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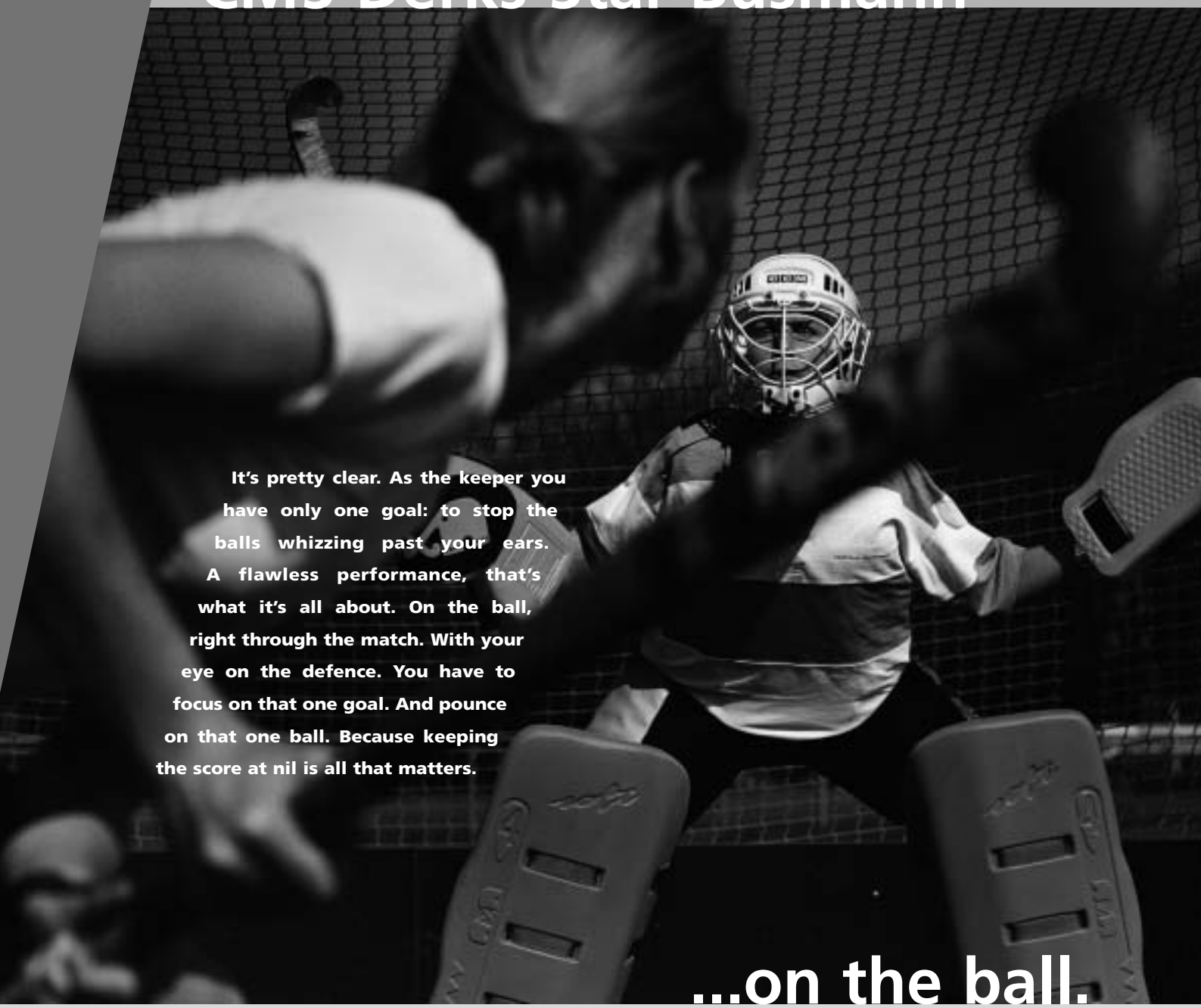

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EDITORIAL

This year, T.M.C. Asser Press in cooperation with the ASSER International Sports Law Centre will publish the following books: *The European Union and Sport: Legal and Policy Documents,* which will appear on the occasion of the enlargement of the EU in 2004 and presents the European "sport acquis" for both the "old" and the "new" Member States; *Sport Image Rights in Europe* (see the model "trailer" chapter on Italy by Luca Ferrari in this issue), and finally *The Court of Arbitration for Sports: The First Twenty Years* - with the support of CAS and in cooperation with the Rand Afrikaans University (Johannesburg, South Africa) and Griffith University (Brisbane, Australia) (see the "trailer" concluding chapter of this CAS Jubilee Book by Professor Jim Nafziger in this issue). The initiative to produce the last two books mentioned was already taken in 2002 by Ian Blackshaw, contributing editor to ISLJ (see his article on the new subject of cyberspace and sport and his two Opinions in this issue) and also general editor of these books.

Georg Engelbrecht's article on the individual right to participate in the Olympic Games deals with the CAS Ad Hoc Division and reminds us of the Olympic Games to take place in Athens later this year. There is another contribution related to Greece in this issue: Professor Dimitrios Panagiotopoulos, of the Universities of Athens and Sparta, explains the Greek transfer system for athletes. His article can be regarded as part of a series of three articles on labour relations in sports, whereby the other two are, first, Roberto Branco Martins' study on the question of work permits in European professional football after the Kolpak Case, and, second, the article on labour relations in Lithuanian football by Raimundas Jurevicius and Dovilé Vaigauskaité.

Further contributions included in this issue are also "country studies". There is an article on sports law in Brazil by Luiz Roberto Martins Castro and Fabio Laudisio Correa, who are the President and the Director respectively of the Brazilian Sports Law Institute in Sao Paulo. Their contribution among other things deals with the *Zico* and *Pele* laws. Then there are two South African contributions, one by Rochelle le Roux on *2003: Annus Horribilis for South African Sport?* and one by Steve Cornelius on liability of referees at sports events.

In this double issue of ISLJ the subject of the selling of TV rights in professional football in Europe is followed up (see earlier ISLJ 3/2003 pp. 4-18) by three country contributions: Marjan Olfers on European law and the Netherlands, Joseph Eshed on the state of affairs in Israel (a non-EU, but UEFA country) and Michael Siebold on the selling of radio broadcasting rights in Germany.

Finally, the first contribution by Rijkele Betten on *fiscal issues in sport* appears in ISLJ 2004/1-2.

Last but not least, a heartfelt welcome is extended to the Centre's new supporting partner *Hudson Global Resources* and the new Advisory Board members Luiz Roberto Martins Castro and Rochelle le Roux, University of Cape Town.

The Editors

The sketches Aldyr Garcia Schlee drew before he designed the Brazillan football kit (Alex Bellos, Futebol – The Brazilian Way of Life, Bloomsbury, London 2002).

Lex Sportiva

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

1. Introduction

Arbitral awards are normally binding only in the cases and on the parties to which they are addressed. Unlike judicial decisions in common-law systems, arbitral awards therefore have no currency as *stare decisis*. At the most, they may sometimes constitute a *lex specialis.*

In practice, however, the awards and opinions of the CAS provide guidance in later cases, strongly influence later awards, and often function as precedent. Also, by reinforcing and helping elaborate established rules and principles of international sports law, the accretion of CAS awards and opinions is gradually forming a source of that body of law. This source has been called the *lex sportiva*.

The concept of a *lex sportiva*, as a coherent and influential corpus of practice, has been identified with the *lex mercatoria* or law merchant, a venerable source of law that is said to form the foundation of international commercial practice and commercial arbitration.[1] Leaving aside the jurisprudential questions about the status of the *lex mercatoria*,[2] the association of the two terms may be somewhat strained. On one hand, the *lex mercatoria*, having developed from commercial practice over hundreds of years, enjoys a cachet of custom. Also, the *lex mercatoria* extends comprehensively to international commercial activity and institutions. Moreover, the *lex mercatoria* enjoys recognition in both private and public sectors, having a claim in some legal systems to authority as public law.

On the other hand, the *lex sportiva* is the product of only a few hundred arbitral decisions within a limited range of disputes over a historically short period of time. It is still more of a *lex ferenda* than a mature *lex specialis*. Also, the concept of a *lex sportiva* is not as comprehensive of its subject as the *lex mercatoria*. Instead, it is limited to arbitral awards within the larger sphere of international sports law. Although by one interpretation the term is very broad, nearly coinciding with the term "international sports law,"[3] the present commentary adopts the normal limitation of the concept to CAS awards. Both the status and general scope of the emerging *lex sportiva* are therefore much less substantial than the *lex mercatoria* within their respective spheres of application. Still, the *lex sportiva* may eventually develop into a sort of *lex mercatoria* of sports arbitration.

2. The scope of the concept

Although the term *lex sportiva* is generally confined to CAS awards, its scope needs to be clarified. It will be helpful, first, to review choice-of-law rules applicable to CAS arbitration. According to the procedural rules of the CAS, the parties to ordinary arbitration proceedings may exercise autonomy by agreeing to the substantive law to be applied by the tribunal or by authorizing it to proceed *ex aequo et bono*. If the parties do not choose their own law or agree to proceedings *ex aequo et bono*, Swiss law applies.[4] Either the chosen law or Swiss law then provides the rules for decision, on the basis of which the *lex sportiva* may develop. It is unlikely, as yet, that the parties would choose the *lex sportiva* itself or even some blend of the *lex sportiva* with national law to govern a resolution of their dispute.

Do such issues as the arbitrability of a dispute, the validity of an arbitration agreement, or judicial remedies against awards fall comfortably within the scope of the *lex sportiva*? The Secretary General of the CAS has suggested that they do not; instead, they fall within the *lex arbitrii* of Swiss Law.[5] That is so regardless of the actual location of a CAS hearing and award because the seat of the CAS for legal purposes is always in Lausanne, Switzerland. Consequently, the Swiss Federal Act on Private International Law governs issues within its competence in all CAS arbitrations even when one of more of the parties is domiciled or has its registered office outside Switzerland.

What about arbitral pronouncements on the human rights of athletes or on labor, anti-trust (competition) and other regulatory law? They, too, would appear to fall outside the scope of the *lex sportiva*, as would any awards deviating from the requirements of mandatory (Swiss) law or public policy (*ordre public*). Also, many commercial issues bearing on sports but not directly affecting athletes do not fall comfortably within the jurisdiction of the CAS. Moreover, pronouncements about the structure and relationships among constituent federations and other institutions within the Olympic Movement would seem to be *exces de pouvoir*.

3. The purposes of the concept and some implications

An obvious purpose for developing a *lex sportiva* is to guide later awards and thereby stabilize expectations about arbitration of particular issues. Consistency of decision-making is a hallmark of any creditable method of dispute resolution. A fully developed *lex sportiva* would help apply three values that the principle of *stare decisis* serves: efficiency of the legal process, predictability or stability of expectations, and equal treatment of similarly situated parties. Thus, "[t]he lex sportiva will clearly be more beneficial than decisions taken ex aequo et bono. It would form part of the law. The law provides more predictability which is necessary for the clear determination of the rights and obligations of the parties."[6] A broader purpose for developing a *lex sportiva* is to provide authoritative interpretations of the principles and

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1 Lord Mansfield, in a memorable statement, described the *lex mercatoria* in Latin: non erit alia lex Romae, alia Athenis; alia nunc, posthac; sed et apud omnes gentes et omni tempore, una eadem lex obtinebit. ("It will not be the law of Rome or the law of Athens; not one law now, another hereafter; but one and the same law, for all people and for all times.") Luke v. Lyde, 97 Eng. Rep. 787 (1759). For commentary on the analogy between the *lex sportiva* and the *lex mercatoria*, *see* Panagiotopoulos, SPORTS LAW: A EUROPEAN DIMENSION 17-18 (2003).

2 The following critique of the *lex mercatoria* argues that, unlike international sports law and the *lex sportiva*, it has developed solely on the basis of commercial practices, rather than on the basis of national and international law. The questions that the *lex mercatoria* raises, as follows, are a reminder of the importance of nurturing the growth of a *lex sportiva* that generally conforms with public norms and expectations:
The most successful case of law without a state has been *lex mercatoria*....
Practitioners of international commercial law are involved in a battle about fundamental questions: Should national courts recognize *lex mercatoria*'s "private justice" as a new positive law with transnational validity? Could such an ambiguous normative phenomenon which is "between and beyond" the laws of the nation-states and at the same time "between and beyond" law and society be applied by arbitration bodies according to the rules of the law of conflicts? Does it contain distinct rules and principles of its own? Obviously, a new legal practice has been established with its own substantive law and its own judge-made law that cannot be integrated in the traditional hierarchies of national and international law. Teuber, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOC. REV. 763, 769-70 (1997).

3 *See* Adolphsen, *Eine lex sportiva für den internationalen Sport?*, *in* JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 281, 282, 300 (2003) (suggesting the possibility of a *lex sportiva* free of the compulsions and requirements of national rules).

4 Court of Arbitration for Sport, Procedural Rule R45, in CODE OF SPORTS RELATED ARBITRATION 58 (1995). The tribunal's procedures are not subject to party autonomy, however. Also, the rules for resolving disputes during Olympic competition, as distinguished from ordinary arbitration, do not provide for party autonomy, given the exigencies of prompt decisions. Instead, the applicable law ordinarily includes the Olympic Charter, applicable regulations, general principles, and rules of law the application of which the tribunal deems appropriate. Swiss whole law, including its choice-of-law rules, would prioritize party autonomy to choose the law, and, failing that, the rules of law with which a case in question has the closest link. *See* B. v. FIBA, DIGEST OF CAS AWARDS, *supra* note 11, at 300.

5 *See* Reeb, *The Role of the Court of Arbitration for Sport*, *in* INTERNATIONAL LAW AND THE HAGUE'S 750TH ANNIVERSARY 233, 236 (Heere ed. 1999).

6 Oschütz, *Institutional arbitration in sport*, *in* SPORT ET GARANTIES FONDAMENTALES: VIOLENCES-DOPAGE 507, 516 (Korcha & Pettiti eds. 2003). *But see* a listing of the advantages of more informal methods of sports-related disputes that would not ordinarily contribute to the formation of the *lex sportiva*, BLACKSHAW, *supra* note 45, at 21.

rules of international sports law - for example, provisions of the Olympic Charter - by means of arbitral awards. Eventually, repeated interpretations may shape the development of international sports law well beyond CAS proceedings. Indeed, that is a stated purpose of the CAS,[7] and it is capable of performing this casuistic function as its decisions on anti-doping sanctions demonstrate..

