-back to natural law is inherently necessary, more so in order to promote the right to practice sporting activities as a fundamental human right.

## The actuality, utility and definition of the legal grounds for the existence of acquired or possible rights

First generation fundamental rights and liberties cannot be extended to all citizens without a proper protection of second generation rights. In this case, the two generations of rights are not only non-contradictive, but complementary. One cannot talk about the right to life, to freedom, if these comprise only a part of society, the rest being eluded through various means. State intervention can assure a certain degree of social equilibrium. Profound social movements have changed the balance between social forces and have required the state to intervene in order to grant first generation rights to everybody.

One of the causes for the decline of human rights is their unjustified multiplication and extension to various fields that, often, seem utterly fanciful. Their multiplication leads to a decrease in their importance, which in turn can provoke an increase in the state's power stance. This

9 Petre Andrei, *Filosofia valorii (The Philosophy of Value)*, Editura Polirom, Iași, 1997, pp. 15-23.

10 Prutianu Ștefan, *Tratat de comunicare și negociere în afaceri (Business Communication and Negotiation Treaty)*, Editura Polirom, Iași, 2008, p. 339.

11 Martine Fournier, *Coaches and communication - interview with Philippe Meirieu*, in Philippe Cabin, Jean-Francois Dortier (coord.), „Comunicarea” (*Communication*), Editura Polirom, 20010 (Collegium collection), Iași, 2010, p. 198-201; the best medic-communicator (in Romanian) - <http://www.i-medic.ro/stiri/tudor-ciuhodaru-cel-mai-bun-communicator-medic>;

12 Elisabeth Noelle-Neumann, „Spirala Tăcerii. Opinia publică - invelișul nostru social” (*The spiral of silence. A theory of public opinion - Our social skin*), Editura Comunicare.ro., București, 2004.

13 Sylvain Allemand, *Pentru o coabitare...culturală - interviu cu Dominique Wolton (For a cultural ... cohabitation - interview with Dominique Wolton)*, in Philippe Cabin, Jean-Francois Dortier (coord.), „Communication”, Editura Polirom, 2010 (Collegium collection), Iași, 2010, p. 294-297.

14 Maria Voinea, Carmen Bulzan, *Sociologia drepturilor omului (Human rights sociology)*, Universitatea din București, 2004, [ebooks.unibuc.ro/Sociologie/voinea/1](http://ebooks.unibuc.ro/Sociologie/voinea/1)

ambiguity of human rights derives from the paradoxical nature of the human being, which strives on being free of constraints while concurrently stating the necessity of order. What should be considered is that the two concepts should be balanced and mutually dependable. We agree with the statement that “individual freedom cannot be limitless, but the same forces that determine the necessity for limitations can, if permitted, unbearably restrain the scope of human freedom”<sup>16</sup>. The multiplication of human rights cannot be measured only from a quantitative and qualitative perspective. If in the field of quantity, the essential aspect is measurement, we ask ourselves if the right to life and freedom can be measured.

Considering the social importance of the sporting phenomenon, it is necessary to promote the right to practice sports - as a fundamental right of the human being - because this right identifies itself with many civil, political and economical and social rights (the right to work, the right to health welfare), cultural ones (the right to benefit from education, the right to participate in cultural life, the right to have a protection of the moral and material interests deriving from one's work - with emphasis on sporting creations), a person's right to fulfill their economic, social and cultural rights in order to maintain dignity - laid down as fundamental rights in national and international legislations. We must emphasize its particularity in the universal nature of contemporary human society - obviously, considering the communities' inclination to receive this right - this is the only means through which we could make use of the legal instruments for the protection and guarantee of human rights.

The updating methods are conceived differently by the theorists that have pondered in this field. A concern for updating the concept of freedom has always been present, and it focuses on the relationship between individual freedom and power, a relationship which leads to a conception on human rights. As latency is updated, history unfolds itself, and human rights tend to impose themselves. We feel that the multitude of acquired rights - comprised of the third generation fundamental human rights - are in decline also because they are not justified from a legal point of view. These have to be defined by bringing together four essential conditions, without which no right can exist, both in the positive and natural law: 1. a *bearer* who can exert a right; 2. a *scope* that can give meaning to that right; 3. *opposability* which allows the bearer to exert his right in court; 4. an organized *sanction* (as to realize the right)<sup>17</sup>.

### The right to practice sports and its role, as prescribed by the law

In Romania, according to Article 2, para. (5) of Law no. 69/2000 on Physical Education and Sport, “the practice of physical education and sport is a human right, without any discrimination, guaranteed by the state. Exercising this right is free and voluntary and independently undertaken or as part of associated sports structures.” Physical education and sport stand for “all forms of physical activities aimed, through an organized or independent participation, to express or improve physical fitness and mental well-being, to establish civilized social relations and lead to results in competitions at any level” - art. 1 para. (2). As prescribed by the law, physical education and sports activities include physical education, school and university sports, sports for all persons, high-level sports performance, exercise carried out for maintenance, physical development or therapeutic purposes - art. 2 para. (3).

By guaranteeing the promotion of this right, its social importance arises from the content of art. 2 and 3 of the law: “Art. 2 - (1) physical education and sports are activities of national interest supported by the state, (2) In accordance to the applicable legislation, the state recognizes and stimulates organizational actions to promote physical education and sports, held by public authorities and, where appropriate, non-governmental organizations focusing on education, the national defense institutions, public order, national security, health, in companies and other sectors of social life, (4) The State guarantees the performance of specific functions in the public and private sector in physical education and sport, in accordance with the principles of collaboration and responsibility of all interested parties, (5) The practice of physical education and sport is a human right, without discrimination and guaranteed by the state. Exercising this right is free and voluntary and undertaken independently or as part of associated sports structures, (6) The State recognizes and guarantees the natural and legal right to free association for the establishment of sports entities. Art. 3 para. (1) The government units and educational institutions, sports institutions and nongovernmental organizations have the obligation to support sports for all persons and high-level sport performance and to ensure organizational and material conditions for practicing physical education and sport in local communities, (2) The public government authorities and institutions referred to in paragraph (1) shall foremost ensure proper conditions for practicing physical education and sport with respect to preschool children, young persons and the elderly, for purposes of social integration, (3) The public administration authorities must offer the necessary conditions for practicing physical education and sport to persons with physical, sensory, mental and other handicaps in order to sustain their personal development and integration within society and the resources to allow disabled athletes to participate in national and international competitions organized for such persons”.

It is necessary to make a clarification of terminology, to distinguish between the definition provided by the Romanian legislature in year 2000 with respect to “physical education and sport activities”, with that established and enshrined in the European Union's White Paper on Sport. For reasons of clarity and simplicity, the White Paper on Sport uses the definition of „sport” which was established by the Council of Europe in its European Sports Charter<sup>18</sup>: „Sport means all forms of physical activity, which, through casual or organized participation, aims at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.”

In consistency with one of its objectives - the welfare of its citizens, in all forms - the E.U. declared 2004 as the “European Year of Education through Sports”<sup>19</sup>. The aims of this initiative were established as follows: to make educational institutions and sports organizations aware of the need for cooperation in order to develop education through sport and its European dimension, given the great interest that young people take in all kinds of sports; to take advantage of the values conveyed through sport to develop knowledge and skills whereby young people in particular can develop their physical prowess and readiness for personal effort and also social abilities such as teamwork, solidarity, tolerance and fair play in a multicultural framework; to promote the educational value of student mobility and exchanges, particularly in a multicultural environment, through the organization of sporting and cultural contacts as part of school activity; to create a better balance between intellectual and physical activity in school life by encouraging sport in school activities etc.<sup>20</sup>

In 2007, the Lisbon Treaty introduces sports within the categories and fields of competence of the EU. Therefore, according to art. 6 of the Treaty on The Functioning of the European Union<sup>21</sup> (TFUE), the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- a protection and improvement of human health;
- b industry;
- c culture;
- d tourism;
- e education, vocational training, youth and sport<sup>22</sup>;
- f civil protection;
- g administrative cooperation.

15 Dănișor Gheorghe, *Filosofia drepturilor omului (Human rights philosophy)*, Editura Universul Juridic, București, 2011, p. 16.

16 Dănișor Gheorghe, *Filosofia... (Human rights...)*, Editura Universul Juridic, București, 2011, p. 83 and ff. with reference to James M. Buchanan, *Limitele libertății. între anarhie și Leviathan (The Limits of Liberty: Between Anarchy and Leviathan)*, Institutul European, 1977, p. 17.

17 Dănișor Gheorghe, *Filosofia... (Human rights...)*, Editura Universul Juridic, București, 2011, p. 86 and ff. - with reference to la Guy Haarscher, *Philosophie des*

*droits de L'Home*, Editura de L'Universite de Bruxelles, 1993, p. 12, 42.

18 The European Union's White Paper on Sport, Introduction, footnote no. 2

19 Augustin Fuerea, „Manualul Uniunii Europene” (*The European Union Manual*), 5th edition, revised and addended, according to the Treaty of Lisbon (2007/2009), Editura Universul Juridic, București, 2011, Annex II.

20 Decision no. 291/2003/EC of the European Parliament and of the Council, of 6 February 2003, establishing the European Year of Education through Sport 2004.

21 Consolidated version (JOUE C 83/120, 30.3.2010).

# Law and Sports in India

## Development Issues and Challenges

This book is the first endeavour in elucidating the anomalies in the passionate and popular sports industry in India. This book is a must have for every sports lover, sportsperson, sports administrator and anyone connected with the sports industry. This work seeks to create legal awareness about the issues that are of vital importance in sports.

Justice M. Mudgal and the assistant authors Vidushpat Singhania and Nitin Mishra have taken into perspective the incidents and decisions worldwide in the sporting sector while applying their expertise in law. The authors have managed to derive a paradigm for sports in India, which should form the legal framework for the sports industry.

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## **SPORTS LAW CONFERENCE - MARCH 2012**

The Centre for Sports Law Research at Edge Hill University, in association with Brabners Chaffe Street Solicitors, is pleased to announce its Sports Law Conference to be held at the Hilton Deansgate Manchester on 29-30 March 2012.

Aimed at legal practice, clubs, athletes, governing bodies, regulators and academics, the conference will feature a series of keynote speakers and high quality, peer reviewed papers. Proposals for papers are invited on any issue concerning sport and the law, and may be written from a practice-oriented, theoretical, or interdisciplinary perspective. The organisers also invite proposals for complete panels of three or more papers.

Proposals will be reviewed by the organisers, assisted by the Conference advisory panel.

### **Advisory Panel**

Jack Anderson, Queens University Belfast

Carol Couse, Brabners Chaffe Street

Deborah Healy, University of New South Wales

Mark James, University of Salford

Ken Foster, University of Westminster

Dave McArdle, University of Stirling

James Nafziger, Willamette University

Rob Siekmann, TMC Asser Institute

Maurice Watkins, Brabners Chaffe Street

Stephen Weatherill, University of Oxford

Conference fees start at £195 and include a two day conference pass, lunch and refreshments on both days and a drinks reception to be held at Cloud23 at 18.00 on March 29th. At an additional cost, delegates are also offered CPD hours and the option of a conference dinner following the drinks reception. Further details and a draft programme are available at [www.edgehill.ac.uk/law/research/cslr](http://www.edgehill.ac.uk/law/research/cslr)

Title XII - Education, Vocational Training, Youth and Sport<sup>23</sup> provides, in article 165 TFUE 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<sup>24</sup>. 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.

The importance of sports in achieving the objectives set forth at EU level, among which resides the free movement of persons<sup>25</sup>, is obvious, furthermore taking into consideration that, according to the European Court of Justice in Luxemburg<sup>26</sup>, professional athletes are considered workers in terms of EU law and are therefore provided with all rights that occur from this quality.

Olympic Charter in force as from 8 July 2011 provides the Fundamental Principles of Olympism:

1. Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.
2. The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.
3. The Olympic Movement is the concerted, organized, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism. It covers the five continents. It reaches its peak with the bringing together of the world's athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.
4. **The practice of sport is a human right.** Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.

22 Authors' emphasis.

23 Idem.

24 Idem.

25 Augustin Fuerea, „Dreptul comunitar al afacerilor” (Community Business Law), 2nd edition, revised and addended, Editura Universul Juridic, București, 2006, p. 104.

26 Bosman Case (CJE Decision of December 15th 1995, Case no. C-415/1993, Royal Belgian Football Association (ASBL), Royal Club Liégeois SA and European Football Association Union (UEFA) c. Jean-Marc Bosman).

27 White Paper on Sport, p. 14.

5. Recognizing that sport occurs within the framework of society, sports organizations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organizations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.
6. Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.
7. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.

#### Closing statements

The purpose of this article was to describe the importance of the role attributed to sports in contemporary society, a fact which made possible our endeavor to valorize sports as a category of the fundamental rights of humans. Our initiative can contribute to a concrete legalization of the sporting domain, by using the protection and guarantee instruments that are particular to fundamental rights.

Sport is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity. The Olympic ideal of developing sport to promote peace and understanding among nations and cultures as well as the education of young people were born in Europe and have been fostered by the International and the European Olympic Committees. Sport attracts European citizens, with a majority of people taking part in sporting activities on a regular basis. It generates important values such as team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfillment. It promotes the active contribution of EU citizens to society and thereby helps to foster active citizenship. The Commission acknowledges the essential role of sport in European society, in particular when it needs to bring itself closer to citizens and to tackle issues that matter directly to them. However, sport is also confronted with new threats and challenges which have emerged in European society, such as commercial pressure, exploitation of young players, doping, racism, violence, corruption and money laundering. (White Paper on Sport, Introduction, para. 1-3).

In this context we find it necessary to underline the following: “*The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognized and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognized, but it cannot be construed so as to justify a general exemption from the application of EU law.*”<sup>27</sup>

The International Sports Law Journal



## TAIEX Workshop on Sport in Yerevan (Armenia)

**On 24 October 2011, Robert Siekmann delivered a presentation on the subject of “Reinforcement of active citizenship through participation in a team, organization of amateur sport based on non-profit clubs and volunteering in the EU, particularly in the Netherlands”, at the European Commission’s TAIEX (Technical Assistance Information Exchange Instrument) Workshop on EU Economic and Social Dimensions of Sport in Yerevan (Armenia), which was organized in cooperation with the local Ministry of Sport and Youth Affairs.**

# Strict Liability and Sports Doping - What Constitutes a Doping Violations and What Is the Effect Thereof on the Team?

by Niel du Toit\*

## Introduction

The doping violations by two Springbok rugby players at the 2010 tour to the UK and Ireland made me realise that there is a major lack of knowledge regarding Sports Law and specifically the rules regulating sports doping in South Africa.

The national coach, several other prominent sports personalities and members of the media did not seem to grasp the seriousness of the situation. There seems to be the perception that the players are not guilty of doping violations because they did not know that they were using prohibited substances. The coach even went further to say that if the whole team was tested on that specific day, even more players would have tested positive.

In this case the banned stimulant was in a supplement given to the players in the warm-up before the Test against Ireland and is a product that has been used by the Springboks before - without any adverse analytical findings - and is used by other professional and national teams in both hemispheres. It was manufactured in the UK and was tested at South African Rugby Union's request in order to ensure that it complied with the requirements of the World Anti-Doping Agency (WADA).

At the subsequent disciplinary hearing it was then ruled that there was no fault on the part of the Players and that a reprimand be the appropriate sanction on the facts of this case. The disciplinary committee reasoned that

*"the Players have already suffered the ignominy of being sent home early from the overseas tour, provisionally suspended for nearly three months and having their doping charges made public with the concomitant embarrassment, uncertainty, personal anguish and damage to their reputations. All of this should serve as a deterrent for other players against the indiscriminate and careless use of supplements. Any further punishment for the Players in question would, however, be out of kilter with their lack of fault in the matter".<sup>1</sup>*

It is important to note that the match was an international friendly and thus not of the same importance as for example a World Cup match. The Irish Rugby team subsequently did lodge an appeal or any other complaint regarding the doping violations by the two Springboks.

I am however of the opinion the consequences of the doping violations would have been much more severe had this match been a World Cup match.

The aim of this article is thus to show just what exactly constitutes a doping violation and the consequences that it could have on a team.

In order to examine the above it is important to first understand how sports doping is regulated.

## The IOC

Sports doping is regulated by the World Anti-Doping Agency (WADA), which was established by the International Olympic Committee (IOC) as an independent international doping control body.

The need for such an agency was highlighted by the 1998 Tour de France doping scandal. So in order to ensure a fair playing field and to protect the health of athletes the International Olympic Committee undertook a rigorous programme to combat the doping problem. This started with the World Conference on Doping in Sport in Lausanne in

February 1999. And as it was proposed at the conference, the World Anti-Doping Agency was established in November 1999 as an independent international doping control body. Then in 2003 WADA adopted World Anti-Doping Code (WADC). And it is this Code that now regulates sports doping internationally.<sup>2</sup>

The second question is where WADA derives its status or power to regulate the different sporting codes. The answer lies in the importance of membership to the IOC.

The IOC is arguably the most powerful and prestigious sporting organisation in the world. Almost all the different sporting codes wish to be a member of the IOC, and in order to be a member it is prerequisite to accept the Olympic charter. The Olympic charter is the founding text and fundamental source of the law of the IOC.<sup>3</sup> Thus, we can say that the Olympic Charter is the most important text regulating the sporting world. And it is clearly stated in the charter that a sporting code or country that wish to be part of the IOC must accept the World Anti-Doping Code. Thus, almost all sporting codes in South Africa have made the WADC part of their constitutions and South Africa as a country has even adopted the code by means of legislation with the South African Institute for Drug-free Sport Act 14 of 1997.

In practise this means that sport organisations (in the case of rugby, the International Rugby Board and the South African Rugby Union) will be forced to adopt the WADC in their constitutions. And thus rugby players will have clauses in their player's contract stating that they will be bound by the WADC.

## Violations

Article 2 of the WADC states that the following will constitute an anti-doping rule violation:

2.1.1 *The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.*

2.1.1 *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1*

The WADC thus creates a position where an athlete would have automatically violated an anti-doping rule when a prohibited substance is found in his sample. The principle of strict liability therefore applies which means that a doping violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance or was otherwise negligent or otherwise at fault.<sup>4</sup>

The strict liability rule is not something new that was created by the WADC. It is a well know legal rule and is contained in several statutes around the world, especially in statutory offences. The justification for strict liability in regards to statutory offences seems to also be applicable to the WADC. Here follows an explanation on several of the arguments in favour of the strict liability rule.

## Arguments in favour of Strict Liability

When a prohibited substance is present in an athlete's body that athlete will have an unfair advantage against "clean" athletes. The question of how the substance entered the body then becomes irrelevant. In the case *Quigley v UIT CAS 94/129* the Court of Arbitration for Sport gave the following rationale for automatic disqualification when a prohibited substance was found in an athletes sample during competition:<sup>5</sup>

*"It is true that a strict liability test is likely in some sense to be unfair in an individual case... where the athlete may have taken a medication as the result of mislabelling or faulty advice for which he or she is not responsible... but it is also in some sense unfair for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will*

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25 January 2011 at SARU Head Office, Newlands, Cape Town

2 Cloete et al Introduction to Sports Law in South Africa (2005) 185.

1 Decision of a Saru Judicial Committee in the matter of Mahlatse Chiliboy

3 Mestre "The Legal Basis of the Olympic Charter" (2008) ISLJ 100.

Ralepelle and Bjorn Basson. Committee: Adv J Lubbe SC, Dr G Van Dugteren, dv R Stelzner SC. date and venue of hearing:

4 Cloete et al 187.

5 Gardiner et al Sports law (2006) 3rd edition 242.

*the rules of competition be altered due to the unfairness. Just as the competition will not be postponed to await an athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption...*"

In cases such as anti-doping rule violations it will be very difficult if not impossible to prove that the defendant had acted with fault or negligence. Athletes would simply say that they do not know how the substance got into their bodies. Thus, such athletes will go unpunished rendering the WADC useless.

Strict liability thus creates the situation whereby athletes will do everything possible to make sure they are in accordance to the rules of the WADC. An athlete is supposed to know the rules of the WADC. He or she must accordingly implement extra measures to make sure that he or she does not get prohibited substances in their bodies.

Lastly it is important to understand that a doping rule violation does not automatically lead to a punishment or sanction. Article 10 of the WADC states that the athlete will have the possibility to avoid or reduce sanctions if he or she can establish to the satisfaction of a tribunal how the substance entered his or her system, demonstrate that he or she was not at fault or significant fault or in certain circumstances did not intend to enhance his or her sport performance.

Although the concept of strict liability seems harsh, I still believe it is the only viable option to combat doping. Doping is an extreme problem and thus extreme measures must be taken to overcome this problem. It is thus extremely important that all involved in sport understand the WADC and the consequences of doping violations.

With the above in mind it is thus clear to see why the disciplinary committee decided that to reprimand the players would be the appropriate sanction in the case of the two Springbok rugby case. It does however, contrary to popular belief, still mean that they were guilty of a doping offence.

The situation however becomes more complicated when two or more players from the same team are tested positive for a prohibited substance, which was the case in the above situation.

### Consequences of doping violations on team sports.

Article 11.2 of the WADC state that *if more than two members of a team in a team sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an appropriate sanction on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any consequences imposed upon the individual athletes committing the anti-doping rule violation.*

The IRB Regulation 21.23.2 similarly states that *If more than two members of a Team are found to have committed an anti-doping rule violation during the Match, or Tournament or International Tour, the entity with jurisdiction over the Match, Tournament or International Tour shall impose an appropriate sanction on the Team (e.g. loss of points, Disqualification from a Match, or Tournament or International Tour and/or other sanction) in addition to any Consequences imposed upon the individual Player(s) committing the anti-doping rule violations.*

Although a severe sanction such as disqualification will not easily be imposed, there have been cases which were heard by the CAS in which there were argued that a team be disqualified because of doping violations by some of its players or members.

An example would be the case of Arbitration CAS ad hoc Division (OG Beijing) 08/001 Azerbaijan National Olympic Committee (ANOC), Azerbaijan Field Hockey Federation (AFHF), Hidayatova Nazira and others (the Players) v. Fédération Internationale de Hockey (FIH), award of 2 August 2008. At the 2008 Women's World Hockey Qualifier for the Olympic Games the final was contested between the teams of Azerbaijan and Spain, which Spain subsequently won. However, after the event it was confirmed that two Spanish players tested positive

for a prohibited substance. Because two players tested positive, Spain could have been disqualified, however the disciplinary commission found that only one player was guilty of a doping violation. Azerbaijan appealed to CAS, but Spain won the case on a technical point. This case however shows that teams will make use of Article 11 in order to disqualify other teams whose players violated the WADC, and that CAS will be willing to entertain such matters.

Another example is the case of Wales vs. UEFA where the Welsh football team lost out to Russia in a play off for the European Championships of 2004. After the play off matches one of the Russian players failed a doping test subsequently the Welsh argued that not only should the player be banned but Russia should also be disqualified from the tournament meaning that Wales would take their place. UEFA however dismissed the claim saying that the UEFA doping regulations did not make provision for the sanctioning of a team because of the conduct of the player.

The case was subsequently taken before the CAS<sup>6</sup>. UEFA argued that CAS had no jurisdiction to adjudicate the matter, but CAS decided that it did indeed have authority. However in the end the CAS held that Russia would keep its place in the tournament.<sup>7</sup> Like the "Hockey case" this case just further shows the willingness of the CAS to entertain these matters.

Examples of teams, which were indeed disqualified because of doping offences, would be:

- The 2008 USA Olympic equestrian teams horses tested positive for a prohibited substance;
- The 2003 British men's 4 x 100m relay squad lost their silver medals following Dwain Chambers positive drugs test at the recent World Athletics Championships;
- The 2000 USA Olympic women's 4 x 100 and 4 x 400 relay teams.

It is however important to note that while WADC provided specific rules concerning sports which are not Team Sports but where Awards are given to teams (such as track and field relays), the WADC provides no express rule for team competitions within such sports. Thus, the WADC-leaves each International Federation total discretion as to the rules to adopt for its own sport. The International Association of Athletics Federations (IAAF) for example imposes an automatic disqualification for relay teams if one of its members is found guilty of a doping offence (Article 42)

Although there is no example of a disqualification in a team sport the above examples shows that action can and will be taken against teams whose members violated the WADC and that teams may indeed in the future be disqualified.

It is thus clear that if two or more Springbok rugby players test positive at the Rugby World Cup 2011, it can cost the Springboks their whole campaign. We can now only hope that the Springbok management, and for that matter all sports in South Africa, have learnt their lesson and in the future will make sure that they are up to date with the WADC and understand the working and consequences thereof.

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<sup>6</sup> CAS 2004/A/593 - Football Association of Wales v. UEFA.

<sup>7</sup> Charlish: Football Association of Wales v UEFA: [2004] I.S.L.R. 73.