A further application of the *lex sportiva* is within the administrative review processes of sports organizations, especially the appellate panels of the international sports federations (IFs) such as the International Amateur Athletic Federation (IAAF). There is a critical need for such guidance to enhance the integrity and credibility of the IFs and to improve their image as essential elements in the regime of international sports. Otherwise, their administrative and appellate decisions tend to spark suspicions and controversy. All too often, IF decisions appear to be based on political expediency. In two leading cases, for example, the IAAF lifted anti-doping suspensions against world-class medalists Merlene Ottey of Jamaica and Javier Sotomayor of Cuba.[8] In both instances clear scientific evidence to support their suspensions seems to have been compromised by either faulty review of the evidence (Ottey) or extrinsic factors such as empathy by the IF administrative council with the particular athlete (Sotomayor) that called into question both the independence and the binding force of the arbitration. It is hard to escape the conclusion that "the IAAF panel was no more independent in its actions than the national panels whose decisions they were reviewing [and that an] international arbitration system that is not independent and for which there is a political override, no matter how well intended, will ultimately bring both itself and its sports federation into dispute."[9]

IF decisions such as in the *Ottey* and *Sotomayor* cases have important implications for the future of international sports competition and its organizational structure. Such decisions bespeak a critical need for the kind of corrective jurisprudence that the CAS can supply in the absence of other independent and impartial tribunals with special competence to hear international sports-related disputes. Over time CAS arbitration can also lend greater coherence, rationality, uniformity, and influence to international sports law. It is in everybody's interest to pursue these objectives for the sake of greater predictability and stability of expectations.

The more the teleology of CAS is directed toward greater predictability and stability of expectations, however, the more formal the arbitral process may be viewed. That perspective would give rise to expectations of fully reasoned opinions, rules of evidence, meticulous use of precedent, and other characteristics of litigation. Fulfilling such expectations in CAS proceedings might seem to strengthen the process of international sports law in attaining greater stability and integrity, confidence in the consistency of outcomes among the cases, and growth of a reliable corpus of interpretation, a *lex specialis*.

The merits of a robust *lex sportiva* may be questioned, however. Ordinarily, arbitration represents a happy compromise between the uncertainties of more informal methods of dispute resolution, such as negotiation and mediation, and the formality and inflexibility of adjudication. The opportunity to choose specialized experts to decide a dispute is a particularly attractive feature of arbitration. What would arguably be lost by formalizing the CAS process, however, are several other advantages of arbitration: confidentiality; relatively low cost; simplified procedures; speed; mediative quality; capacity to help restore, preserve and maintain relationships between disputing parties; flexibility and customization to particular circumstances and the wishes of the parties; and international enforceability.[10] Delays and transactional costs mount as formality increases, and formalized arbitration more and more begins to resemble litigation.

Fortunately for parties to CAS arbitration, the Code of Sports-related Arbitration discourages an approximation of adjudication. The Code restricts discovery of evidence, protects confidentiality between the parties, encourages conciliation and mediation within the CAS framework, allows party autonomy in choosing the applicable law, provides for party discretion and flexibility in selecting the arbitral panel, and offers an alternative of expedited procedure. The parties' costs of arbitration are limited to relatively modest fixed rates. Appeals are free of charge. Timelines for conciliation and appeals procedures are a matter of a few months rather than years. Moreover, the Code provides that awards will not be made public (as court decisions normally are) unless an award so provides and all parties agree.

Happily, CAS practices have conformed well to the Code. They have been sufficiently flexible, however, to enable the CAS to tailor its exercise of discretion to the circumstances of individual cases so as, for example, to strike appropriate balances between privacy and the public interest, depending on the nature of a dispute.

Despite these constraints on formalization of the CAS, the aspiration to create a *lex sportiva* may arguably give a judicial cast to its proceedings. A judgment in 2003 by the Swiss Federal Tribunal bears out this observation. At issue in *A. & B. v. IOC*[11] was a public-law appeal of a CAS award in the previous year. The controverted arbitration concerned a decision by the IOC Executive Board to disqualify two cross-country skiers on the basis of positive tests for doping during three competitions in December 2001 and in February 2002 during the Salt Lake City Winter Games. The appeal also challenged the two-year suspensions that were subsequently imposed on the skiers by the International Ski Federation (FIS).

The court first established that the CAS ruling at issue involved points of law and not just sporting rules (rules of the game) on the basis that the serious sanction of suspension from competition constituted "a genuine statutory punishment that affects the legal interests of the person."[12] Much of the court's opinion thereafter addressed a claim that the FIS, IOC, and CAS lacked a requisite independence and impartiality. After examining claims of institutional and personal bias and exhaustively reviewing the history of the CAS and its decoupling from the IOC in 1994, the court concluded that the CAS was sufficiently independent of the IOC and FIS for its decisions to be considered "true awards, equivalent to the judgements of State courts."[13]

The court's litmus of verity in arbitral awards - "true" awards are equivalent to judicial decisions - bespeaks its general characterization of the CAS as a body "more akin to a judicial authority independent of the parties."[14] But how can CAS deliberations be assimilated to adjudication if the plaintiffs, according to the court, had freedom to select arbitrators and procedures? And how can CAS decisions be assimilated to judicial decisions if their publication remains within the discretion of the CAS and only with the consent of the parties? Nevertheless, the court observed that "[a] true 'supreme court of world sport' is growing rapidly and continuing to develop.[15] The court further observed that "states and all parties concerned by the fight against doping ... endorse the judicial powers [sic] of the CAS."[16]

It is hard to imagine that the court in *A. & B. v. I.O.C.* actually meant to equate arbitral proceedings with adjudication. Perhaps the Swiss court's identification of the CAS with a court of law was only metaphorical. If not, then the Swiss court must have been prepared to vest authority in the CAS to resolve the very issues of public law, human rights, and due process (natural justice) that have been presumed to lie beyond the tribunal's competence. That may be acceptable under Swiss law, which governs the CAS, but may arouse serious apprehensions among prospective foreign parties sufficient to deter

7 *See* II DIGEST OF AWARDS, *supra* note 15, at xxx, as follows: 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.

8 Ottey v. IAAF, IAAF Decision, July 3, 2000 (unpublished); Sotomayor v. IAAF, IAAF Decision, July 24, 2000 (unpublished).

9 *See* McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379, 390 (2001).

10 For an acknowledgment of several of these advantages by the Secretary General of the CAS, *see*, Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, 2002/2 INT'L SPORTS L.J. 21, 25.

11 Swiss Fed. Trib., 1st Civil Chamber, Judgement of 27 May 2003.

12 *Id.* § 2.1.

13 *Id.* § 3.3.4.

14 *Id.* § 3.3.3.2.

15 *Id.* § 3.3.3.3.

16 *Id.* § 3.3.4.

them from submitting their disputes to the CAS for arbitration.

For a prospective party not bound to CAS jurisdiction by any prorogation provisions, the idea of conceding plenary, binding, more or less judicial authority to an arbitral body that is governed, at least to the extent of the *lex arbitrii*, by national law may simply be unacceptable. Worse yet, formalized arbitral decisions on sensitive issues of public law, labor relations and human rights may invite parallel litigation in other legal systems. In any event, the Swiss court's puzzling *obiter dictum* complicates the growth of the *lex sportiva*.

The CAS would be well advised to proceed cautiously in constructing the *lex sportiva*. Nobody would deny that the tribunal needs to assume a strong enough stature to withstand extravagant interference by domestic courts[17] and expect that its awards will be recognized and enforced under the New York Convention on Arbitral Awards.[18] But the CAS runs considerable risk when it allows itself to be presented as an institution resembling a national court of law, with all of the expectations and problems associated with international recognition and enforcement of court judgments and all of a party's skepticism about the impartiality of a foreign court.

4. The case law

Leaving the jurisdictional questions aside, what has been the range of disputes before CAS panels?[19] What does the CAS case law teach? How well-developed is the *lex sportiva*?

From its beginning, the CAS has given advisory opinions and decided contentious cases involving two dominant themes: jurisdictional questions and eligibility of athletes for sanctioned competition. Most of the latter cases have involved athletes whose eligibility for competition had been suspended or terminated for life by national sports bodies or IFs on the basis of anti-doping sanctions imposed by their national sports bodies or international federations. In one of its first cases, which was conducted *in camera*, the CAS decided a dispute between an athletic club and a national sports body that had imposed a sanction against the club.[20] In another early case, the tribunal rendered an advisory opinion in favor of the Norwegian Olympic Committee in which it upheld the right of an NOC to exclude an athlete from sanctioned competition for life after violating the NOC's anti-doping rules within the IOC framework.[21]

Over time the CAS has fashioned specific rules and principles from its decisions with broad application. For example, equitable considerations have softened CAS review of anti-doping sanctions against athletes. Despite a prevailing rule among IFs of strict liability for doping, CAS awards generally disclose an inclination to avoid unnecessarily harsh results.[22] These awards, in turn, have helped shape the World Anti-Doping Code. Second, in determining the validity of such sanctions, the CAS has consistently relied on the authority of international sports law such as the IOC's Medical Code and Drug Formulary Guidelines, at least until their replacement by the World Anti-Doping Code, rather than its own construction of doping standards and sanctions.[23] Third, an important advisory opinion of the CAS helped resolve jurisdictional issues in doping cases by establishing the priority of IFs over NOCs in the event of a jurisdictional conflict between them.[24] In a fourth case, *Ragheeb v. IOC*,[25] the CAS confirmed that it could review an issue of eligibility only on the basis of an arbitration agreement or a specific accreditation of an athlete for competition by the IOC. Because CAS decisions have conformed closely with trends and expectations within the larger process of international sports law, they have been playing a role in defining and refining the applicable rules in that process.

In confirming its broad jurisdiction, the CAS has not hesitated to deny claims based on a manipulation of rules for strategic advantage. In one case, for example, the CAS reprimanded an NOC for violating the principle of fair play by improperly seeking disqualification of a competing team to elevate the standing of its team in competition even though the NOC had not been directly injured by the competing team.[26]

Another important contribution of CAS jurisdictional decisions is the non-interference rule according to which the CAS will not interfere with the rules of the game or official calls in the course of competition. In drawing a line between nonreviewable rules of the game and reviewable rules that transcend the immediacy of competition, three cases of the CAS are instructive. The first arose out of an incident during the 1996 Atlanta Games.[27] In reviewing a referee's disqualification of Boxer M for landing a below-the-belt punch on his opponent, the CAS applied customary international standards, drawn particularly from practice in the United States, France, and Switzerland. The CAS concluded from the general practice that a technical decision, standard or rule during competition - in other words, a nonreviewable game rule - is shielded from arbitral or judicial scrutiny unless the rule or its application by sports officials is arbitrary, illegal, or the product of a wrong or malicious intent against an athlete. In such cases, the rule or its application is reviewable. Sanctions appearing to be excessive or unfair on their face are also reviewable. The rationale for the *Boxer M* decision was two-fold: that IFs have the responsibility to enforce rules, and referees or ring judges are in a better position than arbitrators to decide technical matters.

A second application of the non-interference rule was the AOC Advisory Opinion.[28] There the CAS considered the reviewability of a decision by the international swimming federation (FINA), less than a year before the 2000 Olympic Games, to approve the use of full-body ("long john") swimsuits. These highly elastic suits, which were first marketed by Speedo, attempted to simulate natural sharkskin. They were designed to increase a swimmer's speed and endurance, to reduce drag, and possible to enhance the buoyancy of the swimmer.

17 Even limited immunity from interference by domestic courts may generate tensions, of course. *See, e.g.*, Sturzaker & Godhard, *supra* note 40, at 248 (discussing an Australian court decision, Raguz v. Sullivan [2000] N.S.W.C.A. 240, that established the international character of CAS arbitration regardless of its physical location on the basis that its juridical seat, by prior agreement between the parties to a dispute, was Lausanne, Switzerland).

18 NEW YORK CONVENTION, *supra* note 25.

19 For a presentation of the decisions of the CAS ad hoc tribunals, *see* KAUFMANN-KOHLER, *supra* note 28.

20 The IOC's summary of the decision is as follows:
The Court of Arbitration for Sport, based in Lausanne, has just delivered a verdict which makes a welcome development towards quicker and simpler settlement of sports conflicts. The case to be resolved started with a protest by a club against a sanction imposed on it by its federation. After exhausting all the possibilities for appeal provided for in the federation's statutes, the club brought a legal action before the civil courts. Rather than pursue a slow and expensive procedure, however, - and that is what constitutes the interest of the case - the parties decided by common assent to instruct the Court of Arbitration for Sport to look into the validity of the federation's decision. The federation agreed, it is important to note, to submit the validity of a decision issued by its highest statutory instance to evaluation by the Court of Arbitration for Sport. After consultation, the CAS delivered its verdict on 30th January 1987, confirming the validity of the decision taken by the highest instance of the national federation. However, the verdict will not be published, as the proceedings took place *in camera* in accordance with the Statute of the CAS.
OLYMPIC REV., March 1987, at 96.

21 OLYMPIC REV., May-June 1987, at 287.

22 A.v XXX, CAS 2001, A/317 (2001); CAS 96/156 (1997). *See generally* Aaron N. Wise, *Sports governing bodies' strict liability drug rule standards*, 14 SPORTS LAW., Sept.-Oct. 1996, at 14.

23 *See, e.g.*, CAS award in NAG 2 (1998) (reinstating the gold medal of the winner of the snowboarding giant slalom at the 1998 Winter Games in Nagano, Canadian Ross Rebagliati, who had tested positive for use of marijuana). The CAS found, under the Medical Code, that the IOC had no competency to disqualify Rebagliati in the absence of the requisite agreement between the IOC and the International Ski Federation (FIS) to provide for tests for cannabinoids (marijuana and hashish). The CAS further found that marijuana was not listed as a banned substance in the Drug Formulary Guide that had been published for athletes participating in the Nagano Games.

24 TAS 94/128 (1995).

25 Ragheeb v. IOC, CAS, Aug. 30, 2000 (unpublished).

26 *See* CAS award in NAG 4 & 5 (1998) (reprimanding the Czech NOC for contesting the eligibility of a United States naturalized hockey player who had played for the Swedish team at the 1998 Winter Games in Nagano). Despite its conclusion that the player had been ineligible to compete in matches already concluded in Nagano, the CAS refused to order forfeiture of the disputed matches involving the Swedish team. Forfeiture would have accrued in the standings to the advantage of the Czech team.

27 M. v. Ass'n Internationale de Boxe Amateur (AIBA), CAS Ad Hoc Div. (O.G. Atlanta 1996), in DIGEST OF AWARDS, *supra* note 16, at 413.

28 Advisory opinion at the request of the Australian Olympic Committee, CAS 2000/C/267 AOC [hereinafter AOC Advisory Opinion].

SportAccord 2004
17 - 20 May

Venue: Palais de Beaulieu, Lausanne, Switzerland.

LawAccord (18 May, 2004) is an outstanding forum for exploring the legal implications of key business issues facing the sports industry. The largest gathering of sports lawyers from around the world, international sporting federations, bidding cities and other commercial partners will come together during LawAccord to evaluate the jurisdictional variations in the sports industry, as well as providing the much-needed opportunity for communicating and sharing best practice.

> "The idea of LawAccord is a good one because everybody involved in sport is having to deal with legal issues more and more, be it for doping or defensively for their events or any number of other reasons," said **Robert H. Storey**, *President of the FIBT* (Bobsleigh), who attended the first LawAccord. "The important thing is that LawAccord should not just be an event for lawyers, but for everyone at SportAccord."

This year's topics have been chosen following extensive research within the sports community to reflect current trends.

LawAccord Conference Programme

LawAccord Opening Address: "The Positive Role of the Lawyer within the International Sports Community"

LawAccord Panel Discussion: "The Liability Issue"
Sport has become an increasing target for litigation by its commercial partners and participants. Understanding this risk and managing it is a core tool for sport in the face of growing litigation. This panel provides an in-depth analysis of the liability that can be attributed to a sports federation through the acts or omissions of its officials and how this can best be reduced or avoided.

LawAccord Panel Discussion: "Developing and Exploiting Your Intellectual Property Rights"
As the industry has suffered from static or declining media rights and sponsorship revenues, it has looked at its other core assets to develop revenue. This panel addresses how such rights exist in law and takes a look at the different approaches adopted by Federations and National Olympic Committees with regard to licensing, logos, marks, names, image rights, audio-visual rights, data and data protection, licensing fans data, gaming and betting and sponsor expectations.

LawAccord Panel Discussion: "Event Cancellation Risks"
As the threat of terrorism and political risks increase, all sports events need to consider the implications and liabilities that may arise from cancellation. This panel will discuss how Federations and Organising Committees can understand and mitigate the risk attached to event cancellation, including political and economic risks, the liability with regard to sponsors, issues with housing and organising committee agreements and having to move the entire event to a new location.

Chairman: Stephen Townley, Active Rights Management, *Consultant*, Hammonds

Confirmed speakers include:

Jeffrey G. Benz, *General Counsel and Managing Director of Legal and Government Affairs*, United States Olympic Committee
François Carrard, *Dr en droit, Avocat, Former Director General*, International Olympic Committee
Dirk-Reiner Martens, *Partner*, Belten Burkhardt Goedeler
Malcolm Speed, *Chief Executive Officer*, International Cricket Council
Robert H. Storey, *President*, International Bobsleigh & Tobogganing Federation
Howard Stupp, *Director of Legal Affairs*, International Olympic Committee
Adrian Thomas, Sport & Contingency, AON
Caroline Townley, *Managing Director*, Active Rights Management
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The FINA Bureau, after lengthy discussion, ruled that "the use of these swimsuits does not constitute a violation of the FINA Rules.[29] In response to this ruling, the Australian Olympic Committee (AOC), concerned about possible claims of unfairness at the Sydney Games, asked the CAS for an advisory opinion. The AOC inquired whether the FINA ruling had complied with FINA's own rules and whether, in any event, use of the suits would raise contestable issues of fairness. In a thorough and thoughtful opinion, the CAS properly held that FINA had reached its decision in compliance with its own rules and that its ruling, which was tantamount to approval of bodysuits, did not raise any reviewable issues of unfair procedure, bad faith, conflict with general principles of law, or unreasonableness.[30]

In the third case regarding the non-interference rule, the CAS again applied this approach in an advisory opinion that had been requested by the Canadian Olympic Committee. Among the issues was whether the Council of the International Badminton Federation (IBF) had acted within its jurisdiction and its published Rules when it made certain changes in scoring of events. The CAS ruled that it had not. The opinion by Ian Blackshaw, consistent with the dictum in the AOC Advisory Opinion, held that the IBF, having failed to comply with its own Rules, had exceeded its powers. The IBF Council's decision to change the scoring was therefore *ultra vires*.[31]

5. The legacy of CAS awards

In examining the jurisprudential legacy of the emerging *lex sportiva*, two studies of CAS case law are especially instructive. In one of them,[32] a leading CAS arbitrator examined the cases heard by the Ad Hoc Division at the 2000 Games in Sydney. In the first part of his study,[33] he divided the fifteen cases arising from the 2000 Games into five broad categories: doping violations, IF suspensions of athletes, commercial advertising issues, disputes with sports officials, and nationality issues as a matter of eligibility.

In one of the doping cases[34] a German athlete, Dieter Baumann, petitioned for removal of a two-year ban Baumann's eligibility that had been imposed by the IOC under a strict liability rule. The IAAF claimed that the CAS was without jurisdiction because at that time its Bylaws did not recognize CAS jurisdiction. The CAS examined Rule 29 of the Olympic Charter, which provides that "their statutes, practice and activities [of all IFs] must be in conformity with the Olympic Charter."[35] Under Rule 74 of the Olympic Charter,[36] the IAAF was therefore subject to the jurisdiction of the CAS. Also, the principle of *res judicata* did not apply to bar CAS review of the IAAF decision because neither Baumann nor the IOC had been a party to the IAAF arbitration. Acting therefore as an appeals court over the IAAF, the CAS upheld the IAAF decision to suspend Baumann's eligibility on the basis that the IAAF had properly addressed the evidence. In a similar due process or natural justice claim, the CAS upheld a suspension by the IAAF of Mihaela Melinte.[37]

The most highly publicized case decided by the Ad Hoc Division of the CAS in Sydney involved Andrea Raducan, a young Romanian gold medalist in the Women's Individual All-Round event in gymnastics.[38] After she failed a drug test, the IOC revoked the award of her gold medal. On Raducan's petition on appeal, the two issues before the CAS were whether only a *de minimis* amount of a prohibited drug (pseudoephedrine) that had been found in her system, together with the circumstances of her ingestion of the substance - in pills given to her by her team doctor as a flu remedy - were sufficient to relieve her from responsibility and a consequent revocation of her gold medal. The CAS, applying an established rule of strict liability to uphold the invalidation of Raducan's performance, found that the *de minimis* amount of the drug in her bloodstream and the circumstances of her ingestion of it were relevant only to the discretion given to the IOC in its application of disciplinary sanctions. The IOC, however, softened its decision, simply revoking her medal without imposing any additional disciplinary measures.

Two cases involved suspensions from eligibility of weightlifters.[39] In one of the cases[40] the CAS confirmed its independence by refusing to be bound by a Samoan court order that had exonerated one weightlifter. In the other case, the CAS struck down an IOC decision. In these and other cases before and after Sydney, the CAS has made clear that the only acceptable basis for suspending the eligibility of an athlete is an explicit rule.[41]

The Ad Hoc Division in Sydney also heard a commercial case[42] involving an alleged infraction of a Bye-law to Rule 61 of the Olympic Charter that regulates the size and other aspects of commercial advertizing on clothing. What is important about the case was a determination that inconsistency in applying the Bye-law among competitors was immaterial. The CAS seemed to be saying that two wrongs do not make a right. Other cases confirmed the established presumption that CAS arbitration would not reverse in-competition decisions.[43]

Two cases involved the nationality and alleged statelessness under the Olympic Charter of Cuban-born athletes, one competing for the United States and the other for Canada.[44] In a series of decisions in those cases that were based on Rule 46 of the Olympic Charter concerning nationality of athletes,[45] the CAS addressed issues of interpretation, *res judicata*, estoppel, the balance between fairness and finality in arbitration, and third-party interests.[46]

In the second part of the same study of the *lex sportiva*,[47] the author expanded his enumeration of the five categories of arbitral decisions in Sydney by adding two categories that have been discussed earlier in this chapter, namely, those involving the jurisdiction of the CAS and the manipulation of sporting rules for strategic advantage.[48]

A second major study of the *lex sportiva*, which was funded by the European Union, focused sharply on the CAS appellate cases involving doping issues.[49] The investigation principally examined the extent to which the CAS cases revealed a more or less deliberate harmoniza-

29 *Id.* at 12.

30 *Id.* at 19-21. *But see* Soek, *You don't win silver - you miss the gold*, INT'L SPORTS L.J., Sept. 2000, at 15 (criticizing the advisory opinion for failing to resolve the issue of fairness of the controversial bodysuits).

31 Advisory opinion at the request of the Canadian Olympic Committee, CAS 2003,C/45.

32 This study, by arbitrator McLaren, may be found in two sources: McLaren, *supra* note 59; McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001) [hereinafter *Introducing the CAS*].

33 35 VAL. U. L. REV. 379.

34 Baumann v. IOC, CAS Ad Hoc Div. (O.G. Sydney 2000), *reprinted in* II DIGEST OF CAS AWARDS, *supra* note 16 at 65.

35 OLYMPIC CHARTER, Rule 29 (2003).

36 *Id.*, Rule 74, which provides that "[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration."

37 Melinte v. IAAF, *reprinted in* II DIGEST OF CAS AWARDS, *supra* note 16, at 111 [hereinafter Melinte Case].

38 Raducan v. IOC, CAS Ad Hoc Div. (O.G. Sydney 2000), *reprinted* in II DIGEST OF CAS AWARDS, *supra* note 16.

39 Samoa Nat'l Olympic Comm. & Sports Fed'n v. IWF, CAS Ad Hoc Div. (O.G. Sydney 2000), *reprinted in* DIGEST OF CAS AWARDS, *supra* note 7 , at 28 [hereinafter Samoa]; Tzagaev v. IWF, CAS Ad Hoc Div. (O.G. Sydney 2000), reprinted in II DIGEST OF CAS AWARDS, *supra* note 16, at 101.

40 Samoa, *id.*

41 *See* McLaren, *Introducing the CAS, supra* note 82, at 533.

42 FFG v. SOCOG, CAS Ad Hoc Div. (O.G. Sydney 2000), *reprinted in* DIGEST OF CAS AWARDS, *supra* note 15, at 137.

43 See, e.g., *Melinte Case*, *supra* note 87.

44 USA Canoe/Kayak v. IOC, CAS Ad Hoc Div. (O.G. Sydney 2000), *reprinted in* II DIGEST OF CAS AWARDS, *supra* note 16, at 13; Miranda v. IOC, *id.* at 3; Perez v. IOC, *id.* at 53; Canadian Olympic Comm. v. IOC, *id.* at 83; In the Matter of Perez, *id.* at 91.45 Rule 46 provides in material part as follows: "Any competitor in the Olympic Games must be a national of the country of the NOC which is entering him." Bye-law 1 to Rule 46 provides that "[a] competitor who has represented one country [in designated competition] 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."

46 *See* summary in McLaren, *supra* note 59, at 399-402.

47 *See* McLaren, *Introducing the CAS*, *supra* note 82, at 523.

48 *See supra* text accompanying notes 35, 37.

49 *See* Gardiner, *Extracts from E.U. funded project*, remarks at the VII Congreso Internacional de Derecho Deportivo, Nov. 28, 2001, Montevideo, Uruguay (copy on file with the author). (N.B. EU Project No. C 116-15: *Legal Comparison and Harmonization of Doping Rules,* Final Report within the framework of the EU pilot project for campaigns to combat doping in sport in Europe, commissioned by European Commission (EU), Directorate-General for Education and Culture, Prof. Klaus Vieweg, Academic Coordinator, and Dr Robert Siekmann, Project Manager; *eds*)

tion of public law and sports law to promote an effective anti-doping regime. The authors of the study came to two important conclusions.

First, the study determined that there was only a limited possibility of extracting harmonizing information from the CAS awards. Second, the authors of the study emphasized the limitations of relying on tribunals, rather than legislative reform, to accomplish any program as ambitious as a harmonization of rules. "In one sense ... the CAS is at the 'wrong-end' of the process [of harmonization] as it only received a case [-it cannot actively seize a case-] when all other remedies have been exhausted."[50] A correlative limitation is that the CAS cannot play an active role in developing a harmonized anti-doping regime. On the other had, "if there were no CAS, or equivalent body, it is difficult to believe that the [more or less national] systems of strict liability would have survived so long without destructive domestic legal challenge."[51]

The authors of this second study of CAS awards made three suggestions to enhance the legitimacy of the CAS and, implicitly, to bolster the role of its emerging *lex sportiva*. First, the CAS, on a principle of transparency, should make its jurisprudence more freely available, presumably by releasing transcripts, recordings or other renditions of all but the most confidential discussions of issues. Second, the tribunal should distill a set of fundamental procedural rights from its case law that it will expressly guarantee (presumably extending beyond the assurances of those rights implicit in its own procedural rules). Third, the CAS should avoid the present interchange of arbitrators, legal counsel appearing before arbitrators, and the arbitrators themselves so as to avoid even the appearance of bias that might be derived from such interchange of personnel. Ultimately, the reputation of the CAS relies on the twin pillars of independence and impartiality. Indeed, the study concludes with the observation that "[a] truly independent and distinct body of arbitrators/sports judges should have a future priority."[52]

6. The future

The CAS deserves acclaim for two decades of high quality, productive arbitration of sports-related disputes. Among its accomplishments is the gradual development of a new and useful jurisprudence derived from its awards. This *lex sportiva*, though still incipient, is emerging as a means of resolving and potentially helping avoid a broad range of sports-related disputes. Principles and rules derived from CAS awards are becoming more clear on such issues as the jurisdiction and review powers of the CAS, eligibility of athletes, and the scope of strict liability in doping cases. The conformity of these principles and rules with the process of international sports law underscores their legitimacy. 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. Much will depend on the ability of the CAS to address lingering questions about its impartiality and certain ambiguities in its institutional status that greater formalization of its proceedings would create. Its resemblance to a judicial body, in particular, might be seen to contradict provisions in the CAS Code of Sports-Related Arbitration. It is likely, however, that the role of the *lex sportiva* in helping shape international sports law will continue to expand.

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50 *Id.* at 8.
51 *Id.* at 9.
52 *Id.*

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The Individual Right to Participate in the Olympic Games

by **Georg Engelbrecht***

1. The problem

Every athlete's dream is to participate in the Olympic Games at least once in her or his life. Often even the most successful competitors in their Olympic discipline fail to fulfil this dream for different reasons: injury, a mishap in the national qualifying rounds, a doping sanction, a change of nationality, etc. However, it can also happen that an athlete, although qualified and eligible, is ignored by the National Federation (NF) or International Federation (IF) for other reasons and is therefore not nominated by the National Olympic Committee (NOC). Such cases of conflicting interests may be on the increase. The question is whether a competitor who was "discriminated against" in this manner is individually entitled to participate in the Olympic Games, and if so, whether she/he can apply for entry in the Games not only against the wishes of the NF or IF, but also directly against the dictates of the IOC as the organiser of the Olympic Games (OCOG).