# Commercial Appropriation of Identity: How Could Two Courts Get It So Wrong?

by Steve Cornelius\*

## 1. Introduction

In our modern society the images famous people have become important commodities in a megabillion dollar global entertainment industry. Legal systems across the globe have recognized this commoditization of the individual and have attempted with various degrees of success, to regulate the commercial appropriation of an individual's image. This recognition of publicity rights has brought this aspect of the law in frequent conflict with the fundamental values underlying freedom of speech. Disputes concerning publicity rights invariably require of the courts to balance the individual's privacy and publicity rights against the appropriator's right to free speech. The courts have thus far approached the issue largely on a case-by-case basis, without laying down clear guidelines that could be of assistance. This note suggests that the lack of clear guidance has apparently led two courts on either side of the Atlantic to hand down what appears to be flawed judgments. It further suggests that clear guidelines can be formulated and such guidelines could have guided those courts to reach different conclusions, or not.

The dilemma for any court in a case dealing with an infringement of publicity rights, is to distinguish between unlawful commercial appropriation and lawful free speech. What makes the unauthorized publication of a photograph in a celebrity magazine different from the unauthorized use of that same photograph on a box of cereals? In both instances the photograph is used to obtain a commercial advantage. Why is it acceptable in some instances while it is frowned upon in others?

## 2. Baseball Fantasy Leagues

In *CBC Distribution and Marketing Inc v Major League Baseball Advanced Media LP*<sup>1</sup> the United States Court of Appeals for the Eighth Circuit held that the fantasy leagues, in which CBC used the names of athletes from various professional leagues without their permission, was protected under the First Amendment even though CBC did so for commercial gain. The court held that in this case, First Amendment protection prevailed over any right to publicity protection which Missouri law could provide to Major League Baseball Advanced Media.

Justice Arnold ruled that state law rights of publicity must be balanced against First Amendment considerations. He concluded that the former must give way to the latter in the case before the court since the information used in CBC's fantasy baseball leagues is all readily available in the public domain. He further explained that

"[c]ourts have also recognized the public value of information about the game of baseball and its players, referring to baseball as 'the national pastime.' ... A California court, in a case where Major League Baseball was itself defending its use of players' names, likenesses, and information against the players' asserted rights of publicity, observed, 'Major league baseball is followed by millions of people across this

country on a daily basis ... The public has an enduring fascination in the records set by former players and in memorable moments from previous games ... The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances.' The ... 'recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.' "

It seems that the court may not have fully appreciated the exact nature of fantasy leagues and placed too much emphasis on the records and statistics of the players. It is not merely a case of fans discussing the game in social chat rooms or news channels reporting on the game. Fantasy leagues are virtual environments where actual players are in fact traded. Participants make up virtual teams composed of actual players. They score points according to the players' performances on the actual field. Participants pay fees to set up their teams and pay additional fees when they wish to trade players in the course of the season. They are in fact paying the operators of the fantasy leagues to use the names of actual players as part of their fantasy teams. In other words, the players are commodities that are being traded in these virtual environments.

Justice Arnold also based his opinion on the consideration that none of the interests that are typically protected under publicity rights were present in this case. He listed amongst these interests the right of an individual to reap the rewards of his or her endeavors and to earn a living, as well as to encourage a person's productivity. Since baseball players are already handsomely rewarded for their play and because they earn large sums from endorsements and sponsorships, he reasoned, the afore-mentioned interests are not infringed upon to any extent which would require protection.

It is ironic that Justice Arnold refers to the players' rewards through endorsements and sponsorships while failing to consider whether the free use of the players' names in fantasy leagues would result in dilution of the players' publicity values.<sup>2</sup> In *Zacchini v Scripps-Howard Broadcasting Co*<sup>3</sup> the United States Supreme Court referred per Justice White with apparent approval to *Kalven*<sup>4</sup> who states that

"[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."

In a billion dollar fantasy league industry,<sup>5</sup> can there be any doubt that the free use of a player's name in respect of fantasy leagues, unjustly enriches the operators of the league at the expense of the player who will no longer be able to share in any of the spoils generated through the fantasy leagues which are based on the player's toil and hard earned fame? Ironically, Justice Arnold cited *Zacchini* multiple times in support of his judgment, but neglected to pay attention to this particular aspect of the judgment in *Zacchini*.

It seems therefore that the court may have got it wrong in this case. At least one commentator suggested that Justice Arnold may have been strongly influenced by his personal feelings as an avid baseball fan.<sup>6</sup> However, as Henning correctly points out,<sup>7</sup> the case was won and lost on the merits of the arguments contained in the briefs. CBC cleverly decided that the old adage, a best defense is a good offense, would hold true. They pre-empted action by Major League Baseball Advanced Media and, in so doing, put themselves in a position from where they could dictate the direction in which the proceedings would go. They cleverly confused the distinction between the free use of baseball statis-

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1 505 F 3d 818.

2 As explained in *Haelan Laboratories Inc v Topps Chewing Gum* 202 F 2d 866.

3 433 US 562, 97 SCt 2849, 53 L Ed 2d 965 (1977).

4 "Privacy in Tort Law Were Warren and Brandeis Wrong?" 31 *Law & Contemp Prob* 326, 331 (1966).

5 "Intellectual Property - Eighth Circuit Holds That the First Amendment Protects Online Fantasy Baseball Providers' Use of Baseball Statistics in the

Public Domain - *CBC Distributions & (and) Marketing Inc v Major League Baseball Advanced Media LP*" 122 *Harvard L Rev* 1439 (2008).

6 K Henning "*CBC Distribution and Marketing Inc v Major League Baseball Advanced Media LP* - Affirmed on appeal; Player names and statistics are in the public domain" (12 March 2011) <http://copywrite.org/2007/10/17/cbc-distribution-and-marketing-inc-v-major-league-baseball-advanced-media-lp-affirmed-on-appeal/> (accessed on 20 July 2011).

7 *Ibid.*

tics that are in the public domain, and the use of the actual players as commodities to be traded in the virtual environment. And because of the primary emphasis in the case was placed on information in the public domain, it is difficult to fault the court for concluding that First Amendment Rights should trump the players publicity rights in this particular case. Counsel for Major League Baseball Advanced Media should have seen the ploy coming and should have formulated their defense in a way that would have exposed the distinction between the use of statistics that are in the public domain on the one hand, and the actual trading of players as commodities in a virtual environment on the other hand. In the end, any court can only rule on the case put before it.

### 3. Surfers and Sunbathers

On the other side of the Atlantic, in *Wells v Atoll Media (Pty) Ltd and another*,<sup>8</sup> the Western Cape High Court in South Africa held that Atoll Media, as owner/publisher of a surfing magazine *ZigZag*, was liable for sentimental damages to the subject of a photograph which appeared in the April 2006 edition of *ZigZag* and which was aired on satellite television as part of a commercial for *ZigZag*.<sup>9</sup> The photograph, which was published without consent, depicted the subject in a bikini, kneeling in the shallows at the shoreline on a public beach. The photograph was taken from behind and the subject's face was obscured by the angle as well as her hair. Although it was essentially the only photograph on the page concerned, it was not a full page photograph and was part of a section entitled "Dishing up the photo feast", together with various other photos depicting beachgoers and surfers in action. Nonetheless, Justice Davis described the photograph as a pinup published

"... without any attempt to obtain consent and with the clear purpose of including it to increase the attraction of a commercial publication ... [i]n the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights."<sup>10</sup>

The implications of this opinion are staggering, particularly if one considers the way in which the photograph appeared in the magazine. It begs the question whether all magazines and newspapers are not sold for profit and whether all photographs published in newspapers and magazines are not published "with the clear purpose of including it to increase the attraction of a commercial publication."<sup>11</sup> It also seems to suggest that the media may not display or publish a photograph depicting an individual subject, unless that subject has consented to such display or publication. If this is indeed how Justice Davis interpreted the law, it cannot be sustained as it would clearly be incompatible with any notion of free speech as enshrined in the Bill of Rights.<sup>12</sup>

Strangely, though, Atoll Media never asserted its right to free speech

and freedom of the media in this case. This seems particularly inexplicable since the Bill of Rights in South Africa also applies to private disputes such as this one, without the need to demonstrate any state action.<sup>13</sup> Sadly, this neglect by counsel for Atoll Media may apparently not only have deprived it of arguably its best possible defense in the matter, but it may also have deprived society in general of a clear precedent on the law in so far as the tension between publicity rights and free speech is concerned.

In actual fact, however, the omission may have been fortuitous since this may indeed have been the worst possible test case to mark the boundaries between free speech and publicity rights. There is one seminal aspect of the case which I have thus far conveniently ignored - the subject was only twelve years old when the photograph was taken. In this regard Justice Davis remarked<sup>14</sup> that

"[i]n the present case ... the editor of *ZigZag*, chose to publish a photograph of a girl in a bikini, posing provocatively... The manner in which the photograph was published without any regard to the context or implications for a twelve year old girl ... does not, in my view, satisfy the test for reasonable publication. ... I am fortified in this conclusion by reference to section 28 (2) [of the Bill of Rights] in which it is provided that a child's best interests are of paramount importance in every matter concerning the child" (judge's emphasis).

As a result, even if Atoll Media had raised free speech as a defense against the claim, the subject's rights in terms of section 28<sup>15</sup> would have trumped Atoll Media's right to free speech. For this reason, Justice Davis's judgment should not be interpreted to suggest that the media may never without consent display or publish a photograph depicting an individual subject. He clearly qualifies his opinion by expressly limiting it to the context of the case. As a result, the value of this judgment as precedent may be questionable and it should be used with some circumspection.

### 4. Balancing the Interests

The two cases discussed above highlight the difficulties courts face when dealing with the enforcement of publicity rights. Any claim based on the use of a person's image without consent, always involves a variety of interests that have to be weighed against each other. On the one hand, the individual has a right to privacy, an interest in being left in peace and not be exposed to inappropriate publication, as well as an interest in being protected against commercial exploitation. On the other hand there is the right to freedom of expression and the public interest in the free flow of information, not only in respect of dissemination of news, but also with regard to everyday human activities.<sup>16</sup>

The matter could be simplified substantially by applying a simple exploitation test. The general rule should be that freedom of speech prevails, unless the unauthorized use of a person's image amounts to an improper exploitation of the individual concerned or of the reputation of that individual. But what amounts to improper exploitation? The difference between proper and improper exploitation relates to the two possible meanings which the verb "exploit" could have, one with a positive connotation and one with a negative connotation. According to

8 (1196/1/2006) [2009] ZAWCHC 173 (9 November 2009), available at [www.saflii.org/za/cases/ZAWCHC/2009/173.html](http://www.saflii.org/za/cases/ZAWCHC/2009/173.html) (accessed on 20 July 2011).

9 This case dealt with both a claim based on defamation and a claim based on the publication of a photograph depicting the plaintiff without her consent. For the purposes of this note, I will only deal with the latter aspect.

10 At paras 45 - 49.

11 At para 45.

12 S 16 (1) of the Constitution of the Republic of South Africa 1996 (available at [www.info.gov.za/documents/constitution/1996/96cons2.htm#16](http://www.info.gov.za/documents/constitution/1996/96cons2.htm#16) (accessed on 20 July 2011)) provides:

16. Freedom of expression

1 Everyone has the right to freedom of expression, which includes -  
a freedom of the press and other media;  
b freedom to receive or impart information or ideas;  
c freedom of artistic creativity; and  
d academic freedom and freedom of scientific research.

13 S 8 of the Constitution of the Republic of South Africa 1996 (available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#16> (accessed on 20 July 2011)) provides:

8. Application  
1 The Bill of Rights applies to all

law, and binds the legislature, the executive, the judiciary and all organs of state.

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

3 When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

a in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that leg-

islation does not give effect to that right; and

b may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

4 A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

14 At paras 43 - 45.

15 Constitution of the Republic of South Africa 1996, available at [www.info.gov.za/documents/constitution/1996/96cons2.htm#16](http://www.info.gov.za/documents/constitution/1996/96cons2.htm#16) (accessed on 20 July 2011).

the *Oxford Dictionary*,<sup>17</sup> “exploit” means firstly “to make full use of and derive benefits from (a resource)” and secondly “make use of (a situation) in a way considered unfair or underhanded; benefit unfairly from the work of someone, typically by overworking or underpaying”. And it is in this latter sense that we should regard improper exploitation. To illustrate the point, one can refer to examples from existing precedents.

The unauthorized use of a person’s image which goes to the heart of that person’s ability to earn a living is improper.<sup>18</sup> If the person using the image without consent will be unjustly enriched at the expense of the person whose image is being used, that would be improper.<sup>19</sup> If the unauthorized use of a person’s image could lead the public to believe that the person has some connection with the product or endorses the product that would be improper.<sup>20</sup> If the image of a person is used without consent in advertising, that would be improper.<sup>21</sup> If the unauthorized use of a person’s image amounts to violation of a relationship of trust, the use is improper.<sup>22</sup> The unauthorized publication of a provocative photograph of an underage girl or boy is improper.<sup>23</sup>

The unauthorized use of a person’s image therefore amounts to improper exploitation if it amounts to the kind of use that one would not reasonably expect to see unless that person has consented to such use. In this regard, one could ask: “Would a reasonable person assume that the person involved consented to such use of his or her image?” If the answer is “yes”, unauthorized use is improper if no such consent had actually been given.

On the other hand, if the unauthorized use of a person’s image amounts to parody that would be proper use and the right to freedom of speech should prevail.<sup>24</sup> The use of personal information which is already in the public domain is proper use.<sup>25</sup> The incidental use of a photograph alongside a newspaper or magazine article which has some connection with the subject of the photograph is proper.<sup>26</sup> The use of someone’s image in the course of disseminating news or information concerning other day to day activities is generally proper.<sup>27</sup> Where the owner of copyright uses the creator’s image in relation to the copyrighted work, the use is proper.<sup>28</sup>

In short, the unauthorized use of a person’s image amounts to reasonable exploitation if it amounts to the kind of use one would reasonably expect to see from day to day without the person concerned necessarily being involved.

## 5. Conclusion

If one applies the guidelines set out above to the case of *CBC Distribution and Marketing Inc v Major League Baseball Advanced Media LP*<sup>29</sup> a reasonable person would most likely view it as the kind of use one would reasonably expect to see from day to day without intervention of the players concerned. It will most likely be seen as yet one more way in which fans consume baseball statistics and demonstrate their knowledge of the sport by pitting their skills against those of other fans. Where fans pay to take part in fantasy leagues, they are in fact engaging in some form of gambling on sport. How does the selection of nine baseball players with the aim of essentially predicting which players will in the course of the season be most successful, differ from picking the winning horses in harness racing or thoroughbred racing? As a result, one could argue that baseball players have as much interest in the use of their names in fantasy leagues as drivers, jockeys, trainers or horse owners have in gambling on horses. Consequently, the court reached the correct conclusion in *CBC Distribution and Marketing Inc v Major League Baseball Advanced Media LP*<sup>30</sup>

If one similarly applies the guidelines set out above to *Wells v Atoll Media (Pty) Ltd and another*,<sup>31</sup> a reasonable person would probably have concluded that the photograph was one of many taken of a model at a photoshoot for which the model was in all likelihood compensated. The photograph looks decidedly posed and not at all like the kind of photograph one would expect to be taken at random of sunbathers at the beach. If one adds to that the fact that the girl in the photograph was underage, it is patently clear that the court reached the correct conclusion also in this case.

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16 *Vassiliades v Garfinckel’s Brooks Bros* 492 A 2d 580.

17 Available at [oxforddictionaries.com/view/entry/m\\_en\\_gb0281480#m\\_en\\_gb0281480](http://oxforddictionaries.com/view/entry/m_en_gb0281480#m_en_gb0281480) (accessed on 20 July 2011).

18 *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562, 97 S Ct 2849, 53 L Ed 2d 965 (1977).

19 *Ibid.*

20 Rest 3d Uncom § 46.

21 *Olan Mills Inc v Dodd* 353 SW 2d 22; *Fergerstrom v Hawaiian Ocean View*

*Estates Inc* 441 P 2d 808; *Prudhomme v Proctor and Gamble Co* 800 F Supp 390; *Carson v Here’s Johnny Portable Toilets Inc* 698 F 2d 831; *Candebat v Flanagan* 487 S 2d 207; *Haith v Model Cities Health Corp* 704 SW 2d 684; *Staruski v Continental Telephone Co* 581 A 2d 266.

22 *Vassiliades v Garfinckel’s Brooks Bros* 492 A 2d 580; *Haith v Model Cities Health Corp* 704 SW 2d 684.

23 As in *Wells v Atoll Media (Pty) Ltd and another* (11961/2006) [2009] ZAWCHC

173 (9 November 2009), available at <http://www.saflii.org/za/cases/ZAWCHC/2009/173.html> (accessed on 20 July 2011).

24 *Hustler Magazine v Fallwell* 485 U.S. 46.

25 *CBC Distribution and Marketing Inc v Major League Baseball Advanced Media LP* 505 F3d 818.

26 *Lawrence v AS Abell Co* 475 A 2d 448; *Martinez v Democrat-Herald Publishing Co* 669 P 2d 818; *Crump v Beckley Newspapers Inc* 320 SE 2d 70.

27 *Vassiliades v Garfinckel’s Brooks Bros* 492 A 2d 580.

28 *Gilham v Burlington Northern Inc* 514 F 2d 660; *Gee v CBS Inc* 612 F 2d 572.

29 505 F 3d 818.

30 *Ibid.*

31 (11961/2006) [2009] ZAWCHC 173 (9 November 2009), available at <http://www.saflii.org/za/cases/ZAWCHC/2009/173.html> (accessed on 20 July 2011).

# Variations of European Sports Law in Football Practice

by Pavel Hamernik\*

## 1. Introduction

It is not only European Union law which can exclusively influence the regulation of national sports association. European sports law may have more variations due to parallel existence of supremacy of EU law and so called autonomous global sports law of private law character, created by international sports organizations (with status of primacy over national sports associations).<sup>1</sup> In theory it looks easier: objective general law is applied in relation to everybody, *erga omnes* and according to principle “what is not forbidden is allowed” there exists also autonomy to self-regulate some affairs by determined group, mainly through juridical acts *inter partes* by contract, including those who voluntarily acceded to this “autonomous law” as members.<sup>2</sup> Nowadays resolution of disputes is difficult to predict due to specifics of sport sector’s mosaic of legal and quasi legal relationships, how far *within* or *beyond* self-regulation of sport’s sector the case will get? From the point of view of hierar-

chy of norms, autonomous law cannot be *contra legem* and European Court of Justice (now Court of Justice of EU) has demonstrated vital role on sculpturing the relationship between the law and sport.<sup>3</sup> Nevertheless it concerns only autonomy on some sports’ sector affairs on “EU’s terms.”<sup>4</sup> There are variations available through national law

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tion and its development was already described in this Journal by Ken Foster, issue 3-4/2010, ‘Transnational Law in Action’, p. 20.

2 Knapp V. *Theory of Law*, 1st edition, C.H.Beck., 1995, p. 52-53. He adds, that a form of autonomous law could be also customs like rules of the game.

3 Beloff M.J., Kerr T., Demetriou M., *Sports Law*, Hart Publishing, 1999, p. 4.

1 The status of this private sports regula-

too, which are shown below as a basis for autonomy of sports sector by constitutional guarantees of a state.<sup>5</sup>

International sporting associations among others define the rules of the game, ensure their harmonization and implementation within national associations, also enforcement of decisions of national associations (avoiding moving of sanctioned persons to other parts of the world to practice the same sport), provide appellate body like Court of Arbitration for sport and disciplinary structures.<sup>6</sup> This article uses the example of practice of football to describe the issue what rules are having effect on national football associations' affairs and dispute resolution in variations consisting general law and law of International sporting association. It starts with "Bosman type" transfer case of Martin Sus in the light of (not exclusively) EU law. Then it describes examples of influences of mentioned autonomous self-regulation of sport created by international sports associations. Cases built on such "multi-sources regulation" test the quality of existing system of legal environment too. That is why at the end of article sort of hard case of Bohemians Prague club saga demonstrates the difficulties when autonomous law is not capable unlimitedly cover all needs of sports sector. General law most probably is to be still needed to heal specific issues of an area of sport due to its commercialization, no matter if general law will be made at national or European level thanks to new article on sport of Lisbon Treaty.

## 2. Martin Sus transfer case - mosaic of alternatives and autonomies within and outside EU law

### 2.1. EU and sport are both special

EU and its legal system is very original and in a sense specific as well with the aim of, among others, creating of functioning internal market: „Nothing could be worse than to try to leap into the study of this new legal order equipped with domestic preconceptions about what judges do and about how law should be interpreted and applied... economic, political, and social objectives exert a profound formative influence on the law”.<sup>7</sup> Thus while promoting the effectiveness of European law the European Court reasoned in *Walrave and Koch*<sup>8</sup> that the prohibition on discrimination based on nationality does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at collectively regulating gainful employment and services. This applied to sporting associations, despite at that time sport was not covered by European law. The European Court did recognize specifics of sport sector in the case of *Bosman*<sup>9</sup>. At the same time in *Meca-Medina and Majcen*<sup>10</sup> the Court took a broad view of the scope of Community trade law, but having brought sporting rules within the scope of the Treaty it shows itself readily prepared to draw on the importance of matters not explicitly described as "justifications" in the Treaty in order to permit the continued application of challenged practices which are shown to be necessary to achieve legitimate sporting objectives and/or are inherent in the organization of sport.<sup>11</sup> The Court treats sport as special industry.

### 2.2. When EU law is uncompromising

Circumstances in practice might direct the case with the result that there are situations when European law treats the sporting subjects the same way like in any other field although initially the story could have been

different. The following example shifted the sporting association to uncompromised grip of European procedural law. In August 2007 Czech FA refused to issue International Transfer Certificate (ITC) to the Royal Netherlands Football Association (KNVB) for Martin Sus, Czech player, for the reason that he was according to his current club contractually bound as professional till July 2008. Martin Sus asserted that his professional contract is not valid (that he signed an amateur contract only) and sought interlocutory proceedings in the Dutch Court (Utrecht) in August 2008.<sup>12</sup> Utrecht Court made a decision where it ordered Czech FA to cooperate in releasing Martin Sus to Netherlands (according to art. 9 in conjunction with art. 3 of Annex 3 of FIFA Regulations on Status and Transfer of Players). If Czech FA did not cooperate within 10 days from the date of the judgment, it would be subject to substantial financial sanction of scale from penalty per day (*dwangsom*) up to maximum cap amount of money declared by the court.<sup>13</sup> The player consequently sought the enforcement of the decision of Dutch Court in the Czech court according to Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and at the same time applied for execution of Czech FA property.<sup>14</sup> The Czech Court of first instance did order the execution towards Czech FA property based on Dutch Court's order, so in this situation European law did not treat sports association differently than any other subject.

### 2.3. When EU law could have been potentially respectful based on "EU's terms"

Under normal circumstances Martin Sus case could have been useful for the sports law testing the regulation on transfers in the light of EU law of free movement of persons. Czech FA took steps according to FIFA Regulations on Status and Transfer of Players (FIFA Transfer Regulations), thus applied rules specific to sports association (which Commissioner Monti described as rules finding the balance between fundamental rights of players and legitimate aims of the competition)<sup>15</sup>. It could have tested the look of Dutch court at sports rules. It also could have been interesting preliminary ruling question towards European Court, since this court has not yet interpreted current FIFA Transfer Regulations in the light of free movement of persons. For some reason, the Czech FA representatives did not show up in Utrecht in 2008 and decision was in fact default judgment. Czech FA found out about this decision in December 2009 when served by enforcement based on Council Regulation (EC) 44/2001 and execution order from Czech court (new Czech FA administration was elected in June 2009, thus it was unexpected "Christmas gift" from past times). The Czech FA only had to defend itself in the sphere of European procedural law with the status as any other subject and missed the opportunity to try to argue on the merit in the light of principles capable of justifications on "EU's terms" classics of *Bosman* or *Meca-Medina and Majcen*.

### 2.4. Switching to classic autonomy of global sports law derived from national constitutional guarantees (through "pointsman" in form of Regulation no. 44/2001)

The Czech FA did win on appeal based on procedural grounds<sup>16</sup> but

4 Terminology used by Weatherill S., in 'Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?' *International Sports Law Journal*, 3-4/2010, p. 17.

5 I do not deny public international law could be a triumph once for sports sector as well, in the light of Council of Europe for example. At the same time IOC got special observer status at UN (see material *Legal Committee by Decision without Vote Recommends International Olympic Committee for General Assembly Observer Status*. <http://www.un.org/News/Press/docs/2009/gal3369.doc.htm>) or by Swiss Federal Council (Art. 15/1 of Olympic Charter) but Court of Justice of EU still considers it as an undertaking for purposes

of Competition law (T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II - 3291, C- 519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I - 6991, para. 38). For comparison see also *Public International Sports Law - "A Forgotten" Discipline?* written for this Journal by Wax A., 3-4/2010, p. 25).

6 Summary from description by James M. in *Sports Law*, Palgrave Macmillan, 2010, p. 43.

7 Weatherill S., *Cases and Materials on EU Law*, 7th ed., Oxford University Press, 2006, Introduction to the book.

8 Case 36/74 [1974] ECR 1405.

9 Para 106 of Case C-415/93 [1995] ECR I-4921: "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 encouraging the recruitment and training of young players must be accepted as legitimate".

10 Case C-519/04 [2006] ECR I- 6991.

11 Weatherill S., 'Bosman Changed Everything: The Rise of EC Sports Law', in *The Past and Future of EU Law, The Classics Revisited on the 50th Anniversary of the Rome Treaty*, eds. Maduro M., Azoulay L., Hart Publishing, Oxford, Portland, Oregon, p. 486.