This problem will be analysed in connection with three typical cases which arose during the 27th Olympic Summer Games in Sydney in 2000 and the 19th Olympic Winter Games in Salt Lake City in 2002. These will show what the possibilities are for an unnominated competitor to retain a chance of participating in the Games and achieving Olympic fame.

A highly topical variation on this problem could arise regarding participation in the upcoming 28th Olympic Summer Games in Athens in 2004. The World Anti-Doping Agency (WADA) constantly has to admonish Member States for the considerable delays in their payment of the financial contributions which they promised at the Copenhagen Conference in March 2003. This lack of funding for WADA's fight against doping led to an IOC resolution of 8 December 2003,[1] which provides that Governments that do not fulfil their financial responsibilities to the Agency on time will be excluded from the accreditation of their Officials to the Olympic Games. In addition, such Governments will not be allowed to compete to host future Olympic Games. This IOC resolution does not mention athletes anywhere. So, what can an athlete do when his/her country is subject to this WADA and IOC sanction and chooses not to nominate competitors for the Games or even refuses to participate at all?

2. Entry form

At first glance it would seem that any direct claim of an athlete to being entered in the Olympics would be prevented by Rule 49 of the Olympic Charter (hereafter: OC, as it is in force as of 4 July 2003), which provides:

"49 - Entries

1. Only NOCs recognised by the IOC may enter competitors in the Olympic Games. The right of final acceptance of entries rests with the IOC Executive Board.

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1 WADA press release, www.wada-ama.org; according to a more recent WADA press release of 9 January 2004 the contributions for 2003 have now accumulated to 76% of the budget.

2. An NOC shall only exercise such attributions upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination.
3. The NOCs shall send to the Olympic Games only those competitors adequately prepared for high level international competition. Through its IF, a national federation may appeal to the IOC Executive Board against a decision by an NOC on the matter of entries."

In addition, Rule 45 OC defines eligibility for participation in the Olympic Games as follows:

"To be eligible for participation in the Olympic Games a competitor, coach, trainer or official must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor, coach or trainer must be entered by his NOC...".

Despite this seemingly exclusive competence of the NOCs to enter athletes, it follows from paragraphs 3 and 5.1 of the Bye-Law to Rule 49 OC, that it is the athlete himself who applies for participation. The athlete must sign the Entry Form and agree by his signature that:

"Understanding that as a competitor in the Olympic Games I am participating in an event which has ongoing international and historical significance, and in consideration of the acceptance of my participation therein, I agree to be filmed, televised, photographed, identified and otherwise recorded during the Olympic Games under the conditions and for the purposes now or hereafter authorised by the IOC in relation to the promotion of the Olympic Games and Olympic Movement.

I also agree to comply with the Olympic Charter currently in force and, in particular, with the provisions of the Olympic Charter regarding the World Anti-Doping Code (Rule 18), the mass media (Rule 59 and its Bye-Law), concerning the allowable trademark identification on clothing and equipment worn or used at the Olympic Games (paragraph 1 of the Bye-Law to Rule 61), and arbitration before the Court of Arbitration for Sport (Rule 74).

The relevant provisions have been brought to my attention by my National Olympic Committee and/or my National Sports Federation."

As for the assistance of the NOCs, paragraph 5.2 of the Bye-Law to Rule 49 OC merely states:

"The relevant NOC shall also sign such form to confirm and guarantee that all the relevant rules have been brought to the notice of the competitor and that the NOC has been authorised by the National Sports Federation concerned to sign this entry form on its behalf."

The Entry Form must be presented to the OCOG within a predetermined time-limit, although the IOC is quite generous in its practice of allowing slightly delayed entries.[2]

Another unresolved issue used to be whether the Entry Form should mention beforehand every discipline the athlete intends to participate in. In the case of the Irish swimmer S. in the Atlanta Olympic Summer Games in 1996[3] the CAS ad hoc Panel dismissed objections by US Swimming against S.'s participation in the 400m freestyle competition which S. had failed to include in his Entry Form.

Similar problems of interpretation arose in connection with the FIS Rules concerning the qualification system for the Olympic Winter Games in Salt Lake City in 2002. Here, the matter in dispute was whether a competitor, who had properly qualified in the national qualifying rounds, should in addition rank "among the top 500 of the FIS Point List of November 2001". The CAS ad hoc Panel[4] had serious difficulty deciding this case, but eventually found in favour of the athletes concerned (two skiers from New Zealand).

3. The CAS Ad Hoc Division

Since the 1996 Olympic Summer Games in Atlanta the CAS has established a special system for deciding urgent cases through its Ad Hoc Division. These cases are decided by panels composed of three arbitrators from a special list who are appointed by the President of the Ad Hoc Division. The panels are competent to hear cases concerning participation in the Games. Article 1(1) of the Arbitration Rules for the Olympic Games provides:

"The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by the Rule 74 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games."

4. The Gaia Bassani-Antivari v IOC case - CAS OG 02/003[5]

The Italian skier Gaia Bassani-Antivari has represented Grenada in the international skiing competition since 1998. At the time when the case arose he ranked 474 on the Slalom on the FIS Point List. He had fulfilled the FIS requirements to qualify for participation in the 2002 Olympic Winter Games in Salt Lake City. However, the Grenada Olympic Association (GOA) subsequently decided not to participate in the Games. Consequently, the GOA did not nominate any athletes for the competitions. For this reason, Ms Bassani-Antivari directly submitted an entry form to the SLOC herself and flew to Salt Lake City at her own expense, expecting to march in the Opening Ceremony under the Grenada flag and to represent her country in the skiing competition. But the IOC refused her application for entry in the Games, because the GOA had not submitted an entry form on her behalf. Ms Bassani-Antivari appealed against this IOC decision before the CAS Ad Hoc Division. The IOC argued that the panel lacked jurisdiction to decide the dispute. The panel had to agree and dismissed the appeal. Ms Bassani-Antivari had lost her chance of Olympic fame.

5. The Troy Billington v FIBT case - CAS OG 02/005[6]

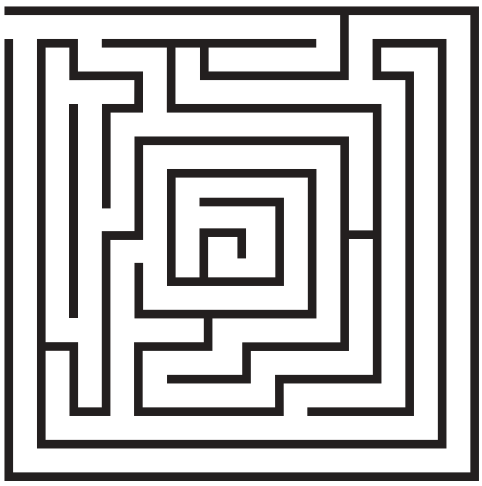
Troy Billington, a bobsleigher from the Virgin Islands, had finished 11th in the FIBT Challenge Cup for the Skeleton race. Under the relevant Rules, countries whose drivers rank among the first eight in the Challenge Cup can enter a participant for the Olympic Games. Among the top eight were two athletes from Latvia and two athletes from the Czech Republic, while South Africa did not enter their athlete for the Games, even though he had finished 6th in the Challenge Cup. According to Billington, a slot had thus become available and he requested to be "bumped-up" in order to be able to enter in the 2002 Olympic Winter Games in Salt Lake City.

However, the FIBT Internal Court of Arbitration dismissed his request, although at the FIBT's suggestion Billington was invited to ride as a "forerunner" during the Skeleton competition. In addition, he was accredited by the SLOC as an Administrative Official (AO). Supported by the Virgin Islands NOC and the national Bobsleigh and Tobogganing Federation, Billington filed an application before the CAS ad hoc division requesting that he be permitted to compete in the official Skeleton event.

The ad hoc panel confirmed the reasoning of the IOC in the Bassani case that it was not competent to deal with this application, now that the Appellant had only signed an entry form as an Official, not as a competitor. The panel reiterated the decision in Bassani where it held that the word "and" in Article 1 of the CAS Ad Hoc Rules was used conjunctively and that therefore admissible cases must involve disputes arising over entry forms from competitors.

By way of an obiter dictum the panel added that even if the CAS had been competent it would have dismissed the appeal, as it was not for the CAS to fill a legal void in the FIBT Rules.

2 See the respective comments in Arbitration CAS Ad Hoc Division (O.G.Atlanta 1996) 001/1996 - US Swimming v FINA, award of 22 July 1996, in: Digest of CAS Awards I, p.377 (paragraph 10).
3 See footnote 2.
4 Arbitration CAS Ad Hoc Division (O.G. Salt Lake City 2002) 02/002 - Canadian Olympic Association (COA) v FIS, award of 8 February 2002, paragraph 4.13.
5 Arbitration CAS Ad Hoc Division (O.G. Salt Lake City 2002) 02/003 - Gaia Bassani-Antivari v IOC, award of 12 February 2002.
6 Arbitration CAS Ad Hoc Division (O.G. Salt Lake City 2002) 02/005 - Troy Billington v FIBT, award of 18 February 2002.



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6. The Jesus Kibunde v AIBA case - CAS OG 00/004[7]

The Congolese boxer Jesus Kibunde, who was to participate in the 2000 Olympic Summer Games, due to different mishaps and through no fault of his own arrived in Sydney one day late and thereby missed the fixed date for weighing (14 September 2000, between 8 and 10 am), the medical examination and the immediately subsequent draw of the participants in the boxing tournament. Consequently, the International Amateur Boxing Association (AIBA) as the competent organiser of the Olympic tournament refused to enter him in the competition. His urgent appeal, which was supported by the Congolese NOC, to the CAS Ad Hoc Division was without success. The panel found that an exception from the strict tournament regulations was not justified in this case and that no Fundamental Principles of the Olympic Games were affected. Both the tournament management's interests and those of the other participants had to be considered as prevailing over the individual wishes of Mr Kibunde, regardless of his undisputed mishap when travelling to Sydney.

The quite incredible chain of coincidences and discrimination which led to this unfortunate failure to join the Olympic Games on time had started in Brazzaville. Mr Kibunde's flight with Air Afrique was delayed and then later annulled. When he subsequently arrived in Brussels on a Sabena flight on 11 September, it turned out his ticket was not valid for Sydney. Belgian police arrested Mr Kibunde and detained him for several hours. When he was finally released after the intervention of the COC and the SOCOG, his connecting flight to Sydney had already departed from Brussels. For this reason, the COC arranged a reservation for him with British Airways via London, where Mr Kibunde arrived on 14 September. This time, he was arrested by British police for lacking a valid transit visa. Time passed and with it his flight to Sydney. He finally got onto another flight, which arrived in Sydney on the morning of 15 September, one day late.

Apart from the personal element, this case is also peculiar from a legal perspective. From the beginning, no valid entry form had been submitted to the SOCOG, neither by the COC, nor by the athlete himself. Nevertheless, the CAS panel apparently considered itself competent by only referring to Rule 74 OC in a general sense.[8] However, a mere reference to Rule 74 OC cannot be sufficient to presume a valid arbitration agreement. According to established CAS case-law under Article R 47 and R 52 of the CAS Code, any application made to the CAS must at least show the prima facie existence of a specific arbitration agreement.[9]

7. Further disputes on eligibility/nationality

Outside the framework of the present article must remain related disputes where athletes have difficulty being eligible to enter in the Olympic Games after having changed their legal or sporting nationality. The CAS Ad Hoc Division has decided several cases concerning this specific problem, e.g. US Swimming v FINA - CAS OG (Atlanta) 001/1996,[10] Perez I, II and III v IOC- CAS OG (Sydney) 00/001, 00/005 and 00/009;[11] Miranda I and II v IOC - CAS OG (Sydney) 00/003 and 00/008;[12] and New Zeeland v SLOC, FIS, IOC - CAS OG (Salt Lake City) 02/006.[13]

8. Exclusion from the Olympic Games

In the case of exclusion from rather than inclusion in the Olympic Games, the IOC has the exclusive competence to bar a competitor from the Olympic competitions, for example, in case of a doping offence. Rule 25 OC, which deals with the "IOC Ethics Commission Measures and Sanctions", under paragraph 2.2.1 confirms the IOC Executive Board's tasks in respect of individual competitors and teams in the context of the Olympic Games as regards:

> "temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the applicable infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or team may lose the benefit of any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; in such case the medals and diplomas won by him or it shall be returned to the IOC."

In this respect, Rule 49(7) OC should also be considered, as it provides that:

> "The withdrawal of a duly entered delegation, team or individual shall, if effected without the consent of the IOC Executive Board, constitute an infringement of the Olympic Charter and shall be the subject of disciplinary action."

while Rule 66 OC states that:

> "The Olympic identity and accreditation card gives, to the degree necessary on each case and as indicated thereon, access to the sites and events placed, by the IOC, under the responsibility of the OCOG. The IOC determines persons entitled to such cards and sets the conditions of their granting and procedures of their issuance. It is the duty of the OCOG to deliver the cards to the persons entitled to them."

9. CAS arbitration agreement

In the Bassani case, as well as in the Billington case, the panel first had to decide the matter of its competence under a valid arbitration agreement between the parties. Ms Bassani had submitted her entry form to the IOC herself, causing the panel to refer to Rule 49(1) OC, which provides that

> "only NOCs recognised by the IOC may enter competitors in the Olympic Games".

Still, this rule only provides that entries must be submitted by the NOCs. An exclusive right of the NOCs to enter their athletes can only, if at all, be inferred from Rule 45 OC as cited above, as it defines the athlete's eligibility for participation by, among other things, the need for a valid entry form submitted by the NOC.

The IOC Rules, especially those concerning entry in the Olympic Games, extend an offer to every interested competitor to conclude a CAS arbitration agreement. The offer is normally accepted by competitors through the submission of the entry form. If the entry form is valid, the agreement is considered to have been concluded. There are no further grounds for the IOC to prevent its conclusion. If one interprets these IOC Rules as an *invitatio ad offerendum*, the question remains whether the IOC must not be considered to have accepted the offer made by the competitor when there appear to be no circumstances or arguments for refusing it.

In various CAS decisions reference is made to the "doctrine of estoppel", most recently in the Award of 10 January 2003, IOC v USA Track & Field (USATF)[15] where the panel cited the following basic proposition from the AEK Athens case:

> "Where the conduct of one party has led to the legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party."

Similarly one could argue that the IOC, having included in its Rules the CAS arbitration clause which applies to all matters related to the Olympic Games, is "estopped" from denying the competence of the CAS only in the specific cases discussed here without having made clear that in these cases matters are potentially different.

Instead, in the Bassani case and in the Billington case the IOC and subsequently the CAS denied that the athletes in question had made an offer, now that one of them had not submitted the entry form via the NOC (Bassani) and the entry form of the other was not a competitor's entry form (Billington). Even if this argument is formally speaking acceptable, it must still be conceded that the IOC, at least in

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7 Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 00/004 - Jesus Kibunde v AIBA, award of 18 September 2000, Digest of CAS Awards II, p. 617.

8 See footnote 7, under paragraph 6 of the award.

9 Arbitration CAS, 95/143 - S. and L. v FIS, Order of 30 October 1995, Digest of CAS Awards I, p. 535; CAS 2000/A/297 - R. v IOC, IWF, NOC Bosnia and Herzegovina and Weightlifting Federation of Bosnia and Herzegovina, Order of 30 August 2000, Digest of CAS Awards II, p. 761.

10 Award of 22 July 1996, Digest of CAS Awards I, p. 377.

11 Digest of CAS Awards II, p. 595, 625 and 651.

12 Digest of CAS Awards II, p. 607 and 645.

13 Award of 20 February 2002.

15 Paragraph 133, see www.tas-cas.org, recent decisions.

the Basssani case, was free to accept the direct offer made by the athlete to bring the case under CAS arbitration. The purely procedural argument used by the IOC to avoid a decision on the merits is not very convincing.

10. Exclusive competence of the IOC for admitting entries to the Olympic Games

In the Bassani case, the CAS ad hoc panel took the additional precaution of stating that the IOC could not accept entries without a valid nomination by, or even against the explicit wishes of, the NOC. However, this statement clearly contradicts the provisions of Rule 49(1) OC, which expressly confirms that:

> "The right of final acceptance of entries rests with the IOC Executive Board."

It should be a matter of course that the IOC is free to "overrule" an absent or negative decision of any NOC by giving the competitors so affected a "wild card" and thereby rendering a "valid" entry via the NOC superfluous.

This result would also coincide with Rule 49(3) OC:

> "Through its IF, a national federation may appeal to the IOC Executive Board against a decision by an NOC in the matter of entries."

It follows from the fact that an IF can appeal against a - negative or even positive - decision of the NOC, that the IOC has an autonomous right to overrule such NOC decisions. The IOC must be able to exercise this same power in cases where the IF and the NOC have remained idle and the athlete directly applies for entry in the Games on his/her own.

This competence to make the final decision corresponds with the way the IOC sees itself as the exclusive "owner" of the Olympic Games as described in Rule 11 OC:

> "The Olympic Games are the exclusive property of the IOC which owns all the rights thereto."

In any case, the IOC also reserves the right to admit competitors from countries in war or civil war that are without infrastructure or NOCs capable of acting. Recent examples are Afghanistan, East Timor and Iraq (see IOC press release of 17 May 2003).[16] It goes without saying that in these special circumstances there will be no "valid" entry forms from NOCs.

In the Bassani case,[17] the CAS ad hoc panel went as far as admitting this original competence of the IOC when it advised the athlete to start proceedings before the national court. If national courts are allowed to decide cases concerning entries in the Olympic Games, this must be even more true for the CAS. And if a court (either national or a court of arbitration) may order the IOC to admit an athlete, contrary to the wishes of the NOC in question, the IOC itself should be able to deal with such cases beforehand, without the pressure of a court order.

11. Injunctive remedies

Bringing proceedings before an ordinary national court only days before the beginning of the Olympic Games would obviously be quite useless, as the chances of obtaining a preliminary injunction on time are slim at best. It therefore seems paradoxical to deny a possible legal remedy to athletes by excluding them from the CAS ad hoc arbitration mechanism, which was especially created for urgent cases concerning entry in the Games. Under Article 18 of the Arbitration Rules for the Olympic Games the ad hoc panel shall deliver a decision within 24 hours. In case of extreme urgency, the President of the Ad Hoc Division, or the panel where already formed, may rule on an application for a stay of the effects of the challenged decision or of other preliminary relief without hearing the respondent first (Article 14). Equivalently, in ordinary CAS proceedings the President or the panel may make an order for provisional or conservatory measures (see Rule R 37 of the Code of Sports-related Arbitration).

When the existence of a valid arbitration agreement is denied in situations like the Bassani case, the athlete may also try to obtain a preliminary injunction from a national court at the seat of the IOC in Lausanne or at the place where the Olympic Games are held. But recourse to such "external litigation" must be considered as contrary to the spirit of the Olympic Games and all parties participating.

In this context, it is worth quoting the relevant observations of the ad hoc panel in the Billington case (paragraphs 7.7 and 7.8):

> "The construction of Article 1 of the CAS ad hoc Rules (...) may give rise to unfairness and hardship for athletes claiming the right to be entered as competitors in Olympic Games. Due to the late holding of the Challenge Cup, the Applicant has had to operate within a restricted timeframe which, in reality, prevented him from having a valid competitor's entry form submitted by his NOC before the closing date for entries. If, contrary to what we shall hold, he had a right to have the FIBT endorse him as qualified for entry in the Games, he would nevertheless have been prevented from enforcing that right because the FIBT refused to acknowledge his qualification which in turn would have prevented the lodging of a valid competitor's entry form by his NOC. There could well be other instances. For instance, an athlete who was discriminated against within Rule 2.2 of the Charter by his or her NOC and who for this reason alone was not entered would have no right to apply to the ad hoc Panel. In the light of the above, the Panel recommends that the contents of Article 1 of the CAS ad hoc Rules be reconsidered."

It appears that this panel's recommendation has led to the recent amendment of Article 1 of the CAS ad hoc Rules, which now include a second sub-paragraph reading as follows:

> "In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS ad hoc Division ineffective."

This amendment could be helpful in the cases of discrimination mentioned in Rule 49(2) OC (discrimination by a national federation "for racial, religious or political reasons"). But if competitors like Bassani or Billington are refused for other reasons, which the Panel does not consider discriminatory, the automatic competence of the CAS still seems "ineffective". An additional amendment of the Rules is therefore necessary, for example by understanding the term "or by other forms of discrimination" in Rule 49(2) OC to comprise all other legal grounds, even when not related to discrimination, which can be considered valid arguments of an athlete to be granted entry in the Olympic Games.

At least the amendment to Article 1 of the Arbitration Rules for the Olympic Games shows that the CAS through its Ad Hoc Division must be competent to deal with entry disputes, even when an entry form including the CAS arbitration clause has not been presented by an NOC. The mere request of the athlete himself together with the declaration provided in Rule 45 OC should be sufficient.

12. Legal right or discretionary decision about entries

In general, the question whether there is an individual right to entry in the Olympic Games against the wishes of the IOC must be answered contrary to the CAS panel's findings in the Bassani case. Of course the IOC may freely enter competitors without an NOC decision or even against such a decision. In this respect, the IOC should take into consideration that under Rule 31.7 OC:

> "each NOC is obliged to participate in the games of the Olympiad by sending athletes."

On the other hand it follows from the Fundamental Principles laid down in the Olympic Charter (see Rule 3(1) OC) that these protect

> "particularly the athletes whose interests constitute a fundamental

16 www.olympic.org/uk/news

17 Paragraph 4.18.

18 CAS 2002/o/372 - Norwegian Olympic Committee and Confederation of Sports, Thomas Alsgaard, Frode Estil and Kirsten Skjedal v IOC, award of 18 December 2003, www.tas-cas.org . See also the parallel award of the same day TAS 2002/O/373 - Canadian Olympic Committee and Beckie Scott v IOC, www.tas-cas.org

element of its (i.e. all the organisations under the Olympic Movement) actions...".

Just recently, a CAS award of 18 December 2003[18] underlined the prevailing interest of athletes in claiming their individual right to secure an Olympic medal which they considered they had won fairly. In this case, after confirming the win of Olympic medals by Norwegian and Canadian competitors after the banning of other athletes for doping offences during the Olympic Winter Games of Salt Lake City, the panel added that:

"More specifically, gaining an Olympic medal is one of the ultimate goals in a star athlete's career, which can bring with it many fruits, thereby giving her/him a very particular interest in challenging a decision if, as in the present case, the modification of the decision could allow her/him to obtain a gold medal or a medal she/he did not get."

However, it also observed (paragraph 75):

"That said, the fact that this Panel deems admissible the specific claim of particular athletes in the circumstances of this case does not imply that competitors of sanctioned athletes will necessarily have standing to sue in other cases and circumstances or that they will have sufficient interest in filing suit or benefit from an appropriate forum for doing so."

13. Conclusion

We may now finally clarify in more detail the situations in which the IOC can be obliged to enter an athlete without an entry form submitted by the NOC. The following situations are conceivable:

1. The IOC has discretion to decide the acceptance of competitors from countries whose organisational structures have broken down due to war or civil war in keeping with its overall responsibility for the Olympic Games.
2. If a NOC - like in the Basssani and Billington cases - arrives at the national decision not to participate in the Olympic Games, for example because of a political boycott, no third instance (e.g. national courts or the CAS) may contest this national decision, even though it goes against Rule 31.7 OC. However, in these cases the IOC has an unenforceable right, to be granted at its discretion, to issue a "wild card" to athletes affected by such a boycott.
3. In cases like the Kibunde case, where formalities were neglected through no fault of the athlete or of any organisation within the Olympic Movement, it depends on the organiser's and the other competitors' interests whether the subsequent entry of an additional competitor may be permitted. The CAS must have competence to deal with cases such as these.
4. If a NOC refuses to enter a competitor in an allegedly discriminatory or otherwise illegal way and contrary to the relevant Rules or regulations, and the IOC supports these actions, a direct claim to the CAS must be allowed.
5. In all cases where a National or International Federation prevents the NOC (for example, by giving the wrong recommendations or decisions concerning eligibility or in qualifying competitions) from supplying the athlete with a valid entry form, the final right of acceptance lies with the IOC. This right must also be subject to the legal supervision of the CAS. Article 1(2) of the Arbitration Rules for the Olympic Games allows a direct appeal to the CAS ad hoc division when prior internal remedies have been exhausted or would be ineffective through lack of time.

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Sports Image Rights under Italian Law

An overview of the main legal issues involved in the commercial exploitation of image rights of top athletes, clubs and sports associations

by **Luca Ferrari***

1. Introduction

The name, the appearance, the voice, the signature and other characterising attributes that distinguish a person are all part of the concept of image. The more a person is known, by becoming a celebrity - either willingly or involuntarily - the more powerful the image: sometimes positively, negatively, or both. Image, therefore, in a broad sense, is not just the physical characteristics of a person but also the public's knowledge and reaction to that person. Because of the immense value associated with commercial exploitation of the image of a sports celebrity, maintaining, promoting, and protecting that image is crucial.

This Chapter illustrates and defines - albeit not exhaustively - the rapidly changing content and power of image rights in the world of sport.

Firstly, we analyse the nature of image rights and the different consideration and legal protection accorded under the Italian, and more briefly United States and English legal systems. As we soon emphasise, not all countries recognise the existence of an image right. For example, only recently in England the concept of an image right has started to be recognised. However, in continental Europe, image rights are widely acknowledged and protected - by and large- along the same lines followed by Italian law.

After this survey of the law, we will concentrate on the principal means of exploiting image rights. This will include the forms and limits through which consent of the owner of such right, as a requirement for such exploitation, comes into substance, and the legal instruments that accord protection against abuse. In particular, attention will be focused on sponsorship and licensing contracts. As a related topic, we have taken into consideration the athlete's right to self-marketing and the resulting conflict, which may often arise with the advertising of the team or sports organisation to which the athlete belongs. For example, is it possible for an athlete of a team to freely execute agreements with sponsors, who are in competition with the sponsors of the team, or does the sports organisation control or limit the athlete's image advertising rights?

This and others are some of the questions we will seek to answer in the course of this analysis.

2. Preliminary concepts

The legal definition of the word "image" is somewhat different from its common usage. In ordinary parlance, as was pointed out in the Introduction, an image refers to the overall representation of a person in the eyes of the public. Thus, the image coincides with an individual's characteristics taken together as a whole and which distinguish this person in his social and professional relations. It is, moreover, synonymous with reputation and personal identity.

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In contrast, an image in legal thought refers to a person's looks, features and physical appearance.

The issues and questions related to the image right have dramatically increased in relation to the proliferation of image reproduction techniques, as well as in relation to the multiplicity of the purposes for which an image is reproduced and disseminated.

The Nature and Content of Image Rights under Italian Law

There have been numerous definitions offered for the legal nature of the image right. According to prevailing opinion, the image right is the affirmative version of the right of privacy[1]. From this perspective, the image right is articulated as the "right of a person not to have his image seen by others; and this situation is violated by the arbitrary knowledge of the image itself"[2].

The content of this right is concretely expressed in the notion that a person may choose to appear according to his or her own needs and requirements.

This right exists independently as a right inherent in a person, fulfilling one's particular characteristics and qualities. It can, therefore, be inferred that it enjoys an autonomous status and legal validity. Above all, such a right is recognised and protected quite apart from the existence of an iniuria. It is protectable even in the case in which the reproduction and disclosure of the image causes no offence or harm to the person.

Besides this "affirmative" aspect, it is important to consider another one, consistent with third parties being prohibited from disclosing a person's image. The law, as later emphasised, grants particular consideration to this second aspect, so much so as to sustain that "the law relative to the image ... has been drawn up in line with said prohibition and is aimed at ensuring an individual's entitlement to not having his features used by others, except in those cases foreseen by law"[3].

A person's image inevitably is recognised by third parties as one does not enjoy the right of not being observed and recognised. Awareness of another's image is a legitimate activity and cannot be forbidden by law. But it is forbidden for third parties to use the image of another or to exploit those features against the interests (not limited to pecuniary) of the owner of the right. However, as we will explore, under specific circumstances a limited use by third parties is permitted, without the consent and even in the face of opposition of the right holder.

Image Rights in England and the United States of America

Image rights are acknowledged and protected throughout the majority of the countries in the European Union[4]. Not so in the United Kingdom. Under English Law, there is no protection whatsoever for the name, or other distinctive individual characteristics, such as the voice or the physical appearance.

The case law has consistently confirmed the lack of this kind of acknowledgement. One of the most quoted cases is Tolley v. Fry[5], in which protection was denied in the field of advertising against the unauthorised use of an individual's identity. Furthermore, the mere concept of a right of personality was dismissed as unworthy of consideration in Elvis Presley Enterprises Inc v. Sid Shaw Elvisly Yours[6].

In spite of this rejection of the image right, protection of the famous has been recognised through different means. The strictures of trademark infringement, passing off, defamation, copyright infringement and malicious falsehood have been freely applied.

This tendency has been consolidated recently. In Edmund Irvine v Talksport Ltd[7]. A commercial radio station, which had used the sportsman's image in some advertising brochures without his prior consent, was held liable for damages, albeit only for a modest amount. The racing driver won basing his claim on the principle of "passing off". This term indicates the unfair practice consisting in "coupling" a known trademark or image to goods or services of an otherwise unrelated entity or individual, thus misappropriating the goodwill of a known (or better-known) trade mark or reputation.