12 Facts of the case at: <http://isport.blek.cz/clanek/ftbal/85534/ftbalista-sus-vysoudil-na-svazu-10-milionu.html>, [\[ftbalista-sus-muze-hrat-naridil-nizozemsky-soud-106-/ftbal.aspx?c=A081113\\\_084148\\\_ftbal\\\_ald\]\(http://ftbalista-sus-muze-hrat-naridil-nizozemsky-soud-106-/ftbal.aspx?c=A081113\_084148\_ftbal\_ald\).](http://ftbal.idnes.cz/byvaly-brnensky-</a></p></div><div data-bbox=)

13 Euro 400.000,- was confirmed by Sus's lawyer in <http://isport.blek.cz/clanek/ftbal/85534/ftbalista-sus-vysoudil-na-svazu-10-milionu.html>.

Martin Sus confirmed the scale starting from Euro 1000,- daily and the cap of Euro 400.000,- in [http://ftbal.idnes.cz/byvaly-brnensky-ftbalista-sus-muze-hrat-naridil-nizozemsky-soud-106-/ftbal.aspx?c=A081113\\_084148\\_ftbal\\_ald](http://ftbal.idnes.cz/byvaly-brnensky-ftbalista-sus-muze-hrat-naridil-nizozemsky-soud-106-/ftbal.aspx?c=A081113_084148_ftbal_ald).

14 Press release to the case by Czech FA at its official web [www.ftbal.cz](http://www.ftbal.cz), December 29th, 2009.

15 Press release of EU Commission on June 5th, 2002, IP/02/824.

let's consider how case could have proceeded even at this level of Regulation no. 44/2001 towards different kind of autonomy than on "EU's terms" classics as known from the case-law of European Court. Return to private autonomous system was still possible through article 34 (1) of this Regulation, which states that if recognition of judgment is manifestly contrary to public policy in the Member State in which recognition is sought, enforcement cannot be made. Czech Constitution's Charter of Fundamental Rights and Freedoms guarantees autonomy to associations established according to the Law on Association of Citizens no. 83/1990 Coll. of Laws. Sporting associations are on this regime. The only form of judicial review towards acts of the association is possible according to art. 15 of the Law on Association of Citizens and the Court may only check if the sporting association within its affairs made breach of its founding Statute or the law. The decision is declaratory, after all means within an association are exhausted (principle of subsidiarity). It is up to sporting association to decide if corrections of its decisions will or will not be made. In the case of Martin Sus Single Judge of FIFA Players' Status Committee decided in December 2008 to allow provisional registration of Martin Sus by KNVB for its affiliated Dutch club with immediate effect as an amateur.<sup>17</sup> Single judge found that former club of Martin Sus does not seem to be interested in his services anymore. The player has been away from the former club at that time already. This registration should be enough for the state court to respect it. Utrecht's court decision was not declaratory at all, not in line with art. 15 of above mentioned Law on Association of Citizens, thus unenforceable according to art. 34 (1) of the Regulation 44/2001 (not talking about litispendency issue, Mr. Sus went to the FIFA's Players' Status Committee according to Art. 23 (3) and Annex 3 of FIFA Transfer Regulations in October 2008, after submitting claim in Utrecht Court)<sup>18</sup>. The case could have continued to Court of Arbitration for sport (CAS) to end the case within the football sector since it is possible to appeal from FIFA Players' Status Committee to CAS according to art. 23 (3) of the FIFA Transfer Regulations.<sup>19</sup>

### 3. Other examples of autonomous sports regulation influencing national football

Why is it important to study the area of autonomous quasi legal norms of International sporting associations? If some cases for some reason finally do get to the hands of ordinary courts like above, these courts at least in Czech republic are sometimes in trouble when in practice the general law does not cover the issues of professional sport. Thus parties to the dispute use arguments based on sports associations' regulation. Ordinary courts ask independently national association for rules of the associations and other details like clarifying the FIFA Transfer Regulations or Players' agents regulations because ordinary courts do not know them. Also European Court of Justice could have obtained more information on the transfer system in case of *Bosman* to understand it perhaps better<sup>20</sup> or in the case of *Meca Medina and Majcen* after studying the CAS case and its appeal system to Swiss Federal Tribunal competent organs could have potentially stopped bringing the case to EU institutions.<sup>21</sup>

It is the fact that International sports associations may provide quality dispute resolution bodies with persons having knowledge of sports law like above mentioned Court of Arbitration for sport. Such a network of non-state actors can help substantially contribute to the legal certainty of the sports environment and improve national regulation. For example FIFA recommended CAS as model framework to Czech FA for the Arbitration Commission.<sup>22</sup> General assembly of Czech FA in June 2011 amended the rules in the light of these instructions. Similarly CAS recommends how things should work better. The dispute of two Czech clubs concerned scenario that transferee further undertakes to pay to the transferor the amount of money in case the player from the transferee's club is transferred or plays as a guest in another club. Clubs did not agree on interpretation of this clause. Losing party of this dispute who did not succeed in front of Czech FA's Arbitration Commission did not have in fact possibility of an appeal within Czech FA since rules on an appeal procedure had not been implemented by Czech FA at that time. CAS stated (despite Czech FA was not party to the proceedings) that fundamental principle of procedural fairness, which in many occasions CAS has recognized and protected, was breached.<sup>23</sup> Thus General assembly of Czech FA amended the rules in June 2009. CAS further promotes abstract terms like Olympic ideals of fair play.<sup>24</sup> The importance of CAS is also demonstrated by the fact that it is the highest organ deciding about final appeals according to World Anti-Doping Agency Codex.

### 4. Limited use of EU Law in the future?

Since there is no intention to create „common market of football”<sup>25</sup>, also in football practice there are situations where European law simply does not step in like in following example. In lower league Club A made a contract with another club B on the loan of player from club A to club B for period of time of one year, in the contract clubs agreed that in mutual football games club B will not nominate the player for the game. If the player were nominated for the mutual game, club B agreed to pay financial penalty. Club B nevertheless did nominate the player. Club A sought payment of the penalty. Arbitration Commission of the national football association decided in favor of Club A, club B defended itself at national court that the organ of association is acting against EU competition law. However, concerning EU competition law, effect on trade between member states must be potentially affected. Similarly in free movement of persons EU concerns obstacles of movement between the states. Thus *Bosman* case does not concern the transfer fees of transfers within the Member State.<sup>26</sup>

European Court was also criticized in relation to some of its reasonings resulting in uncertainty. It is true the results of the Court in the field of sports law were limited within the resolution of disputes which came to its hands.<sup>27</sup> The court only says YES or NO to the question if freedoms guaranteed by European law are unproportionally restricted. In *Bernard*<sup>28</sup> case the Court could not state its opinion (or model answer) on current FIFA Transfer Regulations although it would be interesting how the Court would evaluate principles on which FIFA Transfer Regulations are based. After *Bosman* decision it was difficult for foot-

16 Press release of Czech FA at its official web [www.fotbal.cz](http://www.fotbal.cz), July 17th, 2010.

17 On effect of provisional registration see Annex 3 of the FIFA Transfer Regulations.

18 On issue of litispendency in football Weger F., *Jurisprudence of FIEA DR*, T.M.C. Asser Press, 2008, p. 13.

19 Picturessness of facts of this case is illustrated in September 2009: Martin Sus returns to his former club where it all started, [xnovinky.cz/do-brna-se-vraci-z-twente-enschede-martin-sus-28270/](http://xnovinky.cz/do-brna-se-vraci-z-twente-enschede-martin-sus-28270/). (above described enforcement decision arrived to Czech FA later, in December 2009 but legal machinery did not stop. In December 2009 player stated that the case does not concern his club but Czech FA, that he deserves money from Czech FA for not being able to play in the past:

<http://isport.blesek.cz/clanek/fotbal/85557/od-svazu-dostal-10-milionu-a-je-to-malo-rika-sus.html>).

20 See footnote no. 359 in Weatherill S., *European Sports Law*, Collected Papers, T.M.C. Asser Press, 2007, p. 102.

21 Mitten M. J., Opie H., "Sports Law": *Implications for the Development of International, Comparative and National Law and Global Dispute Resolution*, Marquette Law School Legal Studies Paper, June 11th 2010 Final Draft, p.37. On the other hand European Court referred to CAS in *T-193/02 Piau v Commission* [2005] ECR II - 209.

22 Official web of Czech FA, January 31st 2011: „The main point of a meeting between FIFA and Czech FA representatives was harmonization of football norms

and mechanisms concerning Arbitration Commission of Czech FA. Key infringement FIFA observes in the fact that Czech Arbitration does not include players' representatives... FIFA recommended to establish the system like CAS, that is the open list of arbiters... FIFA concluded if this does not happen, that is if the new amended Statutes of Czech FA will not follow FIFA's rules concerning arbitration, FIFA will not recognize the decisions of Czech FA's Arbitration Commission."

23 CAS 2008/A/1468, para 58. The case was not at CAS's Appeal procedure but Ordinary arbitration procedure.

24 CAS OG Nagano 1998/004-005 *Czech Olympic Committee, Swedish Olympic Committee & S v IIHF*.

25 Infantino G., Mavroidis P., 'Inherit the

Wind: A Comment on the Bosman Jurisprudence', in *The Past and Future of EU Law, The Classics Revisited on the 50th Anniversary of the Rome Treaty*, eds. Maduro M., Azouli L., Hart Publishing, Oxford, Portland, Oregon, p. 501.

26 Para 89 of the *Bosman* judgment. Such approach is reflected also in FIFA Circular no. 592, June 12th 1996 and UEFA Circular no. 69 of 18th December 1995.

27 The issues of some inconsistency or opaque decisions Weatherill and Beaumont describe in relation to free movement of goods: "The court cannot dictate the submission of ideal disputes on which it can supply model answers"

(Weatherill S., Beaumont P., *EU Law*, Penguin Books, 3rd ed., 1999, p. 504-505).  
28 Case 325/08, 16th of March 2010.

ball sector to find out what rules to apply to follow conditions of EU law. National associations were informed by series of circulars of UEFA and FIFA to find out what system to adopt.<sup>29</sup> UEFA/FIFPRO Joint Press Release stated that “We firmly believe that a workable transfer system is vital to safeguard the jobs and career opportunities of footballers in Europe and to protect the future of football”.<sup>30</sup>

Following *Bosman* case an idea was made of financial pool for nursery clubs which lost amateur players they produced by development and training (players initially amateurs without contract leaving nursery clubs to get their first professional contract in another club).<sup>31</sup> The new FIFA Transfer regulations created a detailed system for the payment of training compensation, designed to encourage more and better training of young football players, and to create solidarity among clubs, by awarding financial compensation to clubs which have invested in training young players and the amounts of training compensation do not become disproportionate, and unduly hinder the movement of young players.<sup>32</sup> Regulations stipulate that each association must classify its clubs into different categories based on the extent of each club’s expenditure for training young players.<sup>33</sup> FIFA Transfer Regulations also provide solidarity contribution.<sup>34</sup> Solidarity contribution could be considered as sort of “internal taxation system to transfer money into hands of nursery clubs”<sup>35</sup>.

#### 4.1. Is *Bosman* outdated now?

Nowadays it is questionable how much *Bosman* case is still relevant threat for football at all. In practice we often see that unlike in Martin Sus example, players do transfer freely within above described FIFA Transfer regulations and above mentioned payments are paid consequently after the player indeed transfers. If that does not happen, Dispute Resolution Chamber of FIFA according to art. 24 of FIFA Transfer Regulations is competent to decide about the payments. It has been indeed overloaded body, since these claims are very frequent but it is quicker than potential preliminary ruling procedure at Court of Justice of EU where average duration of preliminary rulings was 16.1 months in 2010.<sup>36</sup> Time deficit is again demonstrated by *Bernard* case since it dealt with transfer system not in existence anymore at the date of judgment.

#### 5. Bohemians saga - hard case for both theory and practice of sports law

Issue when however sporting regulation seems to be short of resolution of particular commercial problems is for example well demonstrated by the area of bankruptcy which will be shown on the following Czech experience. If some particular club becomes bankrupt, can the sporting governing body (an association or a league body) expel the club from its membership? Simply doing so to avoid problems which may arise as described below? If bankrupt club is expelled, will football association be responsible for decreasing the value of a club? On the other hand why to keep bankrupt club in the competition only for the reason that Bankruptcy trustee could sell the players in favor of creditors? Valid bankruptcy law does not seem to cover these sports concerns in the Czech republic. The practice of Czech FA in the past had been that bankrupt club was able to transfer its rights and obligations in football competition to another subject which would continue membership at

Czech FA in the position of bankrupt club. The worst case scenario comes when there are more than one Bankruptcy trustees for one club in its bankruptcy history. If the first Bankruptcy trustee decided to make above mentioned transfer of rights and obligations to another subject and Football association within its autonomy agreed to it, new competition year is started by such a new subject. Nevertheless if first Bankruptcy trustee is replaced by another one by the court and newly appointed trustee asserts that his predecessor made series of mistakes resulting in a fact that rights to the players were not properly transferred in civil law. In how many years ordinary courts will decide this dispute? Football association within its framework considered transferee in the position of transferor and competition has already started with transferees’ participation. Can rights to the players as special kind of value be part of property Bankruptcy trustee can block and can he exclusively decide that concrete players will not be able to change their club anywhere without his approval because they belong to the values of bankrupt club? These issues have been inside Bohemians case. In February 2005 the bankruptcy proceedings were declared against FC Bohemians Praha a.s. (joint stock company). The bankruptcy trustee concluded a “contract on transfer of rights and obligations attached to membership of Czech FA and movables” towards AFK Vrsovice a.s. (nowadays called Bohemians 1905 a.s., also joint stock company). In April 2005 Executive body of Czech FA initially agrees with above transfer provisionally until all requirements of Statutes and rules of Czech FA will be completed by transferee.<sup>37</sup> In June 2005 Executive body of Czech FA confirms its per rollam voting on accepting AFK Vrsovice a.s. as a new member of Czech FA.<sup>38</sup> In June also AFK Vrsovice a.s. changes its name to Bohemians 1905 a.s.<sup>39</sup> However the Bankruptcy trustee of FC Bohemians Praha a.s. has been replaced and the second named Bankruptcy Trustee declared to the court new set of rights of the initial FC Bohemians Praha a.s., including rights to the players who were registered at the time of declaration of bankruptcy at FC Bohemians Praha a.s. In other words FC Bohemians Praha a.s. claims that the above transfer of rights and obligations was invalid, meaning that rights to players never transferred to Bohemians 1905 a.s. due to the fact that these rights were not proceeded by first Bankruptcy trustee according to the law of bankruptcy. To make things more confusing, the third club, initially named FC Strizkov Praha 9 also supports the view of FC Bohemians Praha a.s. that Bohemians 1905 a.s. is not valid member of Czech FA and FC Strizkov named itself as Bohemians Praha to continue with tradition of Bohemians and under this name played third highest league of Czech FA. Consequently Czech FA decided to exclude FC Strizkov from the competition in the year 2005/06 to play under the name Bohemians. The club defended itself in front of Civil Court and obtained the provisional measure in its favor against Czech FA. The court ordered Czech FA basically positive performance to accept the club FC Strizkov under the name Bohemians Praha in the competition and the club played due to this provisional measure complete competition year.<sup>40</sup> Czech FA subsequently concludes very interesting agreement of resolution of state of affairs in relation to FC Bohemians Praha a.s. stating that FC Bohemians Praha a.s. is still member of Czech FA.<sup>41</sup> The result is that there have been three Bohemians in the Czech FA competitors, FC Bohemians Praha and Bohemians Praha (from Strizkov) both claiming together that

29 FIFA Circular no. 592, June 12th 1996 and UEFA Circular no. 69 of 18th December 1995.

30 20th of December 1995.

31 For example UEFA Circular no. 21, April 4th 1996.

32 FIFA Circular no. 769, August 24th 2001. Training compensation shall be paid to a player’s training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player’s contract (Annexe 4 of FIFA Transfer Regulations).

33 FIFA Circular no. 1264, May 19th 2001.

Many clubs nevertheless investigate football CV of a player they are interested in to predict how much they would have to pay to his former clubs to avoid big expenses, the players’ passport concerning financial aspects seems to be also the criteria for involvement of a player in the acquiring club.

34 Solidarity payments of FIFA must be distinguished from UEFA Champions League Solidarity payment which concerns financial support of development of youth teams of clubs not participating in UEFA Champions League. In practice sometimes these payments are confused. Thus solidarity contribution means if a

professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (Annexe 5 of FIFA Transfer regulations).

35 Weatherill S., *Fair play Please! Recent Developments in the Application of EC Law to Sport*, CMLR 40 2003, at p. 69-70 he continues “for sustaining a large number of clubs than would survive in pure market conditions and to diminish gaps in economic strength between clubs. This would connect with the need to preserve a credibly competitive League, the most persuasive general rationale for permitting sports industry autonomy to regulate

itself in a more interventionist manner than would be permitted in other sector.”

36 Press release of the Court no. 13/11, March 2nd 2011.

37 Press release from the meeting of Czech FA Executive body, April 13th 2005.

38 Press release from the meeting of Czech FA Executive body, June 1st 2005.

39 Press release from the meeting of Czech FA Executive body, June 2005.

40 Press release of Czech FA, August 8th 2005.

41 Agreement available in Czech at the web page [www.bohemianspraha.cz](http://www.bohemianspraha.cz), section O konkurzu - dukazy.

42 Press release from the meeting of Czech FA Executive body, November 30th 2009.

Bohemians 1905 a.s. is not member of Czech FA. The newly elected Executive Committee of Czech FA (at General assembly of Czech FA in June 2009), basically the football government of Czech FA, declared in November 2009, that provisionally it is necessary to look at FC Bohemians Praha a.s. and Bohemians 1905 as members of Czech FA.<sup>42</sup> There was also at that time at the table appeal of FC Bohemians Praha a.s. and Bohemians Praha (from Strizkov) to Appellate and Review Commission of Czech FA which claimed the above decision of Czech FA on accepting the member Bohemians 1905 a.s. instead of FC Bohemians Praha a.s. as member of Czech FA is invalid (this Appellate Commission was not able to resolve the case from 2005 until 2010, see below). Meanwhile Bohemians Praha (from Strizkov) did make it to play in the top league of Czech FA (*Gambrinus liga*) under name FK Bohemians Praha a.s. and in 2010 refused to play 24th round of the league against Bohemians 1905 a.s. (Bohemians 1905 also played *Gambrinus liga*). FK Bohemians Praha a.s. (from Strizkov) claimed that Bohemians 1905 a.s. is not member of Czech FA and demonstrated by this act of refusal to play the need to resolve the Bohemians case by Czech FA and appealed at Czech FA the message to do something with it. Disciplinary Commission of Czech FA punished the club by deduction of points and financial punishment of 6 millions Czech crowns. Such a self/help was unacceptable for the Czech FA and administration of Czech FA waited for the resolution of the case by its Appellate and Review Commission and/or the courts. However Appellate and Review

Commission decided on above mentioned appeal of FC Bohemians Praha and Bohemians Praha (from Strizkov) submitted to Appellate and Review Commission of Czech FA in 2005 that it is not competent to review that decision of Czech FA on accepting Bohemians 1905 a.s. instead of FC Bohemians Praha a.s. as member of Czech FA (lack of jurisdiction to review decisions).

### Conclusion

This article showed examples of alternatives of dispute resolution in practice of football. Rather than placing these situations in theoretical brackets it showed sort of legal realism in the area.<sup>43</sup> I dare to state that litigation in front of Court of Justice of EU will not be large at all and majority effective dispute resolution in football will remain for the individual clubs and players at the level of football sector or in front of an organ the sector designates for resolution of disputes, that is the Court of Arbitration for sport (CAS), in other words in an autonomous system of sports associations.<sup>44</sup> Potentially complainants may remain within the regime similar to the above described Czech Law on Associations of Citizens (especially in scenario when EU law element is lacking) if they will not want to go to CAS and will attack decisions of national sports association in national court (and testing sport's autonomy in the light of national constitutional guarantees).<sup>45</sup> On the other hand Bohemians saga showed especially in commercial matters need of help of general law.<sup>46</sup>

<sup>43</sup> Resolution of disputes like *Meca-Medina and Majcen* from CAS to Court of Justice of EU flows in the direction reminding the way of circle of three arrows of the logo of recyclable material when one legal source beats, resp. recycles, the other (rather than direct way through classical pyramid of hierarchy of norms according to the shape of familiar pyramid of sources of law).

<sup>44</sup> In front of Court of Justice of EU bigger cases could show up where also national associations or players/clubs associations voluntarily intervene, cases similar to *S.A. Sporting du Pays De Charleroi, G-14 Groupement Des Clubs De Football Europeens vs. FIFA/UEFA* where at that time Articles 36 to 41 of FIFA Transfer Regulations were pleaded to be inapplicable because they breach European

Competition Law. FIFA Transfer Regulations allowed to national associations calling best national players for national teams games under certain conditions, thus more was at stake than individual interest of one player/club. Similarly TV rights cases or potentially rules on nationality like UEFA's Homegrown Players or FIFA's 6 plus 5. For comparison see example in McArdle D., Longitudinal Profiling and Sports Arbitration and the Woman Who Had Nothing to Lose, stating "Pechstein's decision to argue neither EU Law nor the European Convention on Human Rights seems remiss in retrospect, but time was of the essence and Pechstein played tactical game in her search for ruling that would allow her to compete", p. 52 in *Doping and Anti-doping Policy in Sport: Ethical, Legal and Social*

*Perspectives* / ed. by Mike McNamee and Verner Møller, Routledge, 2011.

<sup>45</sup> For example in the light of variations when we come back to the above example in this article describing the scenario of Club A and Club B agreeing on the loan of player under the condition that this player will not be playing in mutual games, this problem between clubs occurred for some reason not once and once the club went to national court (arguing among others by EU competition law as described above) and on previous occasion to CAS, where CAS was by the way very realistic: One of the clubs argued that principle of balance of competition and Fair Play is the "Highest principle of sports law". CAS concluded that it is very doubtful whether anyone can argue with a "Fair Play" concept in the commer-

cial relationship (CAS 2009/A/1834, October 13th, 2009).

<sup>46</sup> Whether national or European, perhaps basis for it could be new article on sport in Lisbon Treaty to help for European inspirations in this complex area: "diverse legal orders can co-exist in Europe and especially where connected by the channels of EC law, seek to learn one from the other", Weatherill S., *Harmonisation: How Much, How Little?* (2005) European Business Law Journal, p. 545. (However harmonization is not possible - Craig P., *The Treaty of Lisbon: Process, architecture and substance*, (2008) 33 E.L. Rev. April, Sweet and Maxwell and Contributors, p. 147).

# Arbitration Tribunal for Sport Affairs at the Polish Olympic Committee

by Tomasz Pasieczny\*

## Introduction

The aim of this article is to show the recent changes in Polish regulations regarding the sports judicial bodies, concentrating mainly on the Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee (Trybunał Arbitrażowy ds. Sportu przy Polskim Komitecie olimpijskim). The author will try to show how the replacement of the Qualified Sport Act (Ustawa o Sporcie Kwalifikowanym) with the Sport Act (Ustawa o Sporcie) affected the Tribunal and the sports disputes in Poland. Besides analyzing the regulations of the above mentioned Acts the author will also examine the most famous case in the history of the Polish Arbitration Tribunal and the conflict between the Polish regulations and FIFA Statutes. The Sport Act that recently came into force in Poland drastically changed the jurisdiction and power of the Arbitration Tribunal. What is really interesting is the fact that most of the provisions that were erased from the final version of the document existed in its draft which only proves that the decision not to implement them in the new act was

made very late. Although the spectrum of changes was very wide for the purpose of this article only some modifications will be analyzed. To explain and understand the changes, it would help to go back to 2008 and the decision of the Arbitration Tribunal for Sport Affairs at the Polish Olympic Committee to appoint an interim curator for Polish Football Association.

## The Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee Decision from 29 September 2008 to - till the End of the Proceedings and for the Time It Last- Appoint Dr. Hab. Robert Zawlocki as the Interim for Polish Football Association

It was and still is clear, that the supervision of Polish sports associations belongs to the Minister of Sport and Tourism. The Qualified Sport Act in Articles 18 par. 1 and 23a provided the Minister of Sport and Tourism

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with the right to submit the request to the Arbitration tribunal to suspend the authorities of the sports associations in Poland.

*'Tribunal, mentioned in the Art. 42 par. 1 may, at the request of the supervising body, in the form of decision, suspend each individual member of the Polish sport association authorities or the Polish sport association authorities'*

Also further regulations (including Statutes and Regulations of the AT itself) allowed Arbitration Tribunal to appoint the interim curator for, in this case, Polish Football Association.

*'The jurisdiction of the Tribunal covers: processing of requests of the supervising body, in the proceedings to apply the measure mentioned in the Art. 23 a of the Qualified Sport Act' (Statutes of the Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee)*

*'Till the end of the proceeding mentioned in par. 1, Tribunal [...] may appoint an interim' (Qualified Sport Act)*

The Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee decision from 29 September 2008 to - till the end of the proceedings and for the time it last- appoint Dr. hab. Robert Zawlocki as the interim for Polish Football Association was not only widely analyzed and commented but also criticized. It is also my conclusion that the decision and further actions of the interim were of highly disputable validity. I would like to point your attention to the most important aspects of my findings.