This case has undoubtedly paved the way for a more effective legal protection in the UK for sporting personalities, whose names and images have been misappropriated by the advertising industry for years, without having the necessary consent or license to do so.

A further step towards the acknowledgement of the autonomy and protection of image rights was made in the case, Sports Club and Others v. HM Inspector of Taxes[8]. In that case, the Special Commissioners maintained, amongst other things, the possibility of athletes lawfully separating their sporting performances, which are generally subject to their employment contracts, which are taxable, from the advertising and promotional activities connected with their images. Thus, the image rights licensing agreements executed by the athletes (in the case in point, they were Dennis Bergkamp and David Platt) constituted, in the words of the Special Commissioners, "valid and effective commercial agreements". This recognition was logically based on the premise that image rights exist as a valuable asset of the person who projects that image - and, as such, are not subject to income tax.

A more recent dispute between David Beckam and budget airline company 'Easy Jet' concerning the unauthorised use of the player's image in a billboard advertisement, was resolved by the parties without legal action, but 'Easy Jet' was asked to make a donation of £ 10,000 to a children's charity instead of paying compensation to the player for image abuse. The advertisement represented a photo of the soccer star with his new hairstyle next to the caption "Hair today, gone tomorrow" referring obviously to Beckam's transfer to Real Madrid.

Furthermore, we recall the dispute of FA Premier League Ltd Ors V. Panini UK Ltd[9], in which Panini was condemned for infringement of copyright ownership of the League and club logos, after having published and distributed an unofficial and unauthorised sticker album and collection including Premier League players bearing the logo of the clubs and of the Premier League.

In the United States, the so-called right of publicity finds explicit acknowledgement. Indeed, it is defined as an intellectual property created by state-law, whose infringement constitutes an offence and the practice of unfair competition. The right of publicity - as it is known - is not a right that is merely applied in favour of a celebrity. Rather, it comprehends a right granted to everyone to control the unauthorised exploitation of their identity and person for commercial purposes[10].

Currently, the right of publicity is recognised by the judiciary or legislature of twenty-seven states. By way of example, the California Civil Code permits legal action whenever "any person knowingly uses another's name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent". The California Civil Code does not require consent in cases in which use of someone's image is made for information purposes; for matters of a public nature; in sports programmes; and in political campaigns.

In addition to the provisions contained in the laws of the individual states, it is important to note the provisions of the federal law on the subject. In particular, Art. 43(a) of the Lanham Trademark Act, which prohibits use of any "word, term, symbol or device, or any combination thereof, or any false designation of origin, false or mis-

1 A right that originates in English Law.
2 De Cupis, *I diritti della personalità,* in *Trattato di diritto civile e commerciale,* Milano 1959, page 3 and following.
3 *Enciclopedia del diritto,* page 145.
4 This fact has been confirmed in Germany with the recent decision by the Court of Appeal of Hamburg in the case of *Oliver Khan v. EA Sports* (Oberlandesgericht Hamburg, 13.01.04). In such case, the Court of Appeal upheld the earlier decision issued by the Hamburg Regional Court in May 2003, by means of which the goalkeeper of the German National Team was granted an injunction preventing Electronic Arts from including his name and likeness in its FIFA 2002 world cup game, on the grounds that his consent had not been obtained. The regional Court in Hamburg had ruled that Mr. Kahn's personality rights had been infringed by the unauthorised use of his image in the computer game, and the game would have to be withdrawn from sale in Germany.
5 1930 1 KB 467,477
6 Judgment handed down by the Court of Appeal (Civil Division), on 12.03.1999, (case no. CH 1996 E 1337).
7 13 March [2002] EWHC 367 (Ch).
8 SpC253 2000
9 Court of Appeal, (2003) Times Law Reports, 17 July.
10 McCarthy, *The Rights of Publicity and Privacy*, second edition, 1-2 to 1-3

leading description of fact or false or misleading representation" which might in some way create confusion, error or deceit with reference to the affiliation, connection, association, origin, sponsorship or consent between a party and the goods, services or commercial activities of another.

As a consequence of the vigorous, consistent and broad application of this statutory provision, a person's right to control the commercial use of his personality is substantial[11]. Yet a decision of the US Sixth Circuit Court of Appeals in June 2003 seems to contradict the foregoing conclusion[12].

3. Applicable legislation

Returning to Italian law - the subject of this Chapter - the protection reserved for the image is derived from the joint provisions of Art. 10 of the Italian Civil Code and from the Law on Copyright (Italian law No. 633/41).

The Civil Code establishes the principle that, if an image is displayed or published except when consented by law (the exceptions are listed in Article 97 of the Italian Law on Copyright No. 633/41), or its display causes prejudice to the dignity and the reputation of the person concerned, the judicial authorities may order the abuse to cease and award compensation for damages.

This rule is essential with reference to the instruments available against abuse of the image.

Article 96 of the Law on Copyright, in turn, completes the discipline by stating that a person's likeness cannot be displayed, reproduced or sold without the latter's consent, apart from the exceptional circumstances listed in the following article 97.

Consent - The requirements

Generally, consent of the image holder must be explicitly given, even though tacit consent or even presumed (implied by behaviour incompatible with the desire not to grant consent) is usually sufficient.

The Italian Supreme Civil Court (Corte di Cassazione) has established, with regard to the necessity of granting consent, that the reproduction of the image of a famous person, created for advertising purposes without the latter's consent, constitutes an injury to an individual's exclusive rights over their own likeness[13].

The principle that consent (whether explicit or tacit) must be specific, now appears to be a precept established by the decisions of the courts, in the sense that the image cannot be used in a context or for purposes different from those to which the consent itself refers. The reason why consent must necessarily be limited and specific is clearly deduced in a judgement handed down by the Rome Court[14]. In that case, the Court declared that a person's subjective situation may change, perhaps rapidly, and the publication of the image, which at one time might have seemed to be consistent and adequate, may then no longer comply with the different requirements and connotations of the individual's personality. Furthermore, the efficacy of the consent must be kept strictly within the limits in which the consent was granted for the dissemination (defined as the objective limit), and exclusively concerning the individual or individuals towards whom it was granted (the so-called subjective limit)[15].

The exceptions

Art. 97, paragraph 1, of the Law on Copyright provides that the consent of the image holder is not required when reproduction is "justified by the fame or by the public office covered by the latter, for justice and police requirements, for scientific, educational or cultural purposes, when the reproduction is connected to facts, happenings and ceremonies of public interest or, in any case, conducted in public". However, the second paragraph of article 97, limits the scope of the first paragraph, stating that "the likeness cannot be displayed or put on sale, when its display or sale might cause prejudice to the honour, reputation or dignity of the person represented".

Fame

With reference to famous people, two conditions must apply in order to permit use of their image by third parties without their consent: besides the person being famous, the reproduction of the individual's image must be connected with facts of public interest or which have occurred in public. The person's fame must, therefore, be combined with an informational purpose, or rather, publicised facts. It should be stressed, however, that the prevalence of public interest (or rather, curiosity) is not absolute. It must give way at the threshold of undesirable indiscretion concerning any person's more intimate, personal circumstances, even if that person is famous. In other words, the rights of the press and those of privacy must be balanced.

Protection of the image and the exceptions founded on fame unite the legislation of the "civil law" of Western Europe. Indeed, in order to illustrate this exception, we might refer to a judgement handed down by the Regional Supreme Court of Frankfurt[16]. There, the cover of a tennis teaching manual utilising a photograph of Boris Becker, taken while striking a ball, could not be prohibited since the authors of the text were merely disseminating a teaching method for the game of tennis, based on the various ball-striking techniques adopted by famous tennis players. The case was consistent with the rule according to which the interest promoting public information prevails.

Advertising purposes

We return to the hypothesis of a person's image used for advertising. The provisions contained in Article 96 of the Law of Copyright discussed supra prohibit reproduction or exploitation of a person's image for commercial purposes, without their prior consent, and Article 97, paragraph 2, protects the dignity and honour of the person. Those limitations are not displaced by the broad exception in Art. 97, paragraph 1, regarding the public's "right to know". This provision as mentioned, allows the publication of the likeness in the case of an individual's fame or for facts of public interest. However, the public interest cannot, indeed, be identified with the motives of a company to advertise its product. Therefore, the reproduction of the likeness cannot be justified either by the fame of the likeness or the public interest in the facts in which it is involved, if such reproduction is exploited for commercial purposes. This implies that, where consent is required for the dissemination of a person's image for commercial purposes, the consent of the individual concerned is always necessary: the need for authorisation in advertising applies equally to every image holder, regardless of the degree of fame enjoyed or the interest the public might have in the events in which that person is involved.

To this end, for example, we refer to the principles affirmed by the Corte di Cassazione in relation to the exploitation, for advertising purposes, of a photograph of Gino Bartali, taken during the Tour de

11 Professor David A. Anderson, *The Failure of American Privacy Law,* chapter 6 of *Protecting Privacy,* page 146.

12 ETW Corporation v. Jireh Publishing, Inc., 2003 U.S. App. Lexis 12488. In such case, in fact, ETW Corporation, the licensing company owned by golfer Tiger Woods, sued Jireh Publishing Ltd. for infringement of the registered trademark of Tiger Woods and for violation of Mr. Wood's publicity rights pursuant to Ohio State Law. ETW attacked the production and publication by Jireh of a painting commemorating Mr. Wood's victory in 1997 at the Masters Tournament, without ETW's consent. On its part, Jireh claimed that such painting's artistic expression was protected by the First Amendment of the United States Constitution, and it did not, therefore, violate American federal trademarks nor Ohio publicity rights. In such case the Court ruled against ETW and held that "*images and likenesses of Woods are not protectable as a trademark because they do not perform the trademark function or designation (...)*" and, furthermore, "*Jireh's work has substantial, informational and creative content which outweighs any adverse effect on ETW's market and it does not violate Wood's right of publicity*".

13 Cassazione Civile Sez. I, 2nd May 1991 No. 4785.

14 Gatto v. Soc. La Repubblica ed., Tribunale di Roma, 31st October 1992.

15 Clearly, the uncertainty over the objective and subjective limits to consent is greater when it is tacit or presumed. In these instances, it is up to the judge to conduct the inquiry as to the assessment of the limits. A judgement issued by the Rome Court (Rode v. Tiburzi and other, Pretura di Roma, 16th June 1990) established that, in the absence of the explicit consent of the individual to the disclosure of his image, that is to say, if the limit to the consent is not explicit, the authorisation granted by the party concerned, having not been limited in time or constraints, "shall be understood to be without any limitation and subordinate only to the criterion of so-called foreseeable use, excluding any use that might harm the dignity, honour and reputation".

16 NJW 1989, 402

France in 1952[17], as well as the non-authorised use of a photograph and statement made by the designer, Giorgio Armani[18].

More recently, it is worth noting the order handed down by the Court of Milan[19] on 27TH July 1999, to a petition for a temporary injunction, made in compliance with Art. 700 of the Italian Code of Civil Procedure. In this case, the petitioner, Oliver Bierhoff, complained about the abusive use, for purposes of profit and not by way of information, of his name and image and applied for an order prohibiting the production and marketing of objects bearing his own image or name. The opposing party attempted to have the matter fall into one of the cases contemplated by Art 97, paragraph 1, of the Copyright Law, claiming fame as the justification. The Court replied that the "fame which Art. 97 referred to consents to the use of a famous person's image only for information purposes and is, certainly indifferent to whether this also happened in the pursuit of profit". But in the case in point, it continued, there could be no doubt whatsoever that the purpose for which the petitioner's image was used was only that of profit, in consideration of the fact that the image applied to some objects promoted for sale, but without any news or information being offered.

The legal protection adopted against abuse of the image

The use of well-known images without consent, or outside situations permitted by law, represents an unlawful act from which liability for damages of a moral and pecuniary nature arise.

The pecuniary damage refers to the harm caused to the economic exploitation right of one's own image and the reduction of its commercial value, as well as the damage caused by the exploitation of another's fame, in the case of celebrities (the so-called 'right of personality').

The moral (or punitive) damage that is caused by the manipulation or inappropriate use of a person's image stems from a criminal offence, which has the effect of invading the individual's privacy and freedom to control and use their own image.

The means of protection against this abuse of the image by others has been foreseen by the Art. 10 of the Italian Civil Code and is characterised by temporary injunction and compensation by damages.

The injured person can apply to the judiciary to cease the abuse. This, depending on the circumstances, is achieved by having the goods withdrawn from sale or by seizure, destruction or changes brought to the product that has been obtained by abusively using the image and name of the party concerned. This remedy inherent in the restraining injunction mainly aims at protecting a person's intangible assets (such as their name and reputation) and can also be requested, as noted, by means of the temporary injunction foreseen by Art. 700 of the Italian Code of Civil Procedure.

With reference particularly to the pecuniary damage, compensation may be claimed for harm to an individual's right to commercially exploit their name, as explained above. Consideration is given to loss of potential exploitation of the image for the same purpose, as well as for the difficulties created for future, proprietary promotion. The most frequently used criterion applied in evaluating the damage caused by unauthorised advertising exploitation of a person's image by others is the fee that the party concerned would have requested in granting the use - the so-called 'lost licence fee' concept.

The law on privacy, in force since 1996, has had the effect of introducing specific criminal sanctions against certain violations of the right of privacy. In doing so, it created more potential for the compensation of moral damages. Compensation in these cases will be determined on an equitable basis, lacking for this purpose a precise criterion of evaluation. The judge will take into consideration both subjective elements (for example, the individual characteristics of the offended party) and objective elements (for example, the seriousness of the facts).

4. Image exploitation

A person's image is susceptible to a wide range of commercial exploitation, based on the execution of a variety of contractual instruments, which formalise the specific consent required to exploit the image by its owner. In this context, both the image, in itself, of natural persons, as well as the company trademark, products, product line and events come into prominence. The means commonly used in this field are endorsement, licensing, sponsorship and merchandising agreements.

Sponsorship and merchandising agreements constitute two divergent contractual outlines. Indeed, the first one effects the promotion of trademarks or products by coupling them with a personality's or team's image or a given sporting event in exchange for a financial contribution (for example, the main sponsor of a tennis tournament or of a sailing boat race).

In the case of licence and merchandising agreements, but more typically with the latter model, the fame of a sports personality (or a trademark) is exploited to sell products, which, in spite of having their own independent function or utility, base their appeal above all or even exclusively on the image that they incorporate (such as a Mercedes Benz designer bag or a T-shirt with Michael Jordan's photo).