#### Legality of the decision

1. The above mentioned regulations implemented "obligatory arbitration" in the Polish judicial system. Although this concept is getting more and more popular in the sport industry, the Polish Constitution clearly states that the justice system is exercised by courts and, although parties can decide to subject the dispute to arbitration, they can only do it freely. There was no intent to arbitrate from both parties in this case. Arbitration by definition should be voluntary.

2. Polish judicial system guarantees two instances, however the Qualified Sport Act did not provide the parties with the right to launch an ordinary appeal.

3. As the suspended Polish Football Association authorities clearly opposed the decision of the Arbitration Tribunal the interim, in order to act, needed the court order declaring the enforceability of the analyzed decision:

*'The court declares the enforceability of an arbitration award or the settlement concluded before the Arbitration court, suitable for implementation by execution by granting the enforceability order' (1214 § 2 of CCP)*

4. The Qualified Sport Act mentioned two different functions:

- Interim
- Temporary interim appointed till the end of proceedings.

The Minister of Sport and Tourism in his own request asked Arbitration Tribunal:

*'to suspend the authorities of the Polish Football Association and to appoint the interim and the temporary interim till the end of the proceedings.'*

One of the first decisions of the appointed interim was to suspend the Polish Football Association authorities. My detailed analysis of his actions and the existing regulations clearly shows that the right to suspend was exclusive to the AT and it did not belong to the temporary interim. The fact that it was such a function clearly comes from the wording of decision made by Tribunal stating that:

*'till the end of the proceedings and for the time it lasts it appoints the interim...'*

My research also revealed that some of the arguments mentioned by other lawyers commenting on the decision were invalid. Some of them were trying to argue, based on the Code of Civil Procedure, that only the interim had the right to launch a cassation complaint as he was representing the Polish Football Association.

The right of the parties to launch this complaint came from the Art 44 par 1:

*Against the disciplinary or regulatory decision made by the Tribunal in the matters mentioned in Art. 43, and against the decision based on Art. 23 a, in the case of the gross breach of the law or manifestly unjust decision, the right to launch a cassation appeal to the Supreme Court is given' (Art 44 par. 1 of the Qualified Sport Act)*

This interpretation presented above would make no sense, as it is obvious that the suspended Polish Football Association authorities were the party in the dispute, not the interim by himself.

#### National law and FIFA regulations conflict

While lawyers in Poland were arguing if the decision and the actions of the interim were legal, FIFA and UEFA started sending letters underlining dissatisfaction with the decision. FIFA gave Polish government the deadline, threatening to suspend all Polish national teams and clubs from all international competitions (UEFA was obviously supporting this attitude). The pressure from the international football governing bodies combined with many legal disputes regarding the decision resulted in the withdrawal of the Minister's request.

It is the right time to look deeper into the regulations governing the Polish Football Association actions. What is interesting, although should not be surprising Polish football governing body in its regulations refers to both, FIFA's regulations and national law.

*'Polish Football Association acts in accordance to the Law on Associations, other provisions of the law and this Statute'. (Art 5 § 1 of the Polish Football Association Statutes)*

*'While carrying out its tasks, Polish Football Association follows the statutes, regulations, other FIFA and UEFA provisions, and the Statutes of these organizations' (Art. 5 § 2 of the Polish Football Association Statutes)*

Obviously the national law should override FIFA Statutes, however it is clear only in theory. FIFA's power to suspend all Polish teams from all international competitions was an argument good enough for the government to give up and step down. As stated above Polish former Qualified Sport Act was in contradiction to FIFA Statutes. Although many provisions have been changed, including the most relevant ones regarding the supervision of the sport associations, the main difference is that Minister of Sport and Tourism has to submit his request to the state court, not Arbitration Tribunal as it used to be. Such court may, 'in the form of decision:

1. Suspend the authorities of Polish sport associations
2. Dissolve Polish sport association [...]' (Art. 23 par 1 of the Sport Act)

The regulations are still clearly in conflict with the FIFA Statutes providing for the complete independence of the Football Association from the government.

#### The new act on sports - the decrease of the role of the arbitration tribunal

For the purpose of this article I decided to concentrate only on the part of the Sport Act devoted to the jurisdiction of Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee, or should I say on the erased part of the Sport Act. The whole chapter 6 of the draft titled 'Settling sport disputes' did not find its place in the final document because of mainly two arguments stating that the Code of Civil Procedure provisions regarding arbitration were complete and there was no need to implement them in another act and the fact that it would guarantee the independence of the sport associations in Poland. As you can see from the provision quoted above the second aim was not reached. In fact, Arbitration Tribunal was deprived of the jurisdiction of the appeals from the disciplinary bodies of sport associations, is also no longer responsible for the execution of the Minister of Sport and Tourism requests to suspend the association and to appoint the interim as this responsibility now belongs to the state courts.

As a result of the changes the obligatory arbitration model was abandoned. Taking into consideration the fact that the Polish Constitution does not allow the parties to be forced into arbitration, such a decision should be regarded as a step in the right direction. On the other hand

though, there is no doubt that the new Sport Act does not follow current tendencies in the world of sport where obligatory arbitration is becoming more and more popular. It could be argued that the Arbitration Tribunal, by being stripped of the cases it was established to deal with, lost the sole sense of existence. A couple of years ago the biggest was that the ties between the Tribunal and the Polish Olympic Committee were too strong. Although this hasn't been changed it does not seem to be a relevant issue any more with the very own necessity for such a Tribunal to exist under the analyzed regulations being questioned. While the sport arbitration is becoming more and more powerful around the globe with the recent changes of the law, in Poland it became nearly meaningless.

It is not too late for the legislator to reconsider the recent changes in Polish law, as they are without doubt going in the wrong direction.

Appeals from the disciplinary decisions made by sport bodies should be under the jurisdiction of the Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee. Taking into consideration the fact that the legislator decided to maintain the governmental supervision of the sport associations it is hard to imagine a better body to execute it. Although on different terms than before, the Tribunal should be able to be efficient in this type of cases. Even looking at the name of the Tribunal we can see that there is a need to make it much more independent from the Polish Olympic Committee, as it was done in the case of Court of Arbitration for Sport and the International Olympic Committee. Only by making the above mentioned changes the Arbitration Tribunal for Sport Affairs of the Polish Olympic Committee can be saved.

The International Sports Law Journal

## The Civil Liability of Teachers and Trainers for the Acts of the Under-Age Sportsmen, from the Perspective of the New Civil Code of Romania\*

by Alexandru Virgil Voicu\*\* and Réka Kis\*\*\*

Defining the Concept of the Civil Liability of the Teachers and Trainers for the Acts of the Under-age Sportsmen

The liability of the teachers and trainers is a form of the civil liability for the acts of other persons. This latter one is regulated by the section 1000 of the Romanian Civil Code and by the article 1372 of the New Civil Code.

Thus, the liability of the teachers and trainers is a civil liability<sup>1</sup>. Two inherent principles particularize civil liability, namely the rule of *restitutio in integrum*<sup>2</sup> and the rule of *restitutio in natura*<sup>3</sup>. Civil liability has two main forms, respectively tort liability and contractual liability<sup>4</sup>.

*Tort liability* - looked upon as the common form of the civil liability - can be defined as one's legal obligation stemming from either a civil wrong, other than contractual ones, or injury for which a court remedy is justified.<sup>5</sup>

The *contractual liability* - thus, the special form of civil liability - is the duty of the debtor of an obligation assumed under a contract or agreement to repair the damage caused by his failure in performing in accordance with the contract; either by delaying the execution of his obligations, or by executing them only partially or not executing them at all<sup>6</sup>. The contractual liability intervenes only between the parties of a contract, as a result of breaching a precise and a priorly determined obligation. Therefore, whenever the conditions of the contractual liability fail to fulfill, one should examine whether the damage doesn't meet the conditions of the tort liability, which is to be applied in that case<sup>7</sup>.

Though tort liability and criminal liability are similar in some regards and are often linked together, they are not to be confounded. The essential differences between the two emerge from their different purpose and different field of interest: while the purpose of the tort liability is repairing damages caused by unlawful, extra-contractual acts, the purpose of criminal liability is punishing the criminals, seen as persons having extremely serious, unlawful behavior and to defend the society from the acts committed by them<sup>8</sup>. Thanks to the repairing purpose of the

tort liability, the main field of action of it is the *patrimony* of the debtor, while in case of criminal liability - due to its educating and protecting role<sup>9</sup> - the punishment of the author is pursued and therefore, the sanction has a more *personal nature*<sup>10</sup>.

The *tort liability of the teachers and trainers* ought not to be confused with the *professional liability* either, since the latter one is not considered a judicial liability<sup>11</sup>.

The tort liability can be classified as follows: the liability for one's personal acts, which is stipulated in sections 998-999 of the present Civil Code<sup>12</sup>; the liability for other persons' acts, of whom conditions are stipulated in section 1000<sup>13</sup> and finally the liability for the objects in one's custody, the rules of which are established by sections 1001-1002<sup>14</sup>. The fundamental difference between the liability for one's personal acts and the one based on section 1000 is the existence of negligence, as a condition of the liability: negligence is an indispensable condition for incurring the liability for personal acts, but the liability for other persons' acts can occur even without the negligent behavior of the one held responsible for paying the damages.

The section 1000 par. 4 from the Civil code stipulates the liability of *teachers* and *artisans*. Regarding the first category, in the field of sport, the subjects are the teachers and trainers, regardless their position and didactic rank, in primary education, as well as from club and associations with non-work purpose. The artisans in the field of sport can be defined as the teachers of physical education and the trainers who have the legal obligation to teach their apprentices a profession, or in this case, the profession of sportsman. Due to Law no. 69/200 and its subsequent modifications, only the persons owning the proper certificates and diplomas, obtained in accordance with the legal stipulations, can teach physical education and sport or can train sportsmen<sup>15</sup>. When practicing their profession, both the teachers and trainers give instructions, educate and supervise their pupils.

\* By sportsmen we understand sports-women as well, but in order to simplify the language, we might sometimes mention only the prior one.

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and end of private judicial relations and the content of these. (Ionel Reghini, Şerban Diaonescu: Introducere în dreptul civil. Vol. 1, Ed. Sfera juridică, Cluj-Napoca, 2004, p. 15)

2 restoration to original condition

3 As apposed to money damages,

4 Alexandru.V. Voicu,; *Răspunderea civilă delictuală cu privire specială la activitatea sportivă*, Ed. Lumina Lex, Cluj-Napoca, 1999, p. 41

5 Liviu Pop: *Drept civil român. Teoria generală a obligațiilor*, Ed. Lumina Lex,

2000, Bucureşti, p. 177

6 ibidem

7 oicu, *op. cit.*, p. 41, Beside this essential difference, there can be found others, such as the ones regarding the proof of negligence, the extent of the damages, the divisibility of the liability of co-debtors, the legal competency, the extensive prescription, the lawfulness of the exclusion clauses

8 Liviu Pop, *op. cit.*, p. 172

9 Florin Streteanu: *Tratat de drept penal. Partea generală. Volumul I*, Ed. C.H.

Beck, Bucureşti 2008, p. 3-9

10 As a consequence there are other major differences, such as regarding the application of the principle of legality, the equality of the parties, guilt or negligence, sanctions, the legal capacity, etc.

11 For more details about the professional liability in the field of sport, see A. Voicu: *op. cit.*, p. 69-74

12 Sections 1357 and 1379 in the New Civil Code

13 Section. 1372 in the New Civil Code

14 Section 1376 in the New Civil Code

## The conditions and results of the liability

The activation of the liability of the teachers and trainers is preconditioned by categories of elements. Firstly, there are some general conditions that are inherent to all forms of tort liability and there are those special conditions that characterize only this type of liability.

The unanimously accepted general conditions are the *unrepaired damage* - that might be the consequence of breaching one's right or one's legal interest -, the *illicit act*, and the *existence of a causality report* between the illegal act and damage. The followers of the traditional theories of civil liability add the *culpability* of the doer, too to the general conditions<sup>16</sup>.

The special conditions are the follow ones:

- a *the sportsman or sportswoman is under-age*. Though some authors consider that the liability of the teachers or trainers occurs regardless the pupil's age, because the legal stipulations don't mention this condition<sup>17</sup>, we adhere to the opposite theory. Otherwise, the liability of the teachers and trainers would be broader than the liability of the parents<sup>18</sup>.
- b *the pupil commits the unlawful act while being or should have been under the supervision of the teacher or artisan*, thus, at the school or club or association, or other organized activity, even outside the sport unit, as long as they are or should have been supervised by the teacher or trainer.
- c *the pupil causes the injury to a third person* and not to the teacher or trainer. In this latter case, the teacher could be held responsible only based on sections 998-999 of the civil code<sup>19</sup>.

If all the conditions are fulfilled, the teacher or trainer is liable for the acts committed by his or her pupil. If it can be proven that the sportsman or sportswoman had discernment when he/she committed the act, the victim can sue directly the sportsman/sportswoman, due to section 998-999. Moreover, the victim has the possibility to sue both the pupil and the teacher/trainer. Every time the pupil had discernment when committing the act and the existence of his/her fault can be proven, the teacher's or trainer's liability will be *in solidum*<sup>20</sup>.

## The basis of the liability

This section is probably the most important one of all, because the conditions of the liability, the extent, and the effects of it, even the persons held responsible depend on this.

*The birth of the civil liability*, as we know it, is linked to the law of Aquilia. The Law of Aquilia puts the basis of the obligation of a person to repair any damage caused by him or her intentionally or out of negligence to another person. It also stipulates the offence of *damnum iniuria datum* (damage unlawfully inflicted). The Law excludes the non-rational human beings from liability, such as children or mad people, establishing therefore the concept of subjective liability, for the first time<sup>21</sup>. Despite all these, Ulpian, in the Supplements of the stipulations of this Law, in Digests 9, 2, 7, 4, points out some exclusion clauses regarding the primar, tort liability in sport activities. He argues that the Law

won't apply to sport injuries, because these weren't caused with the intention of harming, but in order to attain glory and victory<sup>22</sup>.

*In the present*, section 1000 par. 4 stipulates the liability of teachers and artisans. According to the traditional theory of civil liability, both the liability of the parents for the acts of their children and the liability of teachers and artisans for the acts of their pupils and apprentices is a subjective liability, based on the legal assumption that the prior ones have disregarded their educating and disciplining obligations, while the latter haven't complied with their supervising obligations<sup>23</sup>. The shortcomings of this theory are the ones, as they follow: the difficulty or even impossibility of proving the culpability of parents, the liability of the minor as a precondition of liability of parents' and teachers<sup>24</sup> and the disadvantaged situation of the victim in case the assumption of culpability of the parents or teachers is confuted<sup>25</sup>.

According to another theory, the parents' liability is a strict liability, the parents being responsible regardless their culpability. The plaintiff need only prove that the tort occurred and that the defendant was responsible. The basis of the liability is the *idea of warrant*, incurred by *family solidarity*. Only circumstances outside the parents' control, such as the act of God, the act of the victim or the act of a third person, could exclude their liability. In accordance with this theory, the teachers' liability remains a subjective one, based on the idea of their culpability as a consequence of their failure of supervising their pupils. Their liability will be removed if they prove that they have complied with their supervising and educating obligations and they could have done nothing in order to stop the students' deeds<sup>26</sup>. In this latter case, the parents will be held legally responsible for their children's acts, due to their strict liability.

Even though the above mentioned theory seems interesting and fairly advantageous, we consider that the theory conforming to the idea that both the parents' and the teachers' liability is a strict one, seems more suitable<sup>27</sup> in the domain of sport activities. We chose to support this idea because of the special role of the trainer in the sportsmen's and sportswomen's education : unlike the teachers and artisans, who don't have the obligation of educating, but only of teaching or instructing, trainers - due to the specificities of the sport activities and their special assignment - also have the duty of participating in the *sport education* of the trainees, considered an objective of sport activities, focused on at casual trainings, competitions, sport performances and training camps<sup>28</sup>. Thus, because of the the speciality of the trainers' liability, „parents can not be held responsible for their children's harmful acts, committed during their sport activities according to their age, because sport activities exclude the parents' possibility of supervision.”<sup>29</sup> Therefore, the reasonable and just solution seems to be the strict liability of the trainers, they -and not the parents - having a warranty obligation for the acts of their pupils. In this case, both the trainers' and parents' responsibility can be excluded for the same reasons, namely circumstances outside their control.

*For the future*, the New Civil code stipulates the persons “who, due to their legal, judicial or contractual obligations, have to supervise an under-age person”<sup>30</sup> are generally liable for the damage caused by the

15 Section 58 of Law 69/2000

16 The fault can be defined as the psychological attitude of the author of the illegal and injurious act toward the act and toward the consequences of it. (Liviu Pop, *op. cit.*, p. 225) The fault has two components: *the intellectual component* - standing for one's ability to understand the social significance of his deeds - and the *volitional component*. The intellectual component is an indispensable part of the discernment, without which the latter one can't exist. Without the discernment, the civil liability for personal acts is unimaginable.

17 Ion M. Anghel, Francisc Deak si Marin F. Popa : “*Răspunderea civilă*”, Ed. Științifică, București, 1970, p. 161

18 For further details, see: A. Voicu, *op. cit.*,

p. 312-313, În același sens Constantin Stătescu, Corneliu Birsan: *Drept civil. Teoria generală a obligațiilor*, Ed. Hamangiu, București, 2008, p. 241,

Constantin Stătescu: *Răspunderea civilă delictuală pentru fapta altei persoane*, Ed. Hamangiu, București, 2009, p. 117, L. Pop, *op. cit.*, p. 258, Lăcrămioara Boilă: *Răspunderea civilă delictuală subiectivă*, Ed. C.H. Beck, București, 2009, p. 305

19 For further details, see A. Voicu, *op. cit.*, p. 313-314

20 *Idem*, p. 314

21 *Idem*, p. 10

22 *Idem*, p. 12

23 For more details, see: Stătescu-Bărsan, *op. cit.*, p. 216-220, 242

24 If there can't be proven that the child had the discernment of his deeds, he or she

cannot be held liable and consequently - according to the subjective theory - neither can the parent or teacher. Thus, the victim is put in a disadvantaged situation.

25 For more details, see: Boilă Lăcrămioara: *Fundamentul răspunderii civile pentru prejudiciile cauzate de către minori sau de către persoanele puse sub interdicție* în Dreptul no. 3/2010, p. 112-114

26 For further details, see Boilă Lăcrămioara, *Răspunderea civilă delictuală subiectivă* ..., p. 303 - 305

27 Liviu Pop: *Reglementarea r spunderii delictuale pentru fapta altuia în textele Noului Cod civil* în Dreptul nr. 5/2010, p.

14 In a prior article, the author proposes the idea of admitting the existence of a general principal of the strict liability for

someone else's acts, as stipulated in the section 1000 par. 1, I. thesis Civil code. In his view - and in ours, too - it would be unjustifiable to have a lighter responsibility, depending of culpability, for parents and teachers, while having a strict liability for all the other people, usually less familiar to the child. (Liviu Pop: *Discuții de lege lata cu privire la recunoașterea existenței unui principiu de răspundere civilă delictuală pentru fapta altuia consacrat în Codul Civil român în Dreptul nr. 8/2004*, p. 72 )

28 A. V. Voicu, *op. cit.*, p. 308

29 Supr. Court, Criminal Section., dec. Nr. 183/1976, in RRD nr. 9/1977, p. 56

30 Section. 1372 par. 1 din Noul Cod civil

person in their custody to others. The next paragraph stipulates that the liability subsists even if the one under supervision is exempted from liability because of his age or mental state. The Code also says that the one obliged to supervise can only be excluded if he/she proves that he/she couldn't have prevented the action of the minor. Thus, the New Civil Code includes the liability of teachers and artisans into this general category, without mentioning it separately.

Regarding the ground of the liability, some authors hold that the teachers' and artisans' liability (and thus, the trainers', too - s.n.) is and should always be subjective, based on culpability, while the parents liability is a strict one, regardless of their fault<sup>31</sup>.

According to another opinion, which we agree with, both the teachers' and the parents' liability is a strict one. The arguments in favor of this point of view are the wording of the legal text, on the one hand, and the fairness of the solution, because of the special role of the trainer in the pupil's sport life, on the other. The benefit of this interpretation is a direct liability of the teachers, without being preconditioned by the pupil's culpability.

In the *German law* both the parents' and teachers' liability is based on the relatively assumed culpability of the person in charge with the supervision of the minor; the assumption can be confuted by proving that the responsible person has accomplished his/her supervising duty.<sup>32</sup>

Some other law systems, such as the *Belgian, Italian, Spanish, Lebanese, of Quebec, Mexican, Senegalese and Algerian*, adopted the traditional French view, in accordance with which in order for a person to be held responsible for the acts of the minor in his/her custody, it has to be proven that he/her has missed to accomplish his/her supervising obligations.

In the present, *in France*, the liability of the teachers is bound to the proof of their culpability regarding their way of fulfilling their supervising obligations. It is a direct liability for their personal acts, which is in causality relations with the damage inflicted by the minor.<sup>33</sup>

<sup>31</sup> For further details, see L. Boilă, *Răspunderea civilă delictuală subiectivă* ..., p. 306

<sup>32</sup> L. Pop: *Reglementarea răspunderii delictuale...*, p. 18

<sup>33</sup> L. Boilă, *Răspunderea civilă delictuală subiectivă* ..., p. 308

In this article we tried to gather the main legislative and doctrinal - past, present and future; domestic and foreign - solutions of regulating and interpreting the tort liability of teachers and trainers in sport activities, hoping to pick out the best one. In order to do this, first we defined the largest category of judicial liability and then tried to reveal the *differentia specifica* of the above mentioned tort liability. We hope that the present study will be a useful starting point for those who would like to go thoroughly into this topic.

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2. Pop, Liviu: *Reglementarea răspunderii delictuale pentru fapta altuia în textele Noului Cod civil în Dreptul nr. 5/2010*
3. Pop, Liviu: *Discuții de lege lata cu privire la recunoașterea existenței unui principiu de răspundere civilă delictuală pentru fapta altuia consacrat în Codul Civil român în Dreptul nr. 8/2004*



# Discussion on the Application of European Union Competition Law to the Procedures for the Assignment of Category I, Category II and International Competitions in the Netherlands - KNHS.

by Richard Parrish\*

## 1. The Contested Procedure

1.1. For the purpose of determining the calendar for category I competitions and international competitions, the rules of the Dutch National Federation of Equestrian Sports (KNHS) state that 'both for competition participants and competition organisers it is important to aim to determine a competition calendar which from a sporting point of view and a commercial point of view coincides as much as possible with the wishes of all parties involved'. For this reason, in the year preceding a certain calendar year, a planning procedure is followed 'in order to be able on time to determine a balanced competition calendar for that calendar year'.

1.2. Rule 1.2 states that when deciding on applications for international competitions in the Netherlands (1) Per date and per discipline only one application for the organisation of a category I competi-

tion can be approved on the condition that no Dutch championship is being organised on that date for the age category concerned (2) If there are several applications for the organisation of an international competition in the same discipline the following becomes relevant (2(a)) a competition application for an international competition at level 4\* or 5\* is always given priority over an application for an international competition at level 1\*, 2\* or 3\* (2(b)) the KNHS argues in favour of the competition application for which it is true that the requested date is the traditional annual date on which an international competition is organised in the discipline concerned (2(c)) it will be attempted by mutual agreement to select another date for the organisation which does not traditionally and annually organise a competition in the discipline concerned. In this, the possibilities for an alternative competition programme are also considered (3) If, in the case of bottlenecks concerning the above, competition organisers reach agreement on an alternative solution it is possible in consultation with the KNHS

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to depart from the starting points given. (4) If, in the case of bottlenecks concerning the above, competition organisers are unable to reach agreement on an alternative solution, the Calendar Commission will issue a binding decision.

## 2. The EU Competition Law Provisions

- 2.1. Article 101 Treaty on the Functioning of the European Union (TFEU) (ex 81 TEC) provides that: 101(1) The following shall be prohibited as incompatible with the internal market: 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 the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- 2.2. Article 101 (2) provides that: Any agreements or decisions prohibited pursuant to this Article shall be automatically void and 101(3) states that: The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- 2.3. Article 102 (ex 81 TEC) provides that: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

### 3. First Consideration: Is the sports association that adopted the rule considered an undertaking or an association of undertakings?

- 3.1. According to the Court of Justice, 'the concept of an undertaking encompasses every entity in an economic activity, regardless of the legal status of the entity and the way it is financed'.<sup>1</sup> Economic activity is any activity consisting of 'offering goods or services on the market'.<sup>2</sup>

1 Case 41/90 *Höfnér v Macroton* ECR 1991, I-1979, para 21.

2 Case 118/85 *Commission v Italy* ECR 1987 2599, para 7.

3 Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405 para. 4. Hereafter referred to as *Walrave*.

4 Commission of the European Communities, Commission staff working document. *The EU and Sport: Background and Context*, SEC (2007) 935, pp.66-67.

5 Case T-193/02, *Laurent Piau v Commission of the European Communities* [2005] ECR II-209, para 70. Hereafter referred to as *Piau*.

6 *Piau*, paras 112 & 116.

7 Case 49/07 *Motoe v Ellinko Dimosio*, [2008] ECR I-4863, para. 23, hereafter referred to as *Motoe*.

8 Case 309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, hereafter referred to as *Wouters*.

- 3.2. It is now well established in EU law that sports bodies, including clubs, teams, national associations and international federations are undertakings within the meaning of Article 101 and 102 TFEU to the extent they carry out economic activity. In *Walrave*, the Court of Justice held that 'having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'.<sup>3</sup>
- 3.3. In the White Paper on Sport the Commission states that sports associations are undertakings where they themselves carry out economic activity, for example through the commercial exploitation of the sport.<sup>4</sup> It added that sports associations are associations of undertakings under Article 101 TFEU where they constitute groupings of sport clubs/teams or athletes for which the practice of sport constitutes an economic activity.
- 3.4. In *Piau*, the Court of First Instance (CFI) held that the fact that a national association gathers both amateur and professional clubs/teams is of no importance as far as the classification as an association of undertakings is concerned.<sup>5</sup>
- 3.5. The concept of an 'association of undertakings' is not to be found in Article 102 TFEU which deals with abuses of dominant market positions. However, the CFI has found that even where a sports association is not itself active on a given market, it may be considered an undertaking under Article 102 TFEU to the extent the association is the emanation of its members which are active on the market.<sup>6</sup>
- 3.6. In the case of *MOTOE*, the European Court first had to establish whether a not-for-profit association (The Automobile and Touring Club of Greece - 'ELPA') with statutory powers to authorise applications for the organisation of motorcycling competitions in Greece was an undertaking. In scrutinising the functions of ELPA, the Court found that ELPA organises motorcycling events in Greece and enters into sponsorship, advertising and insurance contracts designed to exploit those events commercially. Therefore, those activities constitute a source of income for ELPA.<sup>7</sup> This was sufficient to satisfy the economic activity test.
- 3.7. The contested rule described in section 1 above (the authorisation rule) is a rule of a national association, the KNHS. National associations perform both regulatory and commercial functions and in practice it is often difficult to separate the two. If it can be shown that the functions of the KNHS are no more than purely regulatory in nature, then the body will not be considered an undertaking subject to the application of EU competition law. The question of whether EU competition law can be raised in this case therefore becomes irrelevant.
- 3.8. It is clear that the contested rule provides the KNHS with the authority to decide which event to authorise in cases where requests have been made to stage more than one event which are to be organised on more or less the same date. The decision to approve or reject a request will therefore entail economic consequences for the applicants, who are assumed to be private companies seeking to make a profit from the organisation of equestrian events.
- 3.9. However, the mere fact that economic effects flow from the exercise of its regulatory function may not, in itself, be sufficient to establish it as an undertaking. For example, in *Wouters* the Court found that the Bar of the Netherlands could not be considered an undertaking despite economic effects flowing from the exercise of its regulatory functions.<sup>8</sup>
- 3.10. Whether the KNHS is to be considered an undertaking will require scrutiny of its functions. For example, is it engaged in the economic exploitation of the sport such as entering into sponsorship, advertising and insurance contracts? From the KNHS website, it appears that the national association has entered into a sponsorship agreement with Rabobank and this is due to continue to 2012. It would appear that this is a source of income for the KNHS.
- 3.11. Given this, and the connection between sponsorship and event organisation over which the KNHS plays a central role, it would be reasonable to assume that for the purposes of EU law, the KNHS is an undertaking carrying out economic activity.

#### 4. Second consideration: Does the contested rule restrict competition within the meaning of Article 101 TFEU or constitute an abuse of a dominant position under Article 102 TFEU?

- 4.1. Rules adopted by sports bodies, such as national associations, may constitute agreements or decisions by undertakings or associations of undertakings within the meaning of Article 101 TFEU. These rules are prohibited if they have as their *object* or *effect* the restriction or distortion of competition within the common market and affect trade between Member States.
- 4.2. It is common for sports governing bodies to adopt authorisation rules. It is conceivable that a governing body might employ such rules to exclude competitors from organizing rival competitions in an attempt to preserve their regulatory and commercial authority. In such circumstances, the *object* of the contested rule may indeed be to distort competition. In *Formula One*, the European Commission considered that the Fédération Internationale de l'Automobile (FIA) had used such authorisation rules to block the organisation of races which competed with the events organized or promoted by the FIA.<sup>9</sup>
- 4.3. Authorisation rules may serve the legitimate aim of ensuring the proper functioning of sporting competition in so far as they promote the efficient and effective scheduling of events. The argument is as follows: competition participants and spectators benefit from a schedule of events so that clashes can be avoided and competition organizers benefit commercially from an effective competition calendar.
- 4.4. It stands to reason that a sufficient number of participants are required to make an event viable and competition between events being staged on the same day may call into question that viability.
- 4.5. It might also be raised that it falls within the expert judgment of a governing body to determine what constitutes a balanced and viable schedule / timetable. In this regard, it might be claimed that only a governing body is in a position to balance the competing interests of stakeholders. In *Deliège* the Court of Justice acknowledged that 'it naturally falls to the bodies concerned, such as organisers of tournaments, sports federations or professional athletes' associations, to lay down appropriate rules and to make their selections in accordance with them. [68] In that connection, it must be conceded that the delegation of such a task to the national federations, which normally have the necessary knowledge and experience, is the arrangement adopted in most sporting disciplines, which is based in principle on the existence of a federation in each country'.<sup>10</sup>
- 4.6. If the above arguments in support of authorisation rules are to be accepted, the object of the rule is not to distort competition.
- 4.7. However, the mere fact that authorisation rules may not have as their *object* a restriction of competition is not sufficient to remove it from the EU competition law prohibitions. It is also necessary to assess whether the *effect* of the rule is restrictive and if so, whether this effect is inherent in the pursuit of the objectives being pursued.
- 4.8. In *Wouters* the Court of Justice stated that in determining whether an agreement amounts to a restriction, 'account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives... it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.<sup>11</sup>
- 4.9. This methodological framework has been employed in the sports

9 COMP 35.163, Notice published at OJ 2001 C169/5. See also Commission press release, 30 October 2001, IP/01/1523, 'Commission closes its investigation into Formula One and other four-wheel motor sports'.

10 Joined Cases 51/96 and 191/97 *Deliège v. Ligue francophone de Judo et disciplines Associées Asb* [2000] ECR I-2549, paras 67-68.

11 *Wouters*, points 97 and 110.

12 Case COMP/37 806: *ENIC/UEFA*, here-

after referred to as *ENIC*. See also Commission Press Release IP/02/942, 27 June 2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.

13 Case 519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, hereafter referred to as *Meca-Medina*.

14 *Walrave* para 8.

15 *Meca-Medina* para 27.

16 *Meca-Medina* paras 45 and 46.

related competition law cases of *ENIC*<sup>12</sup> and *Meca-Medina*.<sup>13</sup> In the sporting context, the *Wouters* approach is now likely to be favoured by the Commission and the Court over the previous method, often referred to as the 'sporting exception'. Prior to *Meca-Medina* it is conceivable that authorization rules would be defended by those imposing such rules on the grounds cited in the *Walrave* judgment, paragraph 8. Referring to nationality discrimination in national team sports, the Court of Justice held that the prohibition on nationality discrimination 'does not affect the composition of sport teams, in particular national teams, the formation of which is a question of *purely sporting interest* and as such has nothing to do with economic activity'<sup>14</sup>

- 4.10. The purely sporting defence was expunged in *Meca-Medina* in which the Court held that 'it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.<sup>15</sup>
- 4.11. The correct assessment on whether authorisation rules amount to a restriction is the *Wouters* method. In this sense, the question to pose is whether the consequential effects of the contested rule are inherent in the pursuit of the stated objectives.
- 4.12. The contested rule states that 'per date and per discipline only one application for the organisation of a category I competition can be approved on the condition that no Dutch championship is being organised on that date for the age category concerned in the discipline concerned'. The justification for this rule appears to be that 'both for competition participants and competition organisers it is important to aim to determine a competition calendar which from a sporting point of view and a commercial point of view coincides as much as possible with the wishes of all parties involved'.
- 4.13. The legitimate objectives of sporting rules will generally relate to the 'organisation and proper conduct of competitive sport'.<sup>16</sup> In this connection, the Commission and the Court of Justice have been willing to apply EU law in such a way that pays respect to certain specificities of sport, such as the need to promote competitive balance, the need to encourage the education and training of young players and the need to preserve the integrity of sporting competition.
- 4.14. The KNHS will attempt to connect the authorization rule with the legitimate objective of ensuring the proper functioning of the sport. In other words there needs to be some system for organizing the sporting calendar so as to avoid conflicts. In many sports this argument would be accepted as participants cannot be in two places at once and competition may undermine the economic viability of the events. If this is to be accepted, then it becomes more likely that the consequential effects of the contested rule will be considered inherent in the pursuit of the stated objectives and the rule will then, subject to proportionality control, fall outside the scope of the Treaty.
- 4.15. These arguments are strengthened further if one considers the counterfactual argument. In other words, could sport operate in the absence of authorisation rules? Whilst arguments between two event organisers may be finely balanced and it may be possible to argue for the staging of both events without negative consequences, what of a scenario in which multiple event organisers wished to stage an event on the same day(s)? In such circumstances it would appear reasonable that a governing body would wish to adopt some procedure for authorising events so as to avoid potentially damaging conflicts.
- 4.16. The counter argument is that the restrictive effects cannot be considered to be inherent in the pursuit of the stated objectives. It would need to be shown that the staging of more than one competition per date and per discipline is not damaging to the sport. This could be established, for example, by demonstrating that there are a sufficient number of riders able to participate in both events.
- 4.17. Further, if it could be established that similar events take place in other member states close by, such as Belgium, without apparent damaging consequences, the argument could be undermined further.

4.18. But even if these facts could be established, they do not necessarily undermine the *principle* of authorisation rules, just the fitness for purpose of specific regimes such as the one adopted by the KNHS. This is discussed further below.

#### *Proportionality*

- 4.19. Not only must a sporting rule pursue a legitimate objective, it must also be proportionate in relation to that objective in order for it not to infringe Articles 101 and 102 TFEU. It must also be applied in a transparent, objective and non-discriminatory manner.
- 4.20. If the objective of the rule is accepted (that it ensures the timely construction of a balanced calendar which benefits the relevant stakeholders), then the focus shifts onto whether the authorisation rule in question goes beyond what is necessary to achieve the stated objective. In other words, how else could the objective be achieved?
- 4.21. Paragraph 2 of the contested rule states that ‘if there are several applications for the organisation of an international competition in the same discipline the following becomes relevant: (a) a competition application for an international competition at level 4\* or 5\* is always given priority over an application for an international competition at level 1\*, 2\* or 3\* (b) the KNHS argues in favour of the competition application for which it is true that the requested date is the traditional annual date on which an international competition is organised in the discipline concerned (c) it will be attempted by mutual agreement to select another date for the organisation which does not traditionally and annually organise a competition in the discipline concerned. In this, the possibilities for an alternative competition programme are also considered
- 4.22. First, it will need to be considered whether events compete in the same market. Do these events attract the same riders for instance? Therefore, is it always reasonable to give priority to higher ranked events even though they may not compete in the same market as lower ranked events?
- 4.23. Second, to what extent does the recognition of historic rights unfairly obstruct entry into the market for new competition organisers? Presumably, existing event organisers have already laid claim to the most commercially valuable dates in the calendar. The recognition of such historic rights appears to preclude access to the market for new market entrants, or those event organisers wishing to change dates. This rule has the potential to be anti-competitive and discriminatory as it is reasonable to assume that historic rights are more likely than not to be held by Dutch event organisers than non-Dutch organisers. Given that events are organised in other Member States of the EU, it is reasonable to assume that non-Dutch event organisers who are active in other national markets are unable to penetrate the Dutch market. Less restrictive and discriminatory means of achieving the objective could be considered, such as an open and transparent tendering process.
- 4.24. Finally, one needs to consider wider questions of how decisions (such as the contested rule) are arrived at within the sport and whether changes in prevailing governance standards could mitigate against the emergence of such disputes.
- 4.25. In this connection, the Commission argued in the White Paper on Sport that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be ‘respectful of good governance principles’.<sup>17</sup>
- 4.26. This built on an earlier intervention made by the Member States during the Nice Treaty deliberations in 2000 in which the European Council stressed ‘its support for the independence of sports organisations and their right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a *demo-*

*cratic* and *transparent* method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable... in the way which they think best reflects their objectives’.

- 4.27. In this light, it needs to be considered whether the current approach adopted by the KNHS to setting the events calendar pays sufficient attention to these principles. For example, given that the rule is designed to protect the interest of stakeholders, what is level of consultation with participants and event organisers? Do they have a voice within existing decision making structures?
- 4.28. Finally, paragraph 4 of the contested rule states that if ‘in the case of bottlenecks concerning the above, competition organisers are unable to reach agreement on an alternative solution, the Calendar Commission will issue a binding decision’. It is not clear from this statement whether this affords the parties a right of a hearing and an appeal. In *Motoe*, a case also involving authorisation rules in sport, the Court of Justice held that there needs to be a means of appealing a negative decision.<sup>18</sup>

#### *Application of Article 102 TFEU*

- 4.29. Article 102 TFEU prohibits any abuse by an undertaking of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States. For this provision of the Treaty to apply, an analysis of the relevant market must be undertaken.
- 4.30. In sport it is common for sports governing bodies to hold practical monopolies. Many sports operate an organizational structure in which a single entity assumes control of the sport at global level, an affiliated body assumes responsibility for the sport at regional (European) level and another affiliated body regulates the sport at national level.
- 4.31. The Court has made clear that the concept of a ‘dominant position’ under Article 102 TFEU concerns a position of economic strength held by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.<sup>19</sup>
- 4.32. The KNHS is in one such position of economic strength as it has the power to authorise the organisation of events on the Dutch territory, a power which effectively regulates the access of undertakings to that relevant market.
- 4.33. However, Article 102 TFEU only prohibits the *abuse* of a dominant position, it does not prohibit market power *per se*. In determining whether the conduct of the undertaking amounts to an abuse, one needs to consider that the KNHS commercially exploits equestrian events in the Netherlands through, for example, entering into sponsorship contracts.
- 4.34. It also needs to be established whether the KNHS is itself active in the market for the organisation of equestrian events in the Netherlands.
- 4.35. Given one or both of these situations detailed in 4.33 and 4.34, there is a strong case for the Court’s *MOTOE* reasoning to be applied. In this case, ELPA both organized and commercially exploited motorcycling events in Greece whilst simultaneously acting as the authorising body for applications for the staging of new events. This, the Court found, was a conflict of interest as it gave ELPA an advantage over competitors which could lead to market foreclosure.<sup>20</sup>
- 4.36. The two cases display further similarities given that the KNHS decision (it would appear) cannot be appealed, as was also the case in *MOTOE*. Commenting on this issue, the Court in *MOTOE* found that ‘such a rule, which gives a legal person such as ELPA the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates’.<sup>21</sup>
- 4.37. The conclusion drawn by the Court in *MOTOE* was that ‘a legal

<sup>17</sup> Commission of the European Communities (2007), ‘White Paper on Sport’, COM(2007) 391 final, s.4.  
<sup>18</sup> *Motoe*, para 53.

<sup>19</sup> *Motoe* para 37.  
<sup>20</sup> *Motoe* para 51.  
<sup>21</sup> *Motoe* para 52.

person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.<sup>22</sup>

- 4.38. The *MOTOE* judgment represents a softening of the Commission's approach adopted in *Formula One*. In this case, the Commission objected to the rules of the FIA which had a number of consequences on the market for the organisation of motor racing competitions. In particular, the FIA was accused of abusing a dominant position in breach of Article 102 TFEU by using its regulatory monopoly to maintain its commercial strength. In 2001, the Commission adopted a Notice under Article 19(3) of Regulation 17/62, signalling its satisfaction with undertakings made by the FIA to the effect of making internal structural changes which were designed to separate the FIA's regulatory function from its commercial exploitation of Formula One, thus reducing restrictions on competitors.
- 4.39. In light of the above, it is reasonable to assume that if a conflict of interest is identified in the functions of the KNHS, rather than requiring a pure separation between the commercial and regulatory functions of the KNHS, the Commission and Court of Justice would wish to see improvements made in the governance standards applicable in that sport. For example, new authorisation rules should be transparent, objectively justified, non-discriminatory and consistently applied and could be negotiated with relevant stakeholders with decisions subject to a hearing and independent appeal. In these circumstances, it would be difficult to identify an 'abuse' of power by the governing body as safeguards in the system counter potentially self-interested decision making.

### 5. Third consideration: Is trade between Member States affected?

- 5.1. Articles 101 and 102 TFEU only apply to the acts of undertakings within the European Union that have an effect on trade between Member States. The anti-competitive effects must also be appreciable.
- 5.2. In the White Paper on Sport the Commission concluded that rules adopted by *international* sport associations will normally affect trade between Member States. However, in view of the fact that rules of *national* sport associations usually concern a sport in the whole territory of a given Member State and in light of today's high level of internationalisation of professional sport, rules adopted by national sport associations may often affect trade between Member States.<sup>23</sup>
- 5.3. In *MOTOE*, the Court held that the assessment of whether the effect on trade between Member States is appreciable must take account of the conduct of the dominant undertaking in question, in so far as Article 101 TFEU precludes all conduct which is capable of affecting freedom of trade in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the single market.<sup>24</sup>
- 5.4. It continued by stating that the fact that the conduct of an undertaking in a dominant position relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected.

<sup>22</sup> *Motoe* para 53.

<sup>23</sup> Commission of the European Communities, Commission staff working document. The EU and Sport: Background and Context, SEC (2007) 935, footnote 178.

<sup>24</sup> *Motoe* para. 41.

<sup>25</sup> *Motoe* para. 42.

<sup>26</sup> Commission decision of 9 December 1999, Case 36851, *C.U. de Lille/UEFA (Mouscron)*, decision not published; also see Commission press release IP/99/965 of 9 December 1999.

Such conduct may have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.<sup>25</sup>

- 5.5. In light of the dominant position held by the KNHS in the national market and given that its authorisation rules have the potential to partition the European market along national lines, it seems that the effect on trade requirement is met.
- 5.6. That said, some authority on the partitioning of national markets does exist. In *Mouscron*, the French communauté urbaine de Lille had lodged a complaint against UEFA under Article 82 EC (now 102 TFEU) challenging UEFA's rule that for clubs competing in UEFA competitions each club must play its home match at its own ground. The Belgian football club Excelsior Mouscron had requested a one off switch to Lille in France and had been refused on these grounds. The Commission rejected the complaint as it considered the 'home and away from home' rule did not fall within the scope of Articles 81 and 82 EC (now 101 and 102 TFEU). The Commission found that the organisation of football on a national territorial basis was *not called into question by Community law*. The Commission considered the rule indispensable for the organisation of national and international competitions in view of ensuring equality of chances between clubs. The Commission also found that the rule did not go beyond what was necessary.<sup>26</sup>

### 6. Fourth consideration: Does the rule fulfil the conditions of Article 101(3) TFEU?

- 6.1. If the contested rule is found to amount to a restriction under Article 101(1) TFEU, such a restriction may be justified under Article 101(3). Article 101(3) provides that the prohibition contained in Article 101(1) may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.
- 6.2. An argument can be presented that authorisation rules do contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. The arguments for this assertion are presented in section 4 above.
- 6.3. That said, the potential for the KNHS to perform a dual (regulatory and commercial) role which may lead to conflicts of interest undermines this proposition. Therefore it becomes necessary to assess whether the beneficial effects of the rule outweigh its restrictive effects.

### 7. The Relevance of Article 165 TFEU.

- 7.1. Title XII (Article 165) of the TFEU provides 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'. Under this provision, Union action is to 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'. The competence allows the Union to adopt incentive measures in the field of sport but it specifically excludes the harmonisation of national laws.
- 7.2. Article 165 does not contain a horizontal clause *requiring* the EU institutions to take account of the 'specific nature of sport' in the application of other Treaty competencies such as free movement and competition law. Therefore, Article 165 does not amount to an invitation for sports bodies to adopt restrictive practices within their respective sports. Therefore, Article 165 does not offer the contested rule in question immunity from the EU competition law prohibitions.

- 7.3. Nevertheless, Article 165 is relevant to the current discussion. In *Bernard*, the first post-TFEU sports case of the Court of Justice, Article 165 was cited to corroborate the Court's view that the specific characteristics of sport allows football clubs to seek compensation for the training of their young players where those players wish to sign their first professional contract with a club in another Member State.<sup>27</sup>
- 7.4. In this connection, it is conceivable that reference to the promotion of *fairness and openness in sporting competitions* contained within Article 165(2) will be raised to both defend and attack authorisation rules in sport, such as the one contained in the KNHS rules. The governing body will defend the rule on the grounds of *fairness*, in so far as the rule grants the governing body the role of balancing the interests of all stakeholders. Opponents of the rule will argue the rule fails to promote *openness* in sporting competition by restricting access to competitions. They are also likely to argue that the rule fails to satisfy the *fairness* principle in circumstances where the staging of two or more events on the same day(s) can take place without obvious negative consequences in terms of sporting and commercial considerations.
- 7.5. Also contained in Article 165(2) is reference to developing *cooperation between bodies responsible for sports*. In the White Paper on Sport, the Commission argued that governance issues in sport should fall within a territory of autonomy and that most challenges can be addressed through self-regulation which must however be 'respectful of good governance principles'.<sup>28</sup> Article 165 could therefore be raised by an aggrieved party who feels that a decision of a governing body has caused them to suffer a detriment without them having sufficient opportunity to have an input into the decision making process.

## 8. Conclusions

- 8.1. National sports associations are to be considered undertakings carrying out economic activity. As such, they are subject to EU competition law.
- 8.2. As a *general* statement it is safe to conclude that authorisation rules adopted by sports bodies are compatible with EU law. A governing body, who holds specialist expert knowledge of their sport, should not be dislodged as the central body to decide on such matters. Authorisation rules pursue a legitimate objective and the consequential restrictive effects of such rules have the strong potential

to be considered inherent in the pursuit of the stated objectives. In other words, authorisation rules have the potential to be fit for the purpose of achieving the objective of ensuring the proper functioning of sport, from both a sporting and commercial perspective.

- 8.3. However, *individual* authorisation rules require scrutiny to ensure compliance with EU law. There may be specific conditions in which inherency arguments cannot be supported. For example, an inherency argument cannot be supported if it can be demonstrated that the staging of two or more events on the same day(s) does not undermine legitimate sporting or commercial considerations. This calculation must be made on an evidenced based case-by-case basis.
- 8.4. Rules considered inherent in the pursuit of legitimate objectives must remain proportionate. The recognition of historic rights potentially gives rise to anti-competitive and discriminatory concerns and it would appear that less restrictive means of achieving the stated objectives might be considered. In this connection, special consideration should be given to the question of whether changes in prevailing governance standards in sport could minimise the most restrictive elements of authorisation rules. The apparent failure to offer an appeal against a negative decision appears out of step with current Court jurisprudence and should be corrected.
- 8.5. The KNHS would appear to hold a dominant position in the market for the organisation of equestrian events in the Netherlands. The potential for a finding of 'abuse' is heightened if the KNHS acts in such a way as to reveal a conflict of interest between its commercial exploitation of the sport and its authorisation function. Amendments in governance structures and standards could minimise the scope for a finding of 'abuse'.
- 8.6. It would appear that the effect on trade requirement is satisfied.
- 8.7. If the contested rule is found to amount to a restriction under Article 101(1) TFEU, the restriction may be capable of qualifying for an exemption under Article 101(3).
- 8.8. Article 165 TFEU is relevant to the current discussion but does not exempt authorisation rules from the scope of EU competition law. The question of *fairness and openness* in sporting competitions could be raised to defend and attack authorisation rules but the weight attached to such arguments remain secondary to the normal application of the principles contained in Articles 101 and 102 TFEU.
- 8.9. The above analysis does not preclude an action being brought in national law.

<sup>27</sup> Case 325/08, *Olympic Lyonnais v Bernard & Newcastle United*, judgment of 16 March 2010.

<sup>28</sup> Commission of the European Communities (2007), 'White Paper on Sport', COM(2007) 391 final, s.4.

# Drafting Sports Mediation and Arbitration Clauses for Settling Disputes Through the Court of Arbitration For Sport

by Ian Blackshaw\*

Sport is now a global business worth more than 3% of world trade and 3.7% of the combined GNP of the twenty-seven Member States of the European Union. So, there is much at stake, both on and off the field of play!

It is not surprising, therefore, that sports-related business disputes are on the increase, especially in the present economic climate. The sporting world, in general, prefers to settle their disputes by some form of ADR (Alternative Dispute Resolution). Over its twenty-seven years of operations, the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, is proving to be a popular and effective forum

for settling sport-related disputes by Mediation or Arbitration or a combination of the two processes: 'Med-Arb'.

Rather than leaving questions of dispute resolution to be decided when sports disputes arise, it is advisable to include an express arbitration clause in the Sports Agreement or Contract concerned. This introduces certainty and does not rely upon the parties agreeing to some form of ADR at the time a dispute arises - one party may be in agreement, whilst the other is not!