In sponsorship, we have the case of a "sports product or event" that acts as a trademark's advertising media; in merchandising, we have a famous trademark image, which acts as the product's advertising media and added value.

A special combination of image licensing and merchandising, "character licensing", has enjoyed an out and out boom over the last few years. It consists in the "characterisation" of large-scale consumer goods with the images of either "virtual or real" personalities, who are the characters in television series, cartoons and films (for example, "Pokémon" rucksacks and pencil cases, or "Barbie" toothbrushes). Character licensing is, indeed, a licence agreement: the sponsored party grants the use of their distinctive symbols to be coupled with the licensee's products much in the same way as a trademark. In the case of merchandising, the company or (less often) sports personality marks a whole range of products with its famous brand ("Ferrari" branded products, for example); whereas, in the case of trademark or character licensing, the brand or respectively the fortunate media product fill the role of a secondary trademark. As noted above, the image is exploited quite differently in the case of sponsorship: the sponsor uses the licensed image as a vehicle for its own advertising message.

On the other hand, it is also possible for the two sponsorship and licence outlines to be interwoven, where the sponsorship agreement foresees the sponsor using the sponsored party's[20] distinctive symbols (typically in the sponsorship of sporting events - such as the Football World Cup - which also foresees the merchandising of gadgets dedicated to the event).

The sponsorship agreement

A party (the sponsor) by means of a sponsorship agreement pays the other party to the agreement (the party which is being sponsored) a sum of money or something of value to finance the latter's activities and the sponsored party, in turn, performs their activities using the name, trademark or other symbol that refers to the sponsor. For example, a beer producer, such as "Veltins", sponsors a race team and driver for a racing event or events (that is, pays the considerable costs in deploying a racing car in a Formula 3000 race), while the driver wears clothing and the team applies 'decals' on his automobile advertising "Veltins" beer.

With reference to the legal qualification, the Italian legal authors agree in considering a sponsorship agreement to be a defined contract

17 In this case, reforming a decision of a lower Court, the Supreme Court spoke of "breach and false application of Article 10 of the Italian Civil Code and Articles 96 and 97 of the Italian Law No. 633/41, for the [lower] Court not having considered that when the reproduction, display and publication of an image is done for a purpose, which is not the legitimate one of satisfying a requirement for information, in its various aspects (and which, in the case in point, is instead purely commercial), the justification for the publication of the likeness does not apply, and the prohibition contained in Art. 96 has full effect, combined with Art. 10 of the Italian Civil Code ..."(Cass., 6th February1993, no. 1503).

18 Cass., 2nd May 1991, no. 4785.

19 Weah v. Soc. For Service and EPI, Tribunale di Milano, 27th July 1999.

20 Cagnasso-Cottino, *Trattato di diritto commerciale,* IX Vol., page 381 and following.

(in as much as it is foreseen by legal rules), but not typified (in that it has not been specifically framed and regulated by the Civil Code or other statutes). This qualification implies that its discipline must be reconstructed using both the general rules on contracts, as well as the rules referring to individual, similar contractual patterns.

This framework must be considered in order to define the rights and obligations, which are foreseen in only general terms or are only implied by the contractual parties. To begin with, the principal obligation of the sponsored party, consisting of the use of the sponsor's distinctive symbols in performing their activities, must be defined. The agreement will usually foresee the contents of the commitments undertaken by the individual, who is being sponsored, and will describe the conditions for them to be performed. However, to integrate possible gaps therein, the general principles of fairness and good faith in the execution of the contracts can be used.

A second line of problems presents itself with reference to the existence and contents of further obligations charged to the parties, in particular, that of the sponsored individual or entity. Even from this point of view, reference should be made to the contractual clauses and the will of the contracting parties. In any case, obligations exist that are derived from the agreement's actual purposes, as well as from "the connection between the sponsor's image and that of the sponsored party, which has been created by the agreement itself"[21].

Indeed, regardless of any specific contractual provisions, the sponsored athlete must act diligently in the performance of the sponsored sports activity or, at the very least, not do anything that might prejudice the outcome, with consequent damage to the sponsor's image. Disqualification for doping is but one example - albeit extreme.

Sponsorship and merchandising

Sponsorship has become, over the last few years, a form of financing to which sports organisations are resorting ever more frequently. It is a determining factor in both the development of professional and amateur sport. With reference to the sports individuals or entities, who have the potential to be sponsored, these include an athlete, a competition, or a sports club. The relevant agreement frequently attributes the so-called naming right or title sponsorship, when the sponsor is entitled to coupling its own name with the name of the sports event or club.

In the case of sponsorship of an individual athlete, the latter's greater or lesser fame will have a substantial influence both on the level of the financial contribution of the sponsor, as with reference to the performances requested of him, which will certainly be that much better developed and effective in the case of greater fame.

In many cases, a non-competition clause is foreseen, which obliges the athlete to refrain from entering sponsorship agreements with competitive commercial operators or from endorsing competitive products or services. The non-competition performance can be limited to the product sector in which the sponsor operates (the so-called "relative" exclusive), but can also be extended to any kind of sponsorship or endorsement agreement (the so-called "absolute" exclusive).

Among the duties most often required from the sports personality is the requirement to accept the addition of the sponsor's trademarks to the clothing and equipment worn or used.

As a particular kind of sponsorship, endorsement agreements provide for the use by the athlete of a certain brand of equipment or technical clothing during the performance of his sporting activity. This relationship often requires a higher degree of involvement for the athlete, who must ostensibly utilise the products and praise their qualities.

A licence to use the athlete's name and image is normally granted to the sponsor pursuant to sponsorship or endorsement contracts. Such use can be limited to advertising the association between the athlete and the sponsor's brand or products; or it can involve the branding of lines of products with the famous athlete's name (cf the commingling between sponsorship and merchandising already described). To be more specific, the rights granted to the sponsor can refer to the static image (photograph), mobile images (film and video), voice, signature, and other elements that identify the sponsored party.

In the case of teams or national representatives being sponsored, it has been questioned whether an individual athlete is entitled to oppose the collective reproduction in which he appears. There are currently two positions asserted. The first is inclined to accept the affirmative solution, also affording the athlete the entitlement to oppose reproduction, - or rather, to claim the sharing out of the proceeds derived from sponsorship agreements. And the second point of view prefers to make the distinction between the case, in which the athlete carries out his activities as an employee of a professional sports club, in which case, he should not be entitled to oppose the commercial exploitation of the group image; and the case in which an athlete carries out his activities for a sports club as an amateur, in which case, instead, he would be the sole owner of his image rights and could either oppose the commercial exploitation of the same or claim his right to a share of the proceeds eventually accruing from sponsorship. This interesting theme is covered further in the following paragraph.

The right of self-marketing in sport

The right of self-marketing, or rather, the right of an athlete to freely use hi or her own image for advertising and commercial purposes, leads to a series of problems inherent in the relations between the sports association[22] to which the athlete belongs and the athlete himself.

To begin with, an individual athlete's use of his own image for advertising purposes would be unhindered, except whenever the athlete requires his sports association's authorisation to do so where the image includes the symbols, colours or trademarks of the club to which he belongs [23].

It is in the interests of sporting associations to gain the maximum profit from the commercial exploitation of the sports activities performed by their athletes, in such a way as to finance their various activities.

On the other hand, the athletes are equally interested in freely using their own images for advertising purposes and to gain exclusive advantage of the profits earned in this way. Whose interest is paramount? The sporting associations are free to decide if and how they wish to be involved in advertising-type activities and, closely connected to this theme, if and with whom they should execute sponsorship agreements, in such a way as to promote the activities of all the associate athletes. The athletes, for their part, are entitled to appeal to their professional and contractual freedom.

The conditions through which a sports association is entitled to limit the advertising activities personally undertaken by the athlete can be outlined as follows:

- The association must be clearly authorised to do so by the provisions contained in its Articles of Association;
- The restrictions can only apply in relation to the competitions in which the association is the organiser;
- The association must comply with the principles of fair competition, and
- The association must distribute all the profits acquired amongst the athletes, with the sole exception of retaining the monies necessary to cover the costs sustained in the organisation of the competitions.

Except for specific individual agreements, the association cannot pretend that the athlete publicises the products, which are, in turn, advertised by the association itself.

One might ask, however, if it is legally proper to consider the clauses contained in the Articles of Association of the sporting federations and organisations as being binding with reference to the athletes, when registration or membership is indispensable to being able to practise the specific sporting discipline. The efficacy of the organisation's rules should, at the least, be excluded in the cases in which the

21 Cagnasso-Cottino, *Trattato di diritto commerciale,* IX Vol., page 381 and following.

22 By sports organisation is understood here to imply the organisational body of the discipline that the athlete competes in.

23 Vidimi, *Società sportive,* page 427, quoted n *Il contratto di sponsorizzazione sportiva* in *Attività motorie e attività sportive: problematiche giuridiche,* edited by Carlo Bottari, Padova 2002, page 152 and following.

Articles of Association have not foreseen the participation, in their regulatory (and arguably executive) bodies, of a representative from among the athletes. Such participation is, for example, foreseen in Italy today by reason of the Italian Legislative Decree No. 242/99 (the Melandri Decree) both with reference to the Comitato Olimpico Nazionale Italiano (CONI) as well as with reference to the various sports federations (for example, the Federazione Italiana Giuoco Calcio - FIGC). The dichotomy between the rights of organisations and the rights of the member athletes apply to the relationship between players and clubs as well.

The football players in the French National Team, pursuant to a protest held on the eve of the 1998 World Cup, succeeded in obtaining their freedom from their own federation, to use the boots they preferred and to execute the relative sponsorship agreements. A similar "concession" was recently granted to the football players in the Czech Republic's National Team.

In 1996, a group of German swimmers protested about having to wear "Speedo" swimming trunks during competitions. These athletes had, indeed, either executed agreements with other sports clothing suppliers or simply preferred other trunks.

The former German professional football player, Matthias Sammer, was allowed to maintain his own advertising agreement with Adidas and, accordingly, play with Adidas boots, in spite of the fact that the team he belonged to, Borussia Dortmund, had an agreement in force with Nike, which foresaw the supply of sporting equipment.

These examples show how impossible it is for a club or federation to control or limit the players' image advertising exploitation rights, in absolute terms. One of the most astounding anomalies still in existence is the German National Football Team. The German Football Federation (DFB) imposes on all players of the National team the use of Adidas boots, as if the latter were part of the playing uniform and plainly disregarding the players' freedom to use (and promote) the boots which fit them best.

The exploitation of a footballer's image by his club

But to whom do players' image rights truly belong? Who is the owner of the television rights to the team's competitions and training? Within which limits can the club use the image of one or more players or that of the whole team, in its own marketing and merchandising activities?

It is normally held in Italy that a part of the rights used by the Club are acquired almost automatically through the Convention in force on the regulation of advertising and promotional activities, which was executed between the Associazione Italiana Calciatori (AIC)[24] and Professional Leagues (the Lega Nazionale Professionisti and the Lega Professionisti Serie C) in 1981. On the basis of this Convention, the players, as consideration for the granting of their image rights as members of the team, would be collectively entitled, unless they waive them, to a part of all the profits derived from the promotional and advertising activities of the Club. Such a waiver has, indeed, become a standard, thanks to a short clause that is always added to the individual contractual forms.

But the Convention does not, however, resolve the doubts relative to ownership of the rights. In the first place, it wrongfully embarks with the pre-supposition that the football players' image rights are not freely exploitable by the player (this is inferred a contrario, from Articles 1 and 5). This pre-supposition has been denied, over the years, by the constant behaviour of clubs and players and the decisions of the courts. It is, indeed, an error that could eviscerate the entire Convention. Moreover, numerous doubts arise both as to the efficacy of the Convention towards individual players, especially if they come from foreign federations and are not registered with the AIC, as well as to its hallmark as an agreement in restraint of trade. Furthermore, over the years many of its provisions (in particular Articles 4, 5, 9, 10, 14 and 15) have never been applied, which leads to the conclusion that they are no longer effective. From the invalidity or inefficacy of the Convention, it follows that the clubs should not be entitled to undertake advertising activities, which, in some way, imply the use of the players' image, ranging from the addition of the sponsor's name or logo on the jersey to the licensing of broadcasting rights, and the like.

But even if one wished to hold the Convention as totally valid and effective, contrary to the evidence indicated above, it would still be possible for players - with sufficient contractual powers - to refuse to have the customary wording added to their playing contracts, by which they renounce their part in promotion and advertising revenues. They would then be acknowledged 10% of such revenues.

If we include the proceeds derived from the sale of television rights to this income, we can easily reach 70% of the club's overall turnover. One can easily understand what explosive effects would result if this problem, which to date has never been raised, were to emerge.

In such a way as to ward off these risks, it would be opportune for the club to explicitly negotiate the acquisition of its registered players' image exploitation rights, thus insuring itself against any possible dispute as to its entitlement to the full income generated by each business activity conducted in the media and advertising sectors. In compliance with the principle of fair and prudent administration, the club should have a specific agreement executed in which it is confirmed and explained that the club, in consideration of payment of a certain amount of money, is entitled to use, in all lawful forms, the footballer's image and personal information, when the player finds himself as part of the total team image or part of the broadcast or data transmission by 'phone, internet or other means of communication.

To this initial type of agreement, which concerns an individual's image inserted in a team image or club context, a further agreement could be added, whose object would be the granting of all or a part of the player's individual image exploitation rights to the club. This combination of players' "collective" and "individual rights" would boost the merchandising, advertising and licensing potential of the club.

In the absence of a specific licence by the player, the exploitation of the latter's own image for advertising purposes (self-marketing), would be quite unhindered, except for the need of the team's consent, where the image exploited by the sponsor includes the symbols or trademarks of the club to which the player belongs[25].

24 Art. 25, paragraph 2 of the *AIC's* Articles of Association has foreseen that those footballers who wish to join are obliged to assign to the association, without any temporal limits, "the rights to use their likeness in the case in which the likeness is displayed, reproduced or sold together with or in concurrence with that of other footballers and, in any case, within the ambit of the commercial exploitation that refers to the entire category". These are, clearly, restrictions that greatly hinder the potential of exploiting one's image rights. (Giorgio Resta, *Diritto all'immagine, right of publicity e disciplina antitrust,* in *Rivista di diritto sportivo*, Aprile-Giugno 1997, page 351).

25 Vidimi, *Società sportive,* page 427, quoted in *Il contratto di sponsorizzazione sportiva* in *Attività motorie e attività sportive: problematiche giuridiche,* edited by Carlo Bottari, Padova 2002, page 152 and following.