When drafting such clauses, it is also advisable to include as much detail in them as possible. For example, the venue and language of the Arbitration; who appoints the Arbitrator(s); the procedure to be followed; and the applicable law; to avoid the arbitration clause being held to be void for uncertainty.

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Although in this connection, it may be mentioned that a reference to settle disputes by ADR through a CEDR (Centre for Effective Dispute Resolution, which is based in London) procedure contained in a commercial agreement was judicially held not to be void for uncertainty, despite its brevity. See the English High Court case of *Cable & Wireless plc. v. IBM United Kingdom Ltd.*<sup>1</sup> in which the Judge held that the parties had shown a clear intention to be bound to a process of ADR for the settlement of their disputes under the agreement! The actual ADR clause in dispute provided as follows:

“If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through Alternative Dispute Resolution (ADR) Procedure as recommended to the parties by the Centre for Dispute Resolution. However, the ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.”

Again, in another earlier case, an exchange of telexes between two firms of Brokers in Paris containing the following rather brief statement: “English law - arbitration, if any, London according to ICC rules” was held to be a valid arbitration agreement, providing for arbitration in London under the ICC Rules with English Law as the proper law of the contract.<sup>2</sup>

Of course, as previously mentioned, such a short form of arbitration clause is not to be recommended, in practice.

Each of the international and national arbitral bodies has their own standard Arbitration and Mediation reference clauses and these should be incorporated in the corresponding commercial agreements if the parties wish to use them.

In the case of sports disputes, the Court of Arbitration for Sport offers the following standard ‘Med-Arb’ clause - a popular form of ADR: Mediation to identify the issues, and, if not successful,<sup>3</sup> arbitration to settle them - for inclusion in sports-related Commercial Agreements:<sup>4</sup>

“Any dispute, any controversy or claim arising under, out of or relating to this contract and any subsequent of or in relation to this contract, including, but not limited to, its formation, validity, binding effect, interpretation, breach or termination, as well as non-contractual claims shall be submitted to mediation in accordance with the CAS Mediation Rules.

If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to

participate in the mediation, the dispute shall, upon filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President.”

Such an express CAS Arbitration Clause should be used in all cases, to avoid the CAS refusing to accept jurisdiction. The CAS needs to be satisfied that, in the absence of an express Arbitration Clause, there is a clear intention on the part of the parties in dispute to refer their dispute for settlement by the CAS.<sup>5</sup>

It should be noted that, once the parties to a dispute have given their consent to Arbitration - remembering that Arbitration is a consensual process - such consent cannot be unilaterally withdrawn. Even if the Arbitration Agreement forms part of the original Contract between the parties and that Contract comes to an end, the obligation to arbitrate survives. It constitutes an independent obligation separable from the rest of the Contract. For example, if one party claims that there has been a total breach of contract by the other, this:

“does not mean that the contract, though it may relieve the injured party of the duty of fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purposes of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.”<sup>6</sup>

When drafting express arbitration clauses in general and those relating to sports business disputes in particular, precision is the name of the game,<sup>7</sup> especially concerning the scope of the issues to be referred to arbitration as envisaged by the parties.

In England, for example, general words such as “claims”, “differences” and “disputes” have been held to encompass the widest category of issues within the context of the particular commercial agreement concerned.<sup>8</sup>

Whilst in the United States of America, the word “controversies” has been held to have the widest possible meaning - again, within the context of the commercial agreement concerned.

So, do not leave anything to chance or misinterpretation: make your intentions very clear in all cases!

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1 [2002] 2 All ER (comm) 1041.

2 *Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V.* [1983] 2 Lloyd's Re. 419.

3 Where Mediation is appropriate, it enjoys a general success rate of 85%.

4 These Agreements may include Sponsorship and Merchandising Agreements and other kinds of Sports Marketing Agreements. See Blackshaw, Ian S., ‘Sports Marketing Agreements: Legal, Fiscal and Practical Aspects’, 2011, TMC Asser Press, The Hague, The Netherlands.

5 On the question of CAS jurisdiction in Appeal Cases, for example, see the provisions of Article R47 of the CAS Code of Sport-related Arbitration (Edition, July 2011), which state as follows: “A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said body.”

6 *Per* Lord MacMillan in *Heyman v. Darwins Ltd.* [1942] A.C. 356, at p. 374.

7 Sloppy drafting will not do! In general, to avoid ambiguities and, therefore, disputes on the meaning, interpretation, scope and application of legal clauses generally and dispute resolution clauses in particular, keep sentences short and avoid convoluted ones with lots of relative clauses. Also, use simple and clear language, and make sure that the clause follows a logical and chronological order and, is therefore, easy to read, follow and apply.

8 Other forms of wording to be considered include such phrases as “arising out of this Agreement” and, in England, the Courts have given the widest meaning to them. They will usually cover all disputes capable of being submitted to Arbitration, other than whether the Agreement, under which they arise, has any legal existence at all. That is a matter for the Courts to decide. Note also that in Germany, for example, German Labour Law does not allow disputes, arising under individual Employment Agreements, to be submitted to Arbitration. Such disputes have to be decided in the German Courts. However, if the parties in dispute agree, a German Judge may refer their dispute arising under such Agreements to be referred to a Mediator for extra judicial settlement.



## The International Sports Law Journal

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See the Indexes at p. 195-203

Law & Sports in India by Mukul Mudgal 2011 Lexisnexis Butterworths Wadhwa Nagpur India Hardback Pages 683 + XV ISBN: 978-81-8088-609-1 Price 995 Rupees

In the last decade or so, India has burst onto the world stage, not only as the world's largest democracy, but also as a leading economic power, being a member of the so-called BRICS countries. India has also been a country in which sport and its practice have been recognised since ancient times. In fact, sport in India has signified 'a way of realising the potential of the body to its fullest.' The synonym of sport is '*Dehvada*' - 'one of the ways to full realization.' India has hosted major sporting events, such as the Commonwealth Games in 2010 - not, one must add, without some well-publicised controversies and difficulties! - and is the home of the highly successful - and also very lucrative - Indian Premier League in Cricket!

Writing in the Foreword to this Book, Soli Sorabjee, a Senior Advocate of the Supreme Court of India and a former Attorney General of India, describes a Book, such as the present one, on India Sports Law as "the need of the hour". And I would agree with him that this Book is indeed timely and welcome, and I would also congratulate the Author, Mukul Mudgal, who is the Chief Justice of the High Court of Punjab and Haryana, on satisfying this need and also finding the time in his busy professional life to do so!

The Book is comprehensive and, after a thought-provoking Introductory Chapter reviewing the 'Sports Scenario in India Today' goes on to deal with a wide range of legal issues relating to sport, including, the role of the State in sport; gender issues; doping, which the Author describes as 'the plague of sports', sports betting, which is certainly an issue in India, technically illegal but worth millions; sports broadcasting, a very important topic now that sport is a significant part of the

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Sports Law in South Africa by Andre M. Louw 2010 Wolters Kluwer Law & Business The Netherlands Paperback Pages 512 ISBN 978-90-411-3314-4 Price \$162

South Africa is a sporting nation - in fact, the country has often been called a 'sports mad nation' - and has hosted a number of major international sports events to date, including the highly successful FIFA World Cup in 2010, which made a profit of US\$1.1 billion! No doubt, South Africa will go on to host other sporting events in the future, including the Summer Olympics. So, this Book is a timely and welcome addition to the International Sports Law literature for both practitioners and academics.

Indeed, the coverage of the subject is comprehensive, including such topics dear to the heart of your reviewer as sports image rights - unlike the UK, South African Law recognises 'personality rights' - and alternative dispute resolution of sports disputes, including an analysis of the CAS Award in *Pistorius v. IAAF* (the so-called 'Blade-Runner' Case).

The Book also deals with safety and security issues, which are of particular concern to event organisers and rights holders in these present 'war on terror' times. In fact, the Author quite rightly draws attention to this particular subject in the following terms:

"It is expected that a significant concern for the organizers of major events will in future be the safety and security of participants, officials and spectators..... Sports lawyers would be advised to take a more active interest in the legal aspects and implications in this regard."

The Book also covers employment law issues, doping, and criminal and civil law liability in the sporting arena. All important topics!

global entertainment industry; labour and contractual issues; sport as a business; taxation; and last, but by no means least, dispute resolution, a subject particularly dear to your reviewer's heart! Perhaps not surprisingly, the attitude of the Courts in India to the resolution of sports disputes is the same as in England: they should leave such matters to the sports bodies themselves, who are the experts in these matters, and only, according to a Decision of the Supreme Court of India handed down in 1994, intervene when the decision is "unreasonable, arbitrary, illegal and infringes the fundamental right or constitutional right of a citizen of India." In fact, the Book not only draws on Indian authorities but also on decided cases from other jurisdictions, not least English Law! Such a comparative law approach is welcome.

The Book also contains several Appendices of useful information on a wide range of practical subjects, including the India National Sports Policy of 2001, which makes very interesting reading. Indeed, the Author rightly points out that "[t]he State has an important role to play in the development of sports in India but the manner of such State support and intervention has to be determined by the legislature after obtaining a wide spectrum of views, particularly those of sportspersons."

The Book is completed with a List of Abbreviations, a Select Bibliography, which is not as up to date as it might be - for example, 'Sports Law' by Gardiner et al (to which your reviewer is one of the contributors) is cited as the second edition of 2001, when, in fact, the latest edition of this work is the third edition of 2006! - and also a workmanlike Subject Index.

The sub-title of this Book is: 'Developments, Issues and Challenges' and it lives up well to this descriptor. The Author, assisted by Vidushpat Singhania and Nitin Mishra, has provided a very valuable contribution to the literature on International Sports Law and all those involved in sport in India - in any way - will greatly benefit from reading it.

*Ian Blackshaw*

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There is also a useful overview of Sport and Competition Law, including the Common law Doctrine of 'Restraint of Trade', although the Author points out that:

".....South African law has to date not yet been faced with competition law challenges to conduct related to sport or its commercial operations."

However, with sport being such big business nowadays and elite athletes earning such substantial sums of money from sponsorships and endorsements, I am sure that this situation will change in the near future!

The Book also includes a useful 'Selected Bibliography', a List of Sporting Abbreviations and also a workmanlike Subject Index. Although perhaps a tall order, the Book would also have benefitted from a Table of Cases.

In his introductory remarks, the Author refers to his "own shortcomings" in writing this Book, but such modesty is entirely out of place, as he has acquitted himself well of the task of covering, in his words, "a vast range of issues relating to the areas of where sport and the law intersect." (Notice that, despite the title of the Book, the Author is a 'sport and the law' disciple). Incidentally, he is well qualified to have produced such a very good Book on Sports Law in South Africa, being an academic (he is a Senior Lecturer in the Faculty of Law at the University of KwaZulu-Natal in Durban) and also a High Court Attorney; he is also the first (and perhaps only to date) person to gain a Doctorate in Sports Law in South Africa.

This Book I can thoroughly recommend, therefore, to all those involved directly and indirectly in the administration, practice and business of sport in South Africa and, of course, their professional advisers!

*Ian Blackshaw*

# The Boycott of the 1980 Moscow Olympic Games and Détente\*

by Robert C.R. Siekmann\*\*

## 1. Introduction

On 20 January, 1980, President Carter of the United States, in an address to the chairman of the American Olympic Committee (USOC), insisted that the Committee suggest to the International Olympic Committee (IOC) that the 1980 Summer Olympic Games in Moscow be transferred, postponed or cancelled, unless all Soviet troops had been withdrawn from Afghanistan within a month. He made it clear that if the IOC did not accept these proposals, the United States would not send a delegation to Moscow. The President explained: "We must make clear to the Soviet Union that it cannot trample upon an independent nation and at the same time do business as usual with the rest of the world".<sup>1</sup> Within a week the presidential request to USOC received support in resolutions of the American House of Representatives and the Senate, which voted with 386 votes in favour and 12 against, and 88 votes in favour and 4 against respectively, that no American athletes should participate in the Moscow Olympic Games unless the Soviet troops had been withdrawn from Afghanistan by 20 February, 1980. This American reaction to the Soviet Union's invasion of Afghanistan on 27 December, 1979 marked the start of an international boycott against the Moscow Olympic Games.

All this took place "under" the 1975 Final Act of Helsinki, which devotes one paragraph to international sporting contacts. The question which concerns us here is how a boycott such as that of the 1980 Olympic Games can be assessed in the context of détente between East and West and under international law. When answering this question, we can distinguish two aspects: an inter-governmental aspect concerning the position of "politics" (assessment of the boycott in the light of the Final Act, paras. 2-5) and a nongovernmental aspect concerning the position of "sport" (assessment of the boycott in the light of the relation between "sport" and "politics" and in the light of the Olympic Charter, paras. 6-10).

## 2. Sport and the Final Act of Helsinki

The paragraph on sport can be found in the so-called "Third Basket" of the Final Act of Helsinki, which deals with cooperation in humanitarian and other fields under para. 1: Human contacts sub g (Sport). The provision reads as follows:

"In order to expand existing links and co-operation in the field of sport the participating States will encourage contacts and exchanges of this kind, including sports meetings and competitions of all sorts, on the basis of the established international rules, regulations and practice".<sup>2</sup>

\* Previously published under this title as Chapter 9 in: A. Bloed and P. van Dijk (Eds.), *Essays on Human Rights in the Helsinki Process*, T.M.C. Asser Instituut, The Hague 1985, pp. 181-201.

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1 Department of State Bulletin, March 1980, p. 50.

2 This subject was based on an East European (Bulgarian/Polish) proposal (Doc. CSCE/II/8 and CSCE/III/1/1/Rev. 1 of 5 July and 19 September, 1973 respectively. See Igor I. Kavass, J.P. Granier, M.F. Dominick (eds.), *Human Rights, European Politics, and the Helsinki Accord - The Documentary Evolution of the Conference on Security and Co-operation*

*in Europe 1973-1975* (New York 1981), Vol. I: Stage I - Helsinki 1973, resp. vol. V: Stage II - Geneva 1973-1975, p. 375 et seq., resp. pp. 21, 4-6. During the CSCE follow-up meeting in Belgrade, a Bulgarian proposal was submitted on Co-operation in Sports, Doc. CSCE/BM/44- of 11 November, 1977 (see J.P. Granier, "Human Rights and the Helsinki Conference on Security and Cooperation in Europe", an annotated bibliography of United States Government Documents in: *Vanderbilt Journal of Transnational Law*, Vol. 13, Spring-Summer 1980, Number 2-3, p. 559). The word "sport" as such does not appear either in the final document of Belgrade of 8 March, 1978 or in that of the follow-up meeting of Madrid. On the background to the paragraph on sport: "The intention of the East European

As indicated at the beginning of the "Third Basket", the co-operation referred to there should be encouraged by the States "irrespective of their political, economic and social systems" and "in full respect for the principles guiding relations among participating States as set forth in the relevant document".\* This document can be found in the "First Basket" under (1): "Declaration on principles guiding relations between participating States", One of these ten principles, which together form the so-called "Decalogue", concerns Co-operation among States (principle IX). In this the participating States confirm that organizations should fulfil a relevant and positive role in the co-operation, *inter alia*, in the humanitarian field including human contacts in the field of sport.

On the basis of the "paragraph on sport" combined with the text of principle IX, it is possible to state:

1. that one of the objectives of the Final Act is to encourage détente through the co-operation between States, *inter alia*, in sporting activities;
2. that the States which signed the Final Act did not thereby agree to any strictly legal obligations (of public international law) with regard to sporting activities among themselves, not in the least because of the mere fact that the Final Act as a whole is not a treaty, but should be considered as a "legally non-binding agreement".<sup>3</sup> Moreover, the non-binding character ensues from the use of the word "will" rather than "shall" in the paragraph on sport;
3. that the paragraph on sport is aimed at extending contacts in the field of sport. The participating States have been assigned an active role in this. This implies that the participating States should, at the one hand, stimulate existing contacts, whenever this is necessary to maintain these contacts. At the other hand, the GSCE States should remain passive with regard to the existing contacts in the field of sport in the sense that they will not discourage them;
4. that the relevant provisions of the Final Act are not addressed directly to the sporting organizations so that these organizations have not accepted any formal obligations under the Final Act. On the other hand, one should not overlook the fact that the Final Act explicitly states "that governments, institutions, organizations and persons have a relevant and positive role to play in contributing toward the achievement" of the CSCE aims (see principle IX),

A clear example of the way in which sporting organizations have started to play a role in the context of the Final Act can be seen in the series of agreements (protocols) between the central Western and Eastern European and Soviet sporting organizations on the initiative of the East, concluded particularly since 1975 and always for a period of five years.<sup>4</sup>

countries was to ensure that sporting contacts would help to reinforce friendship and mutual understanding between nations and to use these contacts to carry out the East European idea of détente, and in general to introduce political aspects into sports contacts, possibly by the creation of new European organizations. In contrast, the Western countries adopted the position that only existing ties and existing co-operation was under discussion, as well as contacts in accordance with existing procedures. The text of the Final Act is in fact restricted to existing ties and co-operation. Nor can the text be used for the organization of "political" sporting events". (See "Conferentie over Veiligheid en Samenwerking in Europa; Helsinki-Genève-Helsinki 1973-1975" [Conference

on Security and Co-operation in Europe; Helsinki-Geneva-Helsinki 1973-1975], published by the Ministry of Foreign Affairs of the Netherlands, No. 115 (The Hague 1976), p. 155.)

3 On the legal character of the Final Act, see P. van Dijk, "The Final Act of Helsinki - Basis for a Pan-European system?", in: *Netherlands Yearbook of International Law* (NYIL), 1980, pp. 106-110.

4 The Russian bibliography about the CSCE which appeared in Moscow in 1978 lists in volume II the agreements/protocols of the USSR with Australia, Sweden, France, Portugal, Greece, the Netherlands, Norway, Finland, Denmark and Italy. Apart from its agreement with the Soviet Union, the Netherlands have also made agreements with East Germany, Czechoslovakia, Poland and Bulgaria.

These are agreements between, on the one hand, nongovernmental umbrella organizations, and, on the other hand, state organs» In the Protocol of 29 March, 1977 between the German Sports League (Deutscher Sportbund; DSB) and the Committee for Physical Education and Sport of the Council of Ministers of the USSR, implicit reference is made to the Final Act of Helsinki by the use of the wording “on the basis of the established international rules, regulations and practice”, derived from the paragraph on sport.<sup>5</sup> With regard to the meaning of the words “established international rules, regulations and practice”, we take from an official statement made by the DSB that in the negotiations with the Soviet Sports Committee this formulation, derived from the Final Act of Helsinki was meant explicitly to refer to the rules, regulations and practice of international sport- federations and other world sporting organizations.<sup>6</sup> Examples of these could be the Statutes of the Federation of International Football Associations (FIFA), and the Olympic Charter.

### 3. Assessment

If we now assess the boycott of the 1980 Moscow Olympic Games in the light of the above conclusions with respect to the paragraph on sport combined with principle II of the Final Act, the following remarks can be made. Seen in isolation, the appeal made by the Government of the United States and others to the sporting world not to participate in the Games is not in accordance with the Final Act. It is submitted that this appeal to boycott was in conflict with the aim of the Final Act to promote detente through cooperation, *inter alia*, in the field of sport. The existing contacts in the field of sport were actually even discouraged, rather than encouraged. In this particular case the sporting contacts were based on the Olympic Charter, i.e., the rules etc. which govern the Olympic Games. Thus the existing contacts in the field of sport were also interfered with, in conflict with principle IX of the Final Act.

As regards the (final) decision of part of the sporting world not to go to Moscow, it is submitted here that this was not in conflict with the Final Act as such. The National Olympic Committees (NOCs) which had to take the decision, were not as such signatories to the Final Act. Cases in which the sporting world were to decide on a boycott on its own initiative could therefore not be assessed in the light of the Final Act, unless any decisive intervention by the government could be demonstrated. In principle, government intervention is more likely in the East than in the West, when one considers that the national sports federations in the Soviet Union, for example, are founded and run by the above-mentioned Sports Committee, a state organ which falls under the Council of Ministers of the Soviet Union. In his thesis, Van den Heuvel made the following remark about the position of the Soviet NOC: “We have already noted that the sports federations are subordinated to the National Sports Committee and there can be no doubt that the National Sports Committee is more important than the Soviet Olympic Committee. One can also assume that foreign sports policy is indicated by the National Sports Committee or by the Central Committee of the CPSU [Communist Party of the Soviet Union; RS] and that the Olympic Committee implements this policy. One cannot, therefore, consider the Olympic Committee of the Soviet Union to be

independent in the sense that is considered essential in the Olympic Charter”.<sup>7</sup>

### 4. Afghanistan

Viewed in isolation, the appeal of the United States and others to boycott the Moscow Games was in conflict with the Final Act of Helsinki. However, it ought to be remembered that this appeal arose from the Soviet intervention in Afghanistan. In this case the violation of the Final Act (the invasion of Afghanistan) was answered with a violation of the same Final Act on another point (the paragraph on sport and, in this context, also principle IX). In the view of the parties that took the initiative in the boycott, the earlier violation concerned military intervention by the Soviet Union in Afghanistan, an independent sovereign State, which constituted a violation of the basic principles of the United Nations Charter and of international law; a violation of the prohibition of aggression that applies to the relations between States. In the Final Act the prohibition against aggression is laid down, in particular, in principle II of the “First Basket”, also with regard to States which did not sign the Final Act, as, for instance, Afghanistan: “The participating States will refrain in their mutual relations, *as well as in their international relations in general*, from the threat or use of force against the territorial integrity or political independence of any State, [author’s emphasis added].

In this context the preamble of the “First Basket” is relevant. This concerns “Questions relating to security in Europe” where detente is called a process “universal in scope”, and where the close link between peace and security in Europe and in the world as a whole is recognized, as well as the need for each of the participating States to make its contribution to the strengthening of world peace and security. In fact the invasion of Afghanistan violated many other principles of the “First Basket”, in particular principle VIII concerning the right of peoples to self-determination, as well as principles I, III, IV, and VI (Respect for the rights inherent in sovereignty, Inviolability of frontiers, Territorial integrity of States, Non-intervention in internal affairs)(8) via principle X (Fulfilment in good faith of obligations under international law). These principles guiding the relations between the participating States represent at the same time principles of public international law and were, therefore, applicable in the relations between the Soviet Union and Afghanistan (see explicitly so principle II).

### 5. Reciprocity

Is it possible to justify the fact that the invasion of Afghanistan was answered with an appeal by the United States and others to the NOCs to boycott the Moscow Olympic Games? Or should this appeal nevertheless be considered in this context as a violation of the Final Act and therefore of detente?

The Final Act says only that the participating States “will pay due regard to and implement the provisions in the Final Act of the Conference on Security and Co-operation in Europe” (see principle X). At the end of the Final Act the section “Follow-up to the Conference” states that “The participating States declare (...) their resolve to continue the multilateral process initiated by the Conference: (a) by proceeding to a thorough exchange of views (...) on the implementation of the provisions of the Final Act.”<sup>8</sup> In the Concluding Document of the follow-up meeting in Madrid, no mention was made of contacts in the field of sport, nor of the boycott of the Olympic Games, let alone of the boycott as a reaction to Afghanistan.

As it is, the Final Act of Helsinki is not an agreement under international law (treaty), though it is an agreement in the sense of an “accord”. In this context one may refer to the following statement made on behalf of the Government of the Netherlands to parliaments “Although the undertakings given within the framework of the Final Act of Helsinki are not, strictly speaking, obligations in the sense of treaty law, the Netherlands has consistently maintained the view that the Helsinki accords would lose their point unless all the signatories to the Final Act made every effort to ensure proper implementation of the Final Act provisions (...). The Helsinki accords are accords between thirty-five countries. The mere fact of defective implementation of some of the accords by one or more countries need not immediately be a reason for other

5 In the Agreement concerning the principles of co-operation between the sporting organizations of the USSR and the Netherlands (Nederlandse Sportfederatie: NSF) of 23 June, 1976, the only reference made is to the cultural agreement between the two countries which ascribes a role to exchanges in the field of sport in the context of detente (See Annex D for the text of the Agreement). Text of the Agreement concerning the cultural co-operation between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics of 14 July, 1967, in: Tractatenblad, 1967, No. 115 (see introduction and under Article 2 sub k). See also the Explanatory Memorandum for the parliamentary approval of the agreement, Bijlage Handelingen [Annex to

Parliamentary Proceedings], II 1967/68 - 9337, No. 3. N.B. In the protocols some references are made to the European Sports Conference, which has taken place in alternate years since 1973 between central Western and Eastern sports organizations.

6 W.Ph. Knecht, *Der Boykott - Moskaus missbrauchte Olympiade* (Cologne 1980), pp. 51-52.

7 M.P. van den Heuvel, *Sport in de Sovjetunie* [Sport in the Soviet-Union] (Haarlem 1978), p. 48. N.B. The present chairman of the Soviet NoC is also the Minister of Sport.

8 Cf., the vice-chairman of the American delegation at the follow-up meeting of Madrid on 24 November, 1980, *World Affairs*, 1982, No. 4, p. 333 et seq.

countries to stop implementing them. However, a situation in which some countries do and others do not act in accordance with what was agreed at Helsinki cannot last indefinitely. If one or more countries were to continue to ignore aspects of the Final Act that are essential to detente, and other countries had to tolerate this, then there would be no question of real detente. The fact is that accords such as those of Helsinki are based on the assumption of reciprocity".<sup>9</sup>

If reciprocity is then accepted with regard to the implementation of the Final Act of Helsinki, the 1969 Vienna Convention on the Law of Treaties, which aims at the codification and progressive development of the law of treaties (see the preamble), contains a provision which could be invoked by analogy, viz., Article 60, paragraph 2, under (c); "A material breach of a multilateral treaty by one of the parties entitles any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every other party with respect to the further performance of its obligations under the treaty." In the case under discussion the description of "material breach" in paragraph 3 under (b) of Article 60 is particularly relevant: "the violation of a provision essential to the accomplishment of the object and purpose of the treaty".

If "Afghanistan" and the boycott appeal which was a reaction to it are assessed in the light of the provisions of Article 60, the following conclusion would seem justified by analogy: 1) that the Soviet Union (defaulting State) directly violated, *inter alia*, principles II and VIII of the Final Act, which can undoubtedly be considered to be a material breach because it attacked the very essence of detente (cf., object and purpose), thereby radically altering the position of all the other States with regard to the further implementation of their obligations under the Final Act, and 2) that this material breach can be considered as a ground for the United States and others to suspend the paragraph on sport and, in connection with this, principle IX, with regard to the Moscow Olympic Games (cf., suspending the operation of the treaty in part with respect to itself).

## 6. Sport and politics

The final decision on the boycott of the 1980 Moscow Olympic Games was left to the NOCs\* The NOCs were free to make this decision in two ways. In the first place, in law they would do no more than ignore an invitation to participate in the Games by a negative decision, i.e., in accordance with the rules of a non-governmental organization, the IOC (Article 61 of the Rules of the Olympic Charter). There is actually no obligation for the NOCs, the only responsible authorities for the representation of their countries at the Games (Article 24b Rules), to participate in the Olympic Games. The issue concerned here was, therefore, a decision about entering the Games by 24 May, 1980 at the latest; this was the official closing date which was extended by the IOC to give the NOCs a further opportunity to enter the Games.

In the second place, the Western NOCs - for these were concerned in particular as the boycott was taken on American initiative with the intention that Western Europe especially would follow suit remained officially free in their final decision because the principle of autonomy of the sport federations applies in the Western world, i.e., the respect for the individual responsibility of the national sports organizations. In principle, sports organizations should decide themselves which international contacts they desire to maintain. Governments cannot make directives or give instructions in this matter. They can, however, make recommendations or requests. Sport and politics cannot be separated, but there are areas of separate responsibility. One government (and parliament) will exercise more political pressure in the world of sport than another. In the case of Moscow 1980, the Government of the United States, which took the initiative for the boycott, exerted most pressure. Thus the USOC was addressed by Vice-President Mondale on behalf of President Carter, in his capacity as honorary President of the USOC,

at its meeting on 12 April, 1980, when by a vote of 1,604. to 797 the decision was taken not to participate in the Games.<sup>10</sup> On the contrary, most Western European Governments, which, with the exception of Great Britain, were not such enthusiastic supporters of a boycott, were initially inclined to emphasize the independence of the NOCs. France - the birthplace of Baron Pierre de Coubertin, the spiritual father of the modern Olympic Games was the leading proponent of this point of view. This attitude changed abruptly in most cases when it became known that the Nobel Prize winner, Andrei Sacharov, was banished to Gorky on 22 January, 1980. This was a violation of principle VII of the Final Act of Helsinki (respect for human rights and freedoms). At that point even Western Europe put pressure on the sporting world, without however exceeding the limits of the sports federations' autonomy. To give just one example, the Dutch Government was the first to announce that it would advise its athletes to boycott the Games, The Government had already decided not to give any financial support to the Dutch team for the Games. It withdrew a subsidy of Fl, 6,000, which the NOC had requested for the travelling expenses of an interpreter and for the costs of participating in the IOC meeting in Moscow. However, Prime Minister Van Agt emphasized that in view of the size of the sum, this would not have any consequences for the participation nor for the independence of the sports federations involved in participating in the Olympic Games, a point which was also stressed by the Government as such.<sup>11</sup> Nevertheless, it is submitted that this sort of decision, when viewed in isolation, is, like the appeal to boycott, in conflict with the Final Act (paragraph on sport).

In the event, the boycott of the Olympic Games was not a complete boycott, 81 out of 146 NOCs sent teams to Moscow, and in some cases athletes did not participate in particular events because the national sports federation concerned wished to boycott the Games, even though the NOC did not. This was possible, unlike the converse, i.e., the individual participation of athletes, teams or even entire sports federations, NOCs of 42 countries had declined the invitation to the 1980 Moscow Olympic Games explicitly; these can be regarded as the true boycott States, USOC, for example, decided not to participate because the President of the United States had declared that the national security of the country was being threatened by international events. This motive could in fact have justified administrative measures such as the withdrawal of passports and the refusal of exit visas to those going to the Olympics. The remaining twenty-three countries had simply not responded to the invitation; there were reasons other than the boycott itself, for example, financial reasons. Twenty-seven of the thirty-five States that had signed the Final Act of Helsinki participated in the Games, including eighteen Western European States. The Games were boycotted by the Federal Republic of Germany, Canada, Liechtenstein, Monaco, Norway, Turkey and the United States (the Vatican does not have a NOC).

## 7. The Olympic Charter

The NOCs formally could make their decisions freely. In fact, they were obliged to do so pursuant to Article 24 C of the Rules of the Olympic Charter: "NOCs must be autonomous and must resist all pressures of any kind whatsoever, whether of a political, religious or economic nature". The question is whether there were good reasons to respond to the appeal to boycott.

In my opinion, sport should listen to politics when the underlying reason for the proposed measures also affects the sport as such, i.e., when there are reasons "of sport" for the boycott.<sup>(12)</sup> A good example is the boycott of sports with South Africa. If, and to the extent that there is apartheid in sport in South Africa, there should be no contacts with that country in the field of sports. It would be possible, however, to have contacts with multi-racial (non-racial) sports federations in South Africa. This implies that not all sporting contacts with South Africa should be cut off, in contrast to the aim of the International Declaration against Apartheid in Sport (resolution of the General Assembly of the United Nations of 14 December, 1977, 32/105 M). If this would happen, the world of sport would be adopting a purely political position, unless one would take the position that fully integrated, non-racial sport is impossible under the system of apartheid. Racism in sport should therefore

<sup>9</sup> NYIL, 1981, pp. 167-168.

<sup>10</sup> Department of State Bulletin, May 1980, pp. 14-15.

<sup>11</sup> Aanhangel Handelingen [Appendix to Parliamentary Proceedings], II 1979/1980, No. 568, p. 1111.

be combatted by the world of sport for reasons of principles of sport (cf., the Olympic principle of non-discrimination), but it cannot be the function of the world of sport to combat the apartheid system as such.

What are the implications of all this for the appeal to boycott Moscow 1980? The governments in favour of a boycott were of the view that the Olympic Games should not take place in a country that committed acts of aggression against and within a small neighbouring country (Afghanistan) and thus acted in direct conflict with the principles as laid down in the Charter of the UN, Cf, also Article 1 of the Olympic Rules: "The aims of the Olympic movement are: (...) - to educate young people through sport in a spirit of better understanding between each other and of friendship, thereby helping to build a better and more peaceful world, - to spread the Olympic principles throughout the world, thereby creating international goodwill". The Olympic movement therefore has idealistic aims which go beyond the world of sport itself.

Thus the Olympic Games - "universal in scope" with 146 member countries with NOCs - have to a certain extent political purposes. Cf., for example, the preamble of the Third Basket of the Final Act of Helsinki (including the paragraph on sport), which refers to the participating States' desire to contribute to the strengthening of peace and understanding among peoples. It is now possible to conclude that the appeal to boycott in reaction to "Afghanistan" was not arbitrary. The underlying consideration was that cooperation, the aim of which should be the promotion of detente, would be difficult to achieve in the context of the Olympic Games, which were aimed at promoting peace, at a time when detente had received such a blow by a violation of peace made by the very country where the Games were to take place. The same applies in an assessment of the appeal to boycott in the context of the Final Act, by analogy with Article 60 of the Vienna Convention on the Law of Treaties (see *supra* para 9.5.), the position of the United States and others had altered radically as a result of "Afghanistan" (and "Sacharov"), particularly as regards the Olympic Games.

There is yet another aspect in which holding the Olympic Games in Moscow was directly related to the Final Act of Helsinki, viz., that of "human contacts". Many people wished to use the sporting occasion in Moscow as an opportunity for discussing with the hosts the question of human rights, and in this way for promoting the process of detente from their side<sup>12</sup> However, the preparations for the Games included measures designed to forcibly displace Moscow inhabitants in order to prevent the population of Moscow from having any contact with foreign visitors and athletes. For many people the banishment of Sacharov symbolized the impossibility of any true dialogue. Prominent Russian dissidents abroad, such as Ginzburg, Bukovski and Amalrik founded a pro-boycott committee on the day of Sacharov's banishment. In the Netherlands, the Committee on Olympic Games and Human Rights (COSEM), consisting of members of parliament and representatives of social sectors, also began to favour a boycott, having been against it previously.

Were the NOCs in the same position as governments with regard to the question of whether to participate because the Olympic Games have a detente character which entails to a certain extent political purposes? For the NOCs "Afghanistan" as such was not a sufficient reason of sport to boycott the Games. (N.B. An example of a boycott based on principles of sport was the boycott of the 1976 Olympic Games in Montreal by twenty-nine African states because New Zealand, which maintained contacts in the field of sport with South Africa, had not been banned from the Games by the IOC). The NOCs merely had to ascertain whether, notwithstanding "Afghanistan" and other events, the Games could take place as a normal sports event, and also as an opportunity for the sporting youth of the whole world to meet "in a spirit of better understanding between each other and of friendship", "thereby helping to build a better and more peaceful world", and "thereby creating international goodwill". It is submitted that these questions could be answered

affirmatively, although perhaps with some hesitation. Quite independently of the question of Afghanistan, one reason for a boycott might have been the fear that in principle the host country would use the Games for propaganda for its political and social system etc., to reveal its superiority before the eyes of the world. This would have been in conflict with the Olympic Charter, see Instruction II (The Olympic Games are not for profit): "No one is permitted to profit from the Olympic Games (...) all are determined that neither individuals, organizations or nations shall be permitted to profit from them, politically or commercially".

## 8. National representation

As stated above, I do not consider that "Afghanistan" alone could have been a reason for the NOCs to boycott the Games in Moscow. However, there is another aspect that should be considered in this study. The Games are admittedly apolitical in the way they are planned, but on the other hand, there are provisions in the Olympic Charter which clearly contradict this basic assumption. One example of an apolitical provision is the following: the Games are entrusted to a city by the IOC (Article 4 Olympic Rules). However, this provision is contradicted by Article 64 regarding the opening ceremony: the head of state of the country concerned declares the Games officially opened. At the closing ceremony the flag of the host country is hoisted and the national anthem is played (Article 66). Another apolitical provision is that the Olympic Games are not contests between nations, and no scoring by countries is recognized (Article 46). In this context, Instruction I of the Charter deserves consideration: the IOC "considers (...) as dangerous to the Olympic ideals (...) that certain tendencies exist which aim primarily at a national exaltation of the results gained instead of the realization that the sharing of friendly effort and rivalry is the essential aim of the Olympic Games". This is in line with the important Article 9: "The Games are contests between individuals and not between countries". However, in direct opposition to this, is the fact that:

- only nationals of a country may represent that country and compete in the Games (Article 8);
- the flags of the countries of the medal winners are hoisted while the national anthem of the country of the winner is played (Article 65);
- name-boards of the countries which are represented and their flags are carried at the opening and closing ceremonies. (N.B. During the closing ceremony the athletes may march behind the name-boards and flags of another country, "without distinction of nationality united only by the friendly bonds of Olympic sport".)

In fact, participating in the Olympic Games has both the character of participation of a State in the Games, and of participation of athletes with a particular nationality representing the NOC of the State in question.<sup>13</sup> Thus, in taking their decision on the boycott, the Western NOCs had to consider that they would not only be a sports delegation in Moscow, but actually also a national representation vis-a-vis the head of State of the Soviet Union, while their governments certainly did not wish to be represented there. (N.B. The diplomatic representatives (ambassadors) of the Western States in Moscow were absent for the duration of the Games.) By the use of national symbols (flag, national anthem), this would also become obvious in Moscow. Strictly speaking, USOC and others had to take a decision with national consequences, whether or not it was in accordance with the foreign policy of the government. It should be remembered that the governments feared that if the Western States participated, the Olympic Games would be used by the Soviets as proof of the international acceptance of the policy carried out by the USSR (particularly as regards Afghanistan and Sacharov).

## 9. Depoliticization

The eighteen Western European NOCs which refused to boycott the Games attempted to resolve the dilemma outlined above by a degree of depoliticization or denationalization of their own participation in the Games. On 3 May, 1930, they issued a declaration in Rome, stating the conditions under which they participated, the most important of which are that:

<sup>12</sup> Cf., S. Guldenpfennig, *Internationale Sportbeziehungen zwischen Entspannung und Konfrontation - Der Testfall 1980 (Cologne 1981)*, in particular see pp. 35, 134.

<sup>13</sup> Cf., the Decision of the Judicial Division

of the Council of State on 12 June, 1980 in pursuance of the possible South African participation in the Olympic Games for the Handicapped (Paralympics) held in the Netherlands, NYIL, 1981, p. 349 et seq.

- on all occasions the flag of their delegations would be the Olympic flag;
- the national anthem would be the official Olympic anthem, [N.B. A rather cryptic article (Article 24 F) had been added to the Olympic Charter (Rules) during the Winter Games in February 1980 at Lake Placid, to make this possible.<sup>14</sup>

Moreover, a variety of ways was used in the Summer Games to avoid any form of national representation. Some NOCs even boycotted the opening and closing ceremonies, others used a nameboard with the name of the NOC rather than a nameboard with the name of the country (e.g., “BOA” instead of “United Kingdom”). In a formal sense this covered any moral obligations towards the delegation’s own government. In fact, the condemnation by the government of the countries concerned of “Afghanistan” and “Sacharov” was publicly revealed by the NOCs in this way - though admittedly to a lesser extent than by the absent NOCs. However, the media obviously continued to refer to the NOCs in question by the name of their country. The “country” still participated. However, it is submitted that this is a consequence with which the world of sport, as a sector of society, need not concern itself, if “sport” is not to be completely politicized. It is actually rather difficult to conceive of any other form of organization for international sport than a territorial organization, i.e., by country and also by nationality, cf., Article 24 E of the Olympic Charter (Rules): “The name of a NOC must reflect the territorial extent and tradition of that country”. Even the abbreviations such as USOC and BOA, which are not at first glance obviously connected to a particular country, actually stand for “United States” and “British” respectively, while NOC also stands for the Netherlands Olympic Committee.

Meanwhile, further consideration has been given to the question of depoliticizing the Olympic Games after the problems in Moscow in 1980. The Greek president, Karamanlis, repeated a proposal first made in 1976 (Montreal) to hold the Games permanently in his country at a place with extra-territorial status, in the vicinity of Olympia.<sup>15</sup> This was, therefore, a proposal to denationalize the location rather than the participants. On 15 February, 1980, the European Parliament accepted a resolution about the Olympic Games in Moscow in support of this proposal.<sup>16</sup> The Consultative Assembly of the Council of Europe adopted a similar resolution on 26 September, 1980 (Resolution 738 on the Olympic Games and the outlook for their future, based on a report by M. Druon.<sup>17</sup> “Nea Olympia” would have to be assigned international status, and it would have to be placed under the authority of the IOC. Prompted by Karamanlis’ offer, Lord Killanin, the then President of the IOC, finally set up a special study commission. This commission concerned itself, *inter alia*, with preparing a draft convention on this matter between the Greek government and the IOC.<sup>18</sup> However, the Olympic Congress in Baden-Baden in September 1981 came to the following conclusions with regard to the future of the Olympic Games:

- “The Olympic Games ceremonial should be maintained as in the

- “Olympic Charter” (however, Article 24 F (Rules) remains valid as an escape clause at the time of writing);
- “The Olympic Games should continue to be able to be held anywhere in the world”.

## 10. The IOC

In his initial appeal to boycott, on 20 January, 1980, President Carter had insisted that the USOC propose to the IOC that it relocate, postpone or cancel the Games. What was the IOC’s position? The IOC is the final authority on all matters relating to the Olympic Games (Article 23). The IOC chooses the city where the Games are to be held at least six years in advance. “In the event of a breach of the Rules being committed or a failure to observe the duties and obligations that have been entered into, the IOC may, pursuant to Rule (...) 23 (...), withdraw the organization of the Olympic Games from the city and from the NOC concerned” (Article 51).

The IOC is completely autonomous in its decision-making process, vis-à-vis the NOCs: “Members of the IOC are representatives of the IOC in their countries and not delegates to the IOC” (Article 12). [N.B. IOC members must be members of the NOC of their country (see the Model Constitution for an NOC as contained in the Olympic Charter, Article 111(b)(1)); “They may not accept from governments or from any organizations or individuals instructions which shall in any way bind them or interfere with the independence of their vote”. (Cf., Article 24 C with regard to the NOCs.)

Unlike the NOCs, which have a national representation, the IOC was able to adopt a completely neutral position with regard to “Afghanistan”, i.e., not merely because there were no reasons of “sport” for the boycott. Therefore, there was no need to make an implicit choice for or against the Western policy, based on the view that the invasion of Afghanistan constituted military intervention (as expressed in Resolution ES-6/2 of the General Assembly of the United Nations) or between this view and that of the Soviet Union, that the Government of Afghanistan had requested military assistance against foreign aggression on the basis of the 1978 Treaty of Friendship between the two countries, so that Article 51 of the Charter of the United Nations (collective self-defence) was applicable.<sup>19</sup>

At the IOC session at Lake Placid on 12 February, 1980, the IOC unanimously decided to reject the USOC request to relocate etc. the Games (all seventy-three members were present). A few days earlier, during the opening of the IOC session, Lord Killanin had made the following statement: “Solutions to the political problems of the world are not the responsibility of sporting bodies such as the International Olympic Committee, but of the appropriate governmental organizations (...). We have had to face many problems in recent years, for example, political problems in Germany and China, and racial discrimination in South Africa and Rhodesia. We have always sought to resolve these problems from a sporting point of view, in an effort to bring the peoples of the world together, without discrimination as to race, religion or politics (...). As I have repeatedly said, we have the greatest dislike of sport being made the target, when political, diplomatic and economic measures should be used by those with conflicting ideologies to resolve the differences”.<sup>20</sup> At the end of the IOC session, Lord Killanin made the following statement about the IOC contract with the Soviet NOC and the city of Moscow (a declaration which was unanimously approved by the IOC): “The Games of the XXII<sup>nd</sup> Olympiad were awarded to the City of Moscow by the 75<sup>th</sup> Session of the International Olympic Committee, and an agreement was signed between the parties on 23 October, 1974 All preparations have been made in keeping with the terms of that agreement and consistent with the rules of the IOC”.

## 11. Conclusion

How can a boycott such as that of the 1980 Moscow Olympic Games be assessed from the point of view of the Final Act of Helsinki of 1975?

The Final Act of Helsinki contains a paragraph on sport, a specific elaboration of principle ‘IX of the Decalogue, concerned with the cooperation between the participating States in the field of sport. In my view, the appeal of the American and other governments to boycott the

<sup>14</sup> Article 24 F: “The flag (...) used by a NOC at the Olympic Games shall be submitted to and approved by the Executive Board of the IOC.” The Bye-laws to the Rules states “... NOCs may only make use of the Olympic flag (...) provided that they have the express approval of the IOC to do so”.

<sup>15</sup> At the same time the Mayor of Innsbruck offered his city as a permanent location for the Winter Games, which had been held there previously in 1964 and 1976.

<sup>16</sup> Official Journal of the European Communities, No. C59 of 10 March, 1980, pp. 57-58.

<sup>17</sup> Doc. 4585.

<sup>18</sup> Olympic Review (1980), p. 706.

<sup>19</sup> However, the IOC now has at its disposal a formal criterion of assessment based on international law in view of the contract that is made between the IOC and the organizing NOC, as well as the city cho-

sen for the Games. This is Article 5 of the model contract as contained in the Olympic Charter. (This article was not included in the 1979 version, though it is contained in the 1982 and 1983 versions.) It reads: “If the country where the city is located at any time before the opening ceremony of the Games finds itself in a state of war or in a situation officially considered as one of belligerence, the IOC has the right, by simple notification addressed to (...) the NOC, to withdraw the Games from the city”. (author’s emphasis added). This provision could, in fact, be considered as a modern variation of the classic Olympic principle of political truce. During the Games there was always a truce, and the organizing city State was forbidden to wage war and the other city States were forbidden to declare war on it.

<sup>20</sup> Olympic Review (1980), pp. 107-108, 110.

Games is in conflict with the paragraph on sport, which implies that the participating States will not discourage any contacts in the field of sport. However, I do consider that the appeal was totally justified as a reaction to "Afghanistan", a violation of almost the entire Decalogue and, unlike the non-implementation of the paragraph on sport, a violation of international law. With regard to the implementation of the Final Act, although a "legally non-binding agreement", it is submitted that reciprocity is applicable. By analogy, then, Article 60 of the Vienna Convention on the Law of Treaties could be applied to the appeal to boycott.

As regards the NOCs' decision whether or not to boycott after being appealed to, they were no more bound to the Final Act than was the IOC. The NOCs' decision vis-a-vis Moscow 1980 was a decision about entering the Games to be taken independently of their governments and the IOC.

The position of the governments which had appealed to their NOCs to boycott was based particularly on the consideration that one should not participate in the Olympic Games, which are aimed at the promotion of world peace, in a country which had recently committed an aggressive act. However, it is submitted here that only reasons of principle relating to sport can be a justification for a sport boycott, at least from the perspective of the sporting world. Racial discrimination in sport is an example of this type of reason. In the case under discussion, the NOCs need only have considered whether the Olympic Games could take place normally as a sporting event and an opportunity for young sportsmen of the world to meet in a spirit of better understanding between each other and of friendship, notwithstanding "Afghanistan". Personally, I would have answered this question affirmatively. However, this leaves out one important obstacle. National teams represent their countries in a visible manner by means of the national flag, national anthem etc.

The NOCs which participated in the Games against the advice of their governments visibly demonstrated that they were ignoring the foreign policy of their governments, although they had valid sporting reasons for doing so, I therefore consider that it was a correct decision that the eighteen Western European NOCs attempted to denationalize their presence in Moscow by leaving their national anthems and flags behind. Meanwhile the attempts to depoliticize the Games by creating "Nea Olympia" have foundered. Thus in future the same sort of situation might arise as that of Moscow 1980. There does not seem to be any permanent solution. Even if anything like "Nea Olympia" could ever be achieved (an utopia?), there might still be boycotts among the participating countries, although the IOC would be the host.

Meanwhile I consider that Article 24 F of the Olympic Charter (NOCs performing under the Olympic flag and anthem) was retained

for a good reason, so that it can be applied when the need arises. Moreover, the Olympic Charter should, in my view, make it possible for individual athletes, teams and entire sports federations to participate in the event of a boycott by the national NOC (obviously under the Olympic flag and anthem). After all, the converse is also possible, when athletes etc. do not compete though the NOC does participate. In this context, it should be remembered, that: "The Games are contests between individuals and not between countries" (Article 9 of the Olympic Charter).

#### Postscript

Now that most socialist countries on their turn have boycotted the Olympic Games at Los Angeles in 1984, the question may be asked how this boycott is related to the Final Act of Helsinki.

The first observation to be made is that the boycott was an independent decision by the Olympic Committee of the Soviet Union, The Government had not made any public, official appeal not to participate in the Games before. So, the Final Act was not violated, since the sports organizations did not assume formal obligations under the Final Act.

Secondly, the reasons put forward by the Olympic Committee of the Soviet Union for the boycott, only referred to the organization of the Games. There was no reason given that, on its own, had no direct relation to the Games (cf., Afghanistan). The reasons put forward were gross violations of the Olympic Charter by the host country, i.e., the organizing committee and the public authorities, as a result of which the participants' security was not guaranteed.

So, the boycott of Los Angeles was the opposite of the boycott of Moscow 1980, at least in a formal sense: no political, but a purely "sports" boycott, i.e., based on the sporting world's decision and for technical reasons. Was that true in fact? In the Soviet Union the national sports federations of which NOCs are made up for the most part, are subordinated to a State organ, the Sports Committee. So, one may suppose that, as the Soviet national sports federations suggested the Olympic Committee not to participate in the Games at Los Angeles, they in fact implemented the Government's and Party's policy. If the decision to boycott was taken by the USSR in reaction to the boycott of Moscow 1980 four years earlier, this decision amounts to a reprisal, belated but - for that very reason - exactly proportionate. From the Soviet point of view this reprisal was justified: Afghanistan was a question of military assistance instead of intervention and therefore the US boycott of Moscow 1980 had been unlawful. However, if one starts from the lawfulness of the 1980 appeal to boycott as this author does, it was the boycott of Los Angeles 1984- that constituted a violation of the Final Act of Helsinki.

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Mohamed Bin Hammam Loses His FIFA Bribery Appeal

by Ian Blackshaw

## Max Moseley Loses European Court of Human Rights Privacy Appeal

Max Moseley, the former President of the World Motor Sports Governing Body, the FIA (International Automobile Federation), has lost his privacy appeal to the European Court of Human Rights in Strasbourg. He wanted the Court to require newspapers to warn people before printing stories exposing their private lives.

In 2008, the UK High Court awarded him damages of £60,000 following a ruling that the *News of the World* newspaper had invaded his right to privacy by reporting on his rather colourful and lurid sex life.

He argued before the Strasbourg Court that damages were not sufficient compensation because they were awarded *ex post facto* - in other words, after the details of his private life had been published and the damage to his reputation had already been done. One could not 'unpublish' the story and, therefore, money alone could not restore his reputation!

However, the Court, whilst criticising the conduct of the *News of the World*, held that, under the European Convention on Human Rights of 1950, the press were not required to pre-notify the subject of the story. The Court said that it had to assess and balance more broadly the right to privacy under article 8 with the right of freedom of expression under article 10 of the Convention. The Court also said that the right to a private life in the UK was already protected by self-regulation of the press through the Press Complaints Commission; access to the civil courts for damages; and, where appropriate, interim injunctions. In the UK, we now have so-called 'super' injunctions, where the very fact that an injunction has been granted is also kept confidential. There has been much criticism recently of these injunctions, mainly on the ground that they are open to the rich and famous, including sports 'stars', especially footballers, and not to the ordinary citizens who cannot afford expensive lawyers to obtain them for them, and, therefore, they have no legal protection whatever!

In effect, the Court was applying the so-called '*margin of appreciation*' provision in the Convention in striking the right balance between the freedom of the press, on the one hand, and the right of an individual to have his/her privacy protected by law, on the other hand. This is a difficult balance to achieve in practice - what is in the public interest and what is not is a difficult question to answer and will vary from case to case. In this context, it should always be remembered that the public interest is a rather vague concept - it has been described by one English Judge as "*an unruly horse*" - and also that what interests the public is not necessarily in the public interest!

Furthermore, the Court was of the opinion that a pre-notification legal requirement would have a "*chilling effect*" on serious investigative journalism. Also, to make this legal requirement effective and work, in practice, there would need to be adequate sanctions.

Not unnaturally, Moseley was "*disappointed*" with the Court's ruling and thought that the Judges "*had underestimated the dangers posed by UK tabloid newspapers*." As is generally known, they are ruthless in getting their stories and generally follow the precept: "*publish and be damned*."

However, the Chairman of the UK Press Complaints Commission welcomed the ruling and said that it would be a "*diminution of our democracy, never mind our freedom of expression*" if injunctions could be gained every time somebody sought to block a story!

For more information on the protection of image rights of sports persons, see '*Sports Image Rights in Europe*', I.S.Blackshaw and R.C.R.Sikemann (eds.), 2005, TMC Asser Press, The Hague.

# UK Bid to Host 2018 FIFA World Cup: Lord Triesman Spills the Beans!

Coming hard on the heels of the announcement on 9 May, 2011 by FIFA President, Sepp Blatter, with no doubt an eye on his re-election at the beginning of June 2011, which is being opposed, of an historic ten-year €50 million Agreement with INTERPOL to rid the 'beautiful game' of match-fixing and illegal betting, Lord Triesman, the former Chairman of the English Football Association (FA), under the cloak of Parliamentary Privilege, claimed, on 10 May, 2011, that the UK Bid to host the FIFA World Cup in 2018 was riddled with requests for substantial sums of money and other favours in return for votes from a number of the members of the FIFA Executive Committee, who decided the issue.

These are serious allegations and they need to be thoroughly investigated by FIFA, which claims to be on a crusade to kick corruption out of football, which is not surprising, given that football is not only the world's favourite sport, but also its most lucrative one! With so much money in football, billions of US\$ in fact, the temptations to take unfair advantages and act unethically are considerable, but must be resisted in the interest of fair play in sport, which is what sport is all about.

So, Blatter would do well to take a leaf out of the IOC's book in dealing with the Salt Lake City bribery scandals some years ago, and order - and personally oversee - a root-and-branch internal investigation within FIFA. Furthermore, he should not leave any stone unturned in getting to the truth and, in the process, show no favours to anyone, including any of his cronies and supporters. This is a considerable challenge not only to FIFA's integrity and credibility, but also to Blatter's personal standing within the so-called 'world football family'.

It has been announced that the English FA is also to hold its own investigation into the Triesman allegations, and has appointed James Dingemans, QC, to undertake an independent review of them.

Both the FA and FIFA will need to act decisively and quickly to get to the bottom of these allegations, in line with the FIFA motto, namely, for the game and for the world! As Bill Shankly, the legendary manager of Liverpool Football Club, once said, football is not a matter of life and death; it is more important than that!

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## Protecting Sports Images Rights: the Rise and Fall of Super-Injunctions?

Sports celebrities, like David Beckham, often earn more money off the field of play than on it, through the commercialisation of their image rights by multi-national companies, who are prepared to pay mega sums for their products and services, which they market around the world, to be associated with and endorsed by such celebrities. These image rights/endorsement contracts are very valuable commercially to both parties, not least the sports celebrities concerned, who will do everything in their power to safeguard and protect them, especially when their images are threatened.

Unfortunately, footballers often 'play away' - a euphemism for engaging in extra-marital affairs - and wish to keep their dalliance secret and confidential and hide it from the world's media and thereby preserve their reputation and its saleability.

This has led in the last twelve months or so to the granting by the English Courts of a number of so-called 'super-injunctions' - it is impossible to say how many because of the legal nature of them - preventing the media reporting on their affairs and also - perhaps more importantly - the fact that such injunctions have actually been obtained by the sports celebrities concerned. These injunctions have been pejoratively described as 'gagging orders' by the media and the supporters of a free press and freedom of expression in the United Kingdom and elsewhere. Breach of them constitutes 'contempt of court' which is punishable by fines and/or imprisonment! In fact, the UK Attorney General has been asked on 22 May, 2011 to bring a prosecution against a journalist who has named another footballer who had obtained a 'super-injunction' protecting his identity.

Under the UK Human Rights Act of 1998, which came into effect in October of 2000, the provisions of the European Convention on Human Rights of 1950 are directly applicable in English Law. This means that sports celebrities can invoke the right to privacy enshrined in article 8

of the Convention. But, this right of personal privacy has to be balanced against the general right of freedom of expression enshrined in article 10 of the Convention. It is left to the Judges to determine this balance on a case-by-case basis, and, it is believed, many 'super-injunctions' have been granted by the English Courts in favour of the rich and famous, including several footballers.

The high-water mark of the granting of these super-injunctions relates to the recent granting of such an injunction to an English Premier League footballer, who is alleged to have had an extra-marital affair with a former Miss Wales and ex-Big Brother 'star', and the Court Order also enjoins the social-networking site 'Twitter' to reveal the names of the persons who have revealed his identity on their site. The owners of 'Twitter' are based in California in the US and such an English High Court Order may, according to a number of well-known British media lawyers, including Mark Stephens, be difficult, if not impossible, legally to enforce.

Apart from that, it is reported that, within twenty-four hours of the player obtaining this particular order on 20 May, 2011, more than twelve-thousand 'tweets' about him and his relationship have appeared on the 'Twitter' site.

The whole affair is turning into a farce and making an ass of the Law. So, it is high time that the UK Parliament stepped in to bring some order out of this chaos by introducing some clarifying legal rules on the protection of privacy, as the granting of 'super-injunctions' by the English Courts is clearly running out of control!

However, this will be quite a challenge, as those who wish to rein in the world's media are up against the world-wide web, a very powerful medium in its own right, and one which has often been described as the modern equivalent of the old 'lawless wild west'!

# Champion Jockey Kieren Fallon Is Banned by Court

## Injunction from Competing in the 2011 Derby Horse Race

Champion jockey, Kieren Fallon, has been banned by an English Court of Appeal injunction from riding in the 2011 Derby granted on the day of the race (4 June, 2011), just hours before it was due to be run. The Appeal Court overturned a ruling by the lower English Court (the High Court) the previous day refusing to grant the injunction on public interest - it is likely that punters had placed bets on the horse that Fallon was due to ride simply because he was the jockey and a three-times winner of the Derby - and restraint of trade grounds. The Judge saying, in that respect, that a jockey should be free to ply his trade.

The circumstances in which this intervention by the English Courts in the 2011 English Derby horse race occurred were as follows.

It appears that Fallon had entered into a written contract with the owner of a horse called 'Native Khan' to ride that horse exclusively in the Derby and not to ride any other horse in that or any other race in which 'Native Khan' was competing. The contract was entered into in April 2011 for a term of 12 months. Fallon announced 5 days before the 2011 Derby that he would not be riding 'Native Khan' but another horse entered in the Derby called 'Recital'.

According to the owner of 'Native Khan', Fallon was in breach of his contract and sought an injunction against Fallon precluding him from riding Recital in the 2011 Derby, which is a classic annual horse race in the English racing calendar. As already mentioned, the owner lost in the High Court and appealed successfully to the Court of Appeal.

The two Appeal Court Judges held that damages would not be an adequate remedy for this clear breach of contract (a prerequisite for the granting of an injunction, which is always in the discretion of the English Courts) and that the appropriate remedy would be to grant the requested injunction banning Fallon from competing in the 2011 Derby. The Judges also held that granting the injunction would not constitute a restraint of trade.

Without knowing all the facts and circumstances of this case, I would have agreed with the view expressed by the lower Court Judge that it was, being, in my view, unreasonable and against the public interest! Certainly in the horse racing and jockey fraternities, it is the accepted practice that a jockey should be free to ride whichever horse he likes in whatever race. Perhaps, however, the mistake that Fallon made in the present case was signing the particular contract in which he expressly gave up such right.

In any event, this case illustrates very well that, when the appropriate remedy in a sporting dispute is injunctive relief, the Courts are the proper forum in which to bring the dispute, rather than to rely on some form of Alternative Dispute Resolution (ADR) of the matter.

Indeed, as a former Lord High Chancellor of Great Britain and Northern Ireland, Lord Irvine of Lairg, has well remarked: 'ADR is not a panacea for settling all kinds of disputes'. The Courts do have their uses on occasions!

## The UK Bribery Act 2010 Finally Comes Into Force

We have been hearing and reading a lot recently about bribery and corruption in sport - not least regarding the 'beautiful game' and the corruption allegations in FIFA - and, unfortunately, this is a subject which will continue to dominate the news stories and agenda in the foreseeable future.

On 1 July, a new Act, the Bribery Act 2010, came into force in the United Kingdom, which is wide reaching and tough and will have important implications for the world of sport, especially in relation to the provision of corporate hospitality. The new UK Act is considered to go far beyond the requirements of the US Foreign Corrupt Practices, which, itself, is regarded as a formidable measure designed to eradicate corruption from business and, to use the well-known sporting metaphor/cliché, provide 'a level playing field'.

Like the US Act, the new UK Act is extra-territorial in its reach and those involved in the promotion and commercialisation of sport at the international level need to bear its provisions in mind, when developing, drafting and executing various sports marketing corporate arrangements and agreements.<sup>1</sup>

The new UK Act creates a new corporate offence, which can only be countered by the commercial organisation concerned (as defined in the Act) showing that it has 'adequate procedures' in place to avoid the kind of bribery foreseen by the Act. Clearly, those commercial organisations that already have such policy and operating procedures in place need to review them and ensure that they come up to the expectations and stringent requirements of the new UK Act. *A fortiori*, those that do not have any at all had better get their act together and introduce such procedures pretty quickly. Equally, the staff of such organisations need to be made fully aware of them and participate regularly in compliance training programmes. Such programmes also need to be fully documented.

The Act has teeth: breaches of its provisions can lead to fines and/or imprisonment of up to ten years being imposed on offenders. In fact, these penalties are comparable with the heavy fines imposed by the US Authorities under the US Foreign Corrupt Practices Act.

The UK Ministry of Justice has issued some very helpful guidelines on the interpretation and application of the new measures. These are available by logging onto: [www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf](http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf). This guidance includes some useful and illus-

trative case studies showing how the Act is likely to operate in certain practical situations.

In the sports marketing context, the new UK Act is likely to be keenly felt in relation to corporate hospitality packages offered in connection with major sporting events, such as the FIFA World Cup. The provision of corporate hospitality on a lavish scale with expensive corporate mementos/souvenirs could constitute a bribe and fall foul of the new Act. Reasonableness and proportionality are the order of the day. This is much easier to describe than to define!

As Tom Beezer of the UK Law Firm Bond Pearce in a Client Briefing Paper of 7 July, 2010<sup>2</sup> has rightly pointed out:

*"We don't want to scaremonger but lavish corporate hospitality could fall foul of the new legislation. That will not be taking someone for lunch down the road but perhaps more excessive hospitality like picking a client up in a private jet, wining and dining them with champagne and caviar en route to a sporting event overseas while spending a week in a six star hotel. Certain industries are more susceptible than others.*

*Different areas of the world may have a completely different view of how a relationship should be properly constructed and what is acceptable. Your overseas representatives, who may not be as aware of the UK legislation, might be doing something perfectly normal where they are based but the UK mother ship could fall foul of the Act.*

*Many UK companies with overseas operations are likely to be aware of the US Foreign Corrupt Practices Act (FCPA) but the new UK legislation goes further to cover the bribery, or attempted bribery, of individuals and companies as well as public officials and organisations. What is seen as acceptable and part of local custom in many parts of the world may be totally unacceptable under the new law."*

You have been warned!

1 See further on this subject, the new Book 'Sports Marketing Agreements: Legal, Fiscal and Practical Aspects' by Ian S Blackshaw to be published shortly by the TMC Asser Press, The Hague, The Netherlands.

2 'Corporate hospitality could fall foul of new Bribery Act'. Website: [www.bondpearce.com](http://www.bondpearce.com).

# Manchester United to List on Singapore Stock Exchange

It has been announced, on 16 August, 2011, that the leading English FA Premier League Football Club, Manchester United, is to raise US\$1 billion in an IPO (Initial Public Offering) on the Singapore Stock Exchange in the fourth quarter of this year. The IPO will be coordinated globally by the major Swiss Bank, Credit Suisse.

ManU is reputedly worth US\$1.86 and is the world's wealthiest Football Club. ManU originally was listed on the London Stock Exchange and delisted in 2005, when the US Glazer brothers took over the Club.

Originally, the Club was to have listed on the Hong Kong Stock Exchange, and the listing on the Singapore Exchange is designed to take advantage of the Club's extensive and enthusiastic fan base in the Far East - a football mad region.

Apparently, this move is also designed to expand their lucrative business and, in particular, to raise funds to acquire new players to maintain their leadership as one of the world's most successful Football Clubs, especially to fend off challenges against their prominent status from the likes of long-time rivals, Manchester City, owned by trillionaire Sheik Mansour bin Zayed Al Nahyan of Abu Dhabi.

Of course, this development raises once again the vexed question of whether or not football clubs should be run as public companies or be owned by their fans in some kind of mutual organisation. This is particularly pertinent at a time when, largely due to the mega sums of money sloshing around in the world's favourite game, its world governing body, FIFA, is reeling from several corruption scandals.

The Football Supporters' Federation (FSF), which represents some 180,000 football fans in England and Wales, in written evidence submitted at the beginning of 2011 to the Sport, Media and Culture Select Committee of the UK Parliament, considers that football clubs are principally sporting and cultural assets, and that their prime purpose is to serve their geographical and supporter communities. As far as the FSF is concerned, all other purposes and objectives should be ancillary to those objectives. In other words, commercial profit and financial gain should not be the main goal of football clubs.

And, according to the view of UEFA, the European Governing Body of Football, with which the FSF entirely agrees, the best form of organisation for a professional football club is a mutual member-owned club!

But, one may reasonably ask, is it too late to turn the tide?

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## DHL in New Major Sponsorship Deal with Manchester United

Manchester United (Man U) are never far from the sporting headlines; and this time it is a new sponsorship deal, described by David Gill, the CEO of Man U, as "ground breaking in the English game", is making the news.

DHL, the well-known logistics group, are to become the club's first official training kit sponsors to the tune of £40 million over a four year period. This deal makes the majority of other Sponsorships of other English FA Premier League Football Clubs pale into insignificance.

Sponsorship is the bed rock of Sports Marketing, the commercialisation and promotion of sports events, sports teams and sports persons, which, through the pioneering efforts of Mark McCormack of IMG and Horst Dassler of ADIDAS, has become a multi-billion dollar industry around the world. The attraction and value of Sports Sponsorship lies in the association of the products and services of the Sponsor with leading Sports Brands, such as Man U, which is not only the world's favourite football club, but also its most lucrative one, worth a reputed US\$1.86 billion.

Of course, this new major Sponsorship has been welcomed not only

by Man U, but also by DHL, whose CEO of DHL Express (Europe), John Pearson, has described it as a strategic partnership which "... will see DHL getting more involved in the behind the scenes operations of Manchester United...."

It seems to me to be a rather strange kind of Sponsorship, with such a high price tag, as, one may reasonably ask, what exposure will DHL, in fact, get from being associated with the "behind the scenes" activities of Man U, where their logo will appear only on Man U's training kit? A case of a lot of money for possibly a little marketing gain! Also, who would want to buy replica training shirts of Man U? Surely, Man U fans would want to sport their match play shirts!

However, such are the vagaries of Sports Marketing, which continues to amaze me and also to attract large sums of money, despite the global economic recession.

For more information on Sports Sponsorship, see the new Book on 'Sports Marketing Agreements: Legal, Fiscal and Practical Aspects' by Prof Ian Blackshaw, to be published later this year by the TMC Asser Press, The Hague, The Netherlands.

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## Manchester United Post Record Financial Results

Once again, Manchester United (ManU) are in the news, not because of their 8-2 thrashing of Arsenal in their latest encounter, but because of their record financial results for the year ended 30 June 2011, which they announced on 1 September, 2011.

The financial highlights are as follows:

- Operating profit: £110.9 million
- Revenue: £334 million, up £45 million on the previous year
- Pre-Tax profit: £29.7 million, compared with a loss in the previous year of £15 million
- Net Debt £308.3 million, compared with £376.9 million in 2010

Of course, ManU's debts have been a continuing source of annoyance and frustration to the fans, and, one of the reasons for the projected US\$1 billion IPO on the Singapore Stock Exchange, expected to be launched later this year, is to reduce these debts.

Revenues, which include sponsorship deals, such as the £80 million AON shirt sponsorship, were up from £81.4 million to £103.4 million.

These are very impressive results, so it seems to be a case of onwards and upwards both off and on the field of play for the Club!

ManU's record financial results come against the background, according to Deloitte's, of a spend of £485 million by English FA Premier League clubs in the summer 'transfer window', which ended on 31 August, 2011. This spending, which is largely accounted for by the top-end of the Premier League clubs, as they compete for domestic and European glory, is up by £120 million, compared with the 2010 summer 'transfer window' figure of £365 million; that is, a staggering increase of 33%!

Both sets of financial results draw attention, once again, to the continuing problem of the financing of football clubs and the yawning gap between the clubs at the top of the pile and those struggling to stay afloat at the bottom!

# Mohamed Bin Hammam Loses His FIFA Bribery Appeal

The sad saga of the FIFA corruption scandals continues. On 15 September, 2011, after seven hours of deliberations, the FIFA Appeals Committee upheld the life-time ban imposed in July by the FIFA Ethics Committee on the former FIFA Executive Committee member and FIFA Presidential contender, Mohamed bin Hammam.

He is now appealing to CAS against the FIFA decision, which he says was not unexpected. In fact, quite surprisingly, he has admitted - on his website - that he did not put much effort into the Appeal before FIFA, as he was anxious to bring the matter before CAS, where he considers that he will be on an "equal" footing with FIFA!

He has also launched a separate appeal to CAS challenging the decision of FIFA to appoint Zhang Jilong of China as the 'Acting President' of the Asian Football Confederation (AFC) - in effect, his replacement - and also to appoint him to the FIFA Executive Committee.

According to bin Hammam's lawyer, Eugene Gulland, these actions by FIFA are contrary to the Constitution of the AFC.

Bin Hammam was banned from all activities relating to football for life - a severe sporting sanction, which may, perhaps, amount to a restraint of trade? - for allegedly paying bribes, totalling around US\$ 1

million to officials from Associations belonging to the Caribbean Football Union at a meeting in Trinidad on 10 May, 2011, as part of his bid to win the FIFA Presidency in June, 2011. FIFA have charged 16 of those officials with breaches of the rules in connection with this affair.

Of course, in relation to the Appeal against bin Hammam's life-time ban, the CAS Panel appointed to hear the case, pursuant to the provisions of Article R57 of the CAS Code of Sports-related Arbitration (July 2011 Edition), has wide powers to review the matter - in effect, to have a *de novo* hearing of the case and admit new evidence, witnesses and legal arguments - and may "issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."

It will be interesting to see what the CAS actually decides in this matter, in due course.

Whatever the outcome of the CAS Appeal, bin Hammam can certainly rely upon the independence of the CAS in hearing his Appeal. However, from what he has said or implied publicly in the media, he does not have the same confidence in either the FIFA Ethics or Appeals Committees' impartiality in the handling of his case!

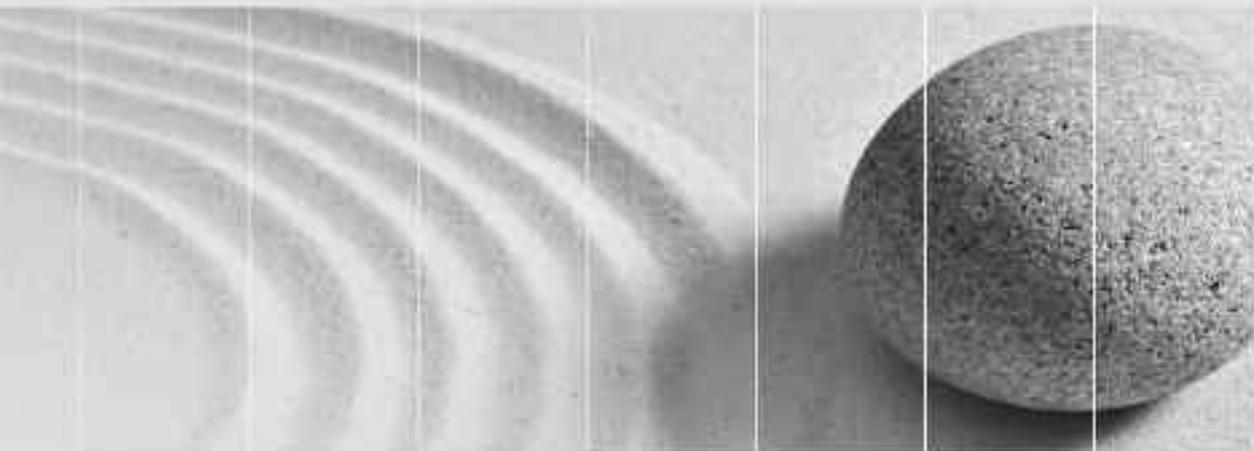
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# **International and European Sports Law Course**

**School of Law, Erasmus University Rotterdam, The Netherlands**

**Lecturer: Prof. Dr R.C.R. Siekmann**

**Structure: ten 2-hour interactive lectures**

**Assessment: paper (10 pages) and oral exam**

**Preknowledge: basic knowledge of public international and EU law**

**Period: 2011/2012**

## **Content**

The world of sport also has its own international rules and procedures. This, coupled with the further professionalization and commercialisation of top-level sport, has led increasingly to tension and friction with general international (and national) legal standards. The application and applicability of such standards in relation to professional top-level sport in particular is the central theme of the current problems in this area. Some examples may illustrate this. In the field of EU law the central question is whether the specificity of sport is such that exceptions to that law (the four freedoms, fair competition) can be tolerated in relation to the legal status of unions, clubs and sportspersons. The applicability of the human rights treaties (ECHR, ICCPR) comes into play in relation to the disciplinary proceedings against the sportsperson suspected of doping. In the area of dispute settlement at international level within this context particular consideration must be given to the position adopted by the International Court of Arbitration for Sport (CAS).

## **Literature**

Course material includes in particular the relevant articles written by the lecturer and published or intended for publication in The International Sports Law Journal (ISLJ).

## **Course aims**

The course provides an overview of the major themes in the field of international and European sports law (*capita selecta*).

In particular, within the context of this legal field, the focus is on providing insight into the problems such as outlined above and the possible solutions for these in a sector ("subculture") attracting growing public interest with specific organisational and other features.

It is intended that the course participants also actively contribute to seeking and evaluating solutions. This is done through interactive lectures in which articles written by the lecturer are explained by the lecturer and discussed. Practice-oriented experts shall, where relevant, be invited to share their views on the subject and to enter into discussions with course participants.

Course participants can write their paper on any subject of international and European sports law, whether or not this subject is part of the *capita selecta*. The oral exam is based on the paper and the subject matter dealt with in the lectures may also be discussed. The best papers are eligible for publication in The International Sports Law Journal (ISLJ). Aside from the main lecturer, some of the lectures will be provided by guest lecturers.

**For further information: please, contact Prof. Robert Siekmann via [sportslaw@asser.nl](mailto:sportslaw@asser.nl)**

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