Settling Sports Disputes in Cyberspace

by **Ian Blackshaw***

1. Introduction

The phenomenal rise in the popularity of the Internet has spawned its own peculiar kinds of disputes and produced a special dispute resolution mechanism for settling them - not least in the sporting arena. 'Cybersquatting', which is abusive registration of 'domain names' (i.e. internet addresses, such as 'fifa.com'), is subject to a particular form of adjudication process under the auspices of the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), a specialised agency of the UN, headquartered in Geneva, Switzerland.

Since introducing this process four years ago, the Center has recently passed the 5,000 mark of cases handled under the ICANN[1] Uniform Domain Name Dispute Resolution Policy (UDRP), which happened to be a sports dispute[2]. The WIPO cases have involved more than 9,000 domain names mostly in the .com, .net and .org domains. More recently, the Center has also been dealing with disputes in the new domains: .aero, .biz, .coop, .info, .museum, .name and .pro. The UDRP procedure has also been adopted by registration authorities for certain national domains. The parties to WIPO disputes have so far come from 118 countries and 11 languages have been used in settling them.

Parties can count on more than 400 independent WIPO domain name panellists from 50 countries. According to Ignacio de Castro[3]: "these panellists are highly specialised practitioners and experts in the field of trademark law as well as electronic commerce." IP is an increasingly significant component in the organisation, management and marketing of major sports events and also in the creation, protection and enforcement of sports personalities' bankable names and images.

2. Cybersquatting

Cybersquatting, which involves the abusive registration of domain names, is a particular problem that is faced by sports organisations (see some examples cited later), events[4] and individual sports persons as well as teams alike[5]. To obtain the transfer of their domain name under the UDRP, complainant trademark owners must establish that the domain name in dispute:

- is identical or confusingly similar to a trade mark of another;
- is registered by a party who has no rights or legitimate interest in that domain name; and
- is registered and used in bad faith[6].

All three conditions must be satisfied for the complainant to succeed.

As to the bad faith requirement, the UDRP provides examples of acts which prima facie constitute evidence of bad faith.

They are:

- an intention to sell the domain name to the trade mark owner or its competitor;
- an attempt to attract for financial gain internet users by creating confusion with the trade mark of another;
- an intention to prevent the trade mark owner from reflecting his trade mark in a corresponding domain name; and
- an intention to disrupt the business of a competitor[7].

The above list is non-exhaustive and merely illustrative of the kinds of situations which may fall within the concept of 'bad faith'.

3. Sports cases

Many sporting and sports-related business disputes, involving highly valuable trademarks, have been quickly and effectively settled using the WIPO dispute settlement process.

For example, FIFA successfully challenged the use of its trade mark 'world cup' in 13 domain names by another party, who had used some of the domain names in the address of his website, which not only related to the FIFA event, but also included copyrighted content from FIFA's official website[8].

In addition, the other party contacted FIFA with an offer to sell some of the domain names concerned prior to FIFA filing the complaint. Finding bad faith, a WIPO Panel ordered the other party to transfer those domain names to FIFA. However, in the same proceeding[9], the Panel refused to order the transfer of two competing domain names consisting of the letters 'wc', holding that these would not be unequivocally seen as an abbreviation of the name 'world cup' and were not sufficiently distinctive to constitute a trade mark.

In line with this decision, a WIPO Panel disallowed a complaint, which a group of companies involved in the organisation of the Formula One Grand Prix Motor Racing Championship had filed against the use of the domain name 'f1.com' on the grounds that 'f1' was its famous trade mark and an abbreviation of the mark 'Formula 1'. The Panel held that, on balance, because the trade mark 'F1' consists of merely a single letter and a numeral, it was not sufficiently distinctive to justify a transfer of the domain name. In order to claim a monopoly right over the use of the abbreviation 'F1', proof of considerable use of this mark would need to be adduced. Although the complainants were able to establish some reputation in this mark, they were not able to show that its use was so widespread as to be able to claim that any commercial use of it implied a connection with their activities.

On the other hand, a complaint by Jordan, owner of the Formula One motor racing team and proprietor of the registered trade mark 'JORDAN GRAND PRIX', as well as the domain name 'jordangp.com', against the use of the domain name 'jordanf1.com', was upheld by WIPO[10].They considered that there was a real danger of confusion in this case, bearing in mind that the name Jordan is well known as being associated with Formula One. There was also other

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1 Internet Corporation for Assigned Names and Numbers

2 The 5,000th case involved the leading English Football Club Tottenham Hotspur and the domain name 'tottenhamhotspur.com'. The decision (D2003-0363) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2003/d2003-0363.html'.

3 Senior Legal Officer at the WIPO Arbitration and Mediation Center.

4 See the case involving the domain name 'torino2006.net'. The decision (D2003-0411) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2003/d2003-0411.html'. Other examples include WIPO cases D2000-1359 'facup.com', D2001-0157 'thelondonmarathon.com' and D2003-0617 'madrid2012.com'. All these cases can be found at http://arbiter.wipo.int/domains/search'.

5 See the case of the Williams' sisters and the domain name 'venusandserenawilliams.com'. The decision (D2000-1673) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1673.html'. Other examples include WIPO cases D2000-1805 'realmadrid.org' and D2003-0464 'bayernmunchen.net'.

6 Paragraph 4(a) of the UDRP.

7 Paragraph 4(b) of the UDRP.

8 ISL Marketing AG and The Federation Internationale de Football Association v. J.Y.Chung, April 3, 2000. The decision (D2000-0034) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0034.html'.

9 Ibid.

10 Jordan Grand Prix Ltd. v. Sweeney, May 11, 2000. The decision (D2000-0233) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0233.html'.

evidence of bad faith, including the fact that the other party had offered to sell the offending domain name to Jordan.

In another motor racing related case, Formula One driver Damon Hill was able to recover his web identity in a case against an individual who had registered 'damonhill.com'[11].

Complaints against other sporting domain names, 'uefachampionsleague.com' and 'niketown.com', by UEFA and NIKE Inc. respectively, have also been successfully and quickly resolved using the WIPO adjudication process[12].

4. The Pepsi Case

The latest sports-related cybersquatting case involved the unauthorised registration by an Italian Company, which rejoiced under the name of "Partite Emozionanti Per Sportivi Italiani" ("Leave the Histrionics for Italian Sports Fans") and allegedly known for short as "P.E.P.S.I.", of 70 domain names incorporating the famous soft drink trade mark 'PEPSI' in relation to an extensive range of sports, such as 'pepsicricket.com' [13]. In view of its general importance, as well as its particular significance in the sporting field, the text of the (transfer) decision by the WIPO sole panellist, Kiyoshi I. Tsuru, is reproduced in extenso in the Appendix to this article. As will be seen, the WIPO Mediation and Arbitration Center has a wealth of previously decided cases on which to draw when deciding disputes. The process is relatively quick and inexpensive. In addition to a model complaint[14], the WIPO Center on its web site makes available a full index to all WIPO UDRP decisions, both by categories of domain names and by legal keywords[15].

Trademark owners tend to prevail in four out of five WIPO cases. All cybersquatting transfer decisions are reported to the Registrar who registered the contested domain name in the first place with a direction to transfer the registration to the rightful party[16].

5. Concluding remarks

The WIPO Arbitration and Mediation Center[17] also handles arbitrations and mediations of other types of sports-related disputes, including those arising under sports goods and marketing transactions and sports business contracts of various kinds, including licensing and merchandising agreements. Such cases are normally based on WIPO dispute resolution clauses included by the parties in their agreement[18].The decisions ('awards') in these types of cases are legally enforceable under the New York Convention[19] without the need for any review on the merits ('exequatur') in the courts of the country in which the awards are sought to be legally enforced. The advantage, therefore, of the WIPO settlement procedures is that they are transnational - the decisions transcend national boundaries. This is particularly true in domain name disputes, where trade marks, which generally confer only territorial rights and can only be legally protected and enforced as such, are involved.

11 Damon Hill Grand Prix Limited v The New Group, March 8, 2002, the decision (D2001-1362) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2001/d2001-1362.html'.

12 Union des Associations Europeennes de Football v. Alliance International Media, April 25, 2000, the decision (D2000-0153) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0153.html'; NIKE Inc. v. Granger & Associates, May 2, 2000, the decision (D2000-0108) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0108.html'.

13 PepsiCo, Inc. v PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS COMPUTER INDUSTRY (a/k/a EMS). October 28, 2003. Case No. D2003-0696. The decision (D2003-0696) can be found at 'http://arbiter.wipo.int/domains/decisions/html/2003/d2003-0696.html'.

14 The model complaint can be found at 'http://arbiter.wipo.int/domains/filing/udrp'

15 The index of WIPO UDRP cases can be found at 'http://arbiter.wipo.int/domains/search'

16 This the Registrar is obliged to do pursuant to the provisions of Paragraph 4 (k) of the UDRP.

17 Further information on the WIPO Arbitration and Mediation Center and its activities can be obtained by logging on to its Website at: 'http://arbiter.wipo.int'. The Center also offers a number of helpful guides.

18 The text of the WIPO dispute resolution clauses can be found at 'http://arbiter.wipo.int/arbitration/contract-clauses/clauses.html'.

19 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958.

APPENDIX
WIPO Arbitration and Mediation Center
Administrative Panel Decision

PepsiCo, Inc. v. PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS COMPUTER INDUSTRY (a/k/a EMS)

Case No. D2003-0696

1. The Parties

The Complainant is PepsiCo, Inc., Purchase, New York, United States of America, represented by Georges Nahitchevansky, Fross Zelnick Lehrman & Zissu, PC, United States of America.

The Respondents are PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS COMPUTER INDUSTRY (a/k/a EMS), Milano, Italy.

2. The Domain Names and Registrar

The disputed domain names
<pepsi3d.com>, <pepsi3d.net>, <pepsiadventure.com>, <pepsiadventure.net>, <pepsiarcade.com>, <pepsiarcade.net>, <pepsiatletica.com>, <pepsiatletica.net>, <pepsibaseball.net>, <pepsibasket.com>, <pepsibasket.net>, <pepsibasketball.com>, <pepsibasketball.net>, <pepsicalcio.com>, <pepsicalcio.net>, <pepsiciclismo.com>, <pepsiciclismo.net>, <pepsicricket.com>, <pepsicricket.net>, <pepsif1.com>, <pepsif1.net>, <pepsifondo.com>, <pepsifondo.net>, <pepsifootball.net>, <pepsiformula1.com>, <pepsiformula1.net>, <pepsigame.com>, <pepsigame.net>, <pepsigames.com>, <pepsigames.net>, <pepsigiochi.com>, <pepsigiochi.net>, <pepsigolf.com>, <pepsigolf.net>, <pepsihockey.com>, <pepsihockey.net>, <pepsimanager.com>, <pepsimanager.net>, <pepsimondiali.com>, <pepsimondiali.net>, <pepsimoto.com>, <pepsimoto.net>, <pepsimotogp.com>, <pepsimotogp.net>, <pepsirugby.com>, <pepsirugby.net>, <pepsisail.com>, <pepsisail.net>, <pepsisci.com>, <pepsisci.net>, <pepsiscommesse.com>, <pepsiscommesse.net>, <pepsisimulator.com>, <pepsisimulator.net>, <pepsiski.com>, <pepsiski.net>, <pepsisoccer.com>, <pepsisoccer.net>, <pepsisport.com>, <pepsisport.net>, <pepsistrategy.com>, <pepsistrategy.net>, <pepsisuperbike.net>, <pepsitennis.com>, <pepsitennis.net>, <pepsivolley.com>, <pepsivolley.net>, <pepsivolleyball.com>, <pepsivolleyball.net>, <pepsiworldcup.com>, <pepsiworldcup.net>
are registered with Melbourne IT trading as Internet Name Worldwide.

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on September 3, 2003 (electronic version), and September 5, 2003 (hardcopy). On September 5, 2003, the Center transmitted by email to Melbourne IT trading as Internet Name Worldwide a request for registrar verification in connection with the domain names at issue. On September 8, 9 and 10, 2003, Melbourne IT trading as Internet Name Worldwide transmitted by email to the Center its verification response con-

firming that the Respondents are listed as the registrants and providing the contact details for the administrative, billing, and technical contact. The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondents of the Complaint, and the proceedings commenced on September 15, 2003. In accordance with the Rules, paragraph 5(a), the due date for Response was October 5, 2003. The Respondents did not submit any response. Accordingly, the Center notified the Respondents' default on October 6, 2003.

The Center appointed Kiyoshi I. Tsuru as the Sole Panelist in this matter on October 10, 2003. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is the manufacturer of, *inter alia*, the soft drink Pepsi Cola, which was first produced in North Carolina, U.S.A. in 1898 (see *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001)). PEPSI, the shortened version of the PEPSI-COLA mark, was used for the first time for soft drinks in 1911, which renders the PEPSI mark 92 years old.

The Respondents registered the disputed domain names on March 15, 2002; April 5, 2002; May 24, 2002; May 31, 2002; July 9, 2002; and November 2, 2002.

5. Parties' Contentions

A. Complainant

A.1. Identity or Confusing Similarity

The Complainant asserts that:

- The basis for its Complaint is its use, registration and ownership of the mark PEPSI, and numerous other trademarks and domain names incorporating the marks PEPSI.
- The PEPSI name and mark are world famous, and enjoy a strong reputation beyond the soft drinks for which the Complainant is most famous.
- The PEPSI brand of soft drinks and soft drink concentrates is currently sold throughout the world, including, *inter alia*, the United States, Italy and Australia.
- The PEPSI trademark and brand has been recognized as being famous (and cites *The World's Greatest Brands*, published by MacMillan Business in 1996, as well as *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001), and *PepsiCo, Inc. v. "null," aka Alexander Zhavoronkov*, WIPO Case No. D2002-0562 (July 30, 2002) stating that "one of the world's most famous and valuable trademarks", a fact the Panel can corroborate with its knowledge ex officio, and also that the PEPSI trademark is "universally recognized").
- The estimated value of the PEPSI brand is $9,37 billion (U.S.).
- The PEPSI brand is the number two brand among the billion-dollar brands in the beverage category. The PEPSI-COLA brand has been ranked No. 2 on the list of the top ten grocery food brands in the United States.
- The trademark PEPSI and the various logos accompanying said mark that have evolved over the last 100 years have been registered in many countries in the world, including Italy where the Respondents are allegedly based.
- The approximate worldwide advertising and promotional expenses incurred by the Complainant since 1991 in respect of soft drink beverages sold under trademarks containing PEPSI, including the various device marks, are in excess of 200 million U.S. dollars annually.
- The following domain names have been owned and used by the Complainant, for active websites, which are formatives of its famous PEPSI mark and PEPSICO trade name, including: <pepsi.com>, <pepsico.com>, <pepsiworld.com>, <pepsibusiness.com>, <pepsiretail.com>, <pepsifountain.com>, <pepsivending.com>, <pepsicojobs.com>, <dietpepsi.com>, <pepsione.com>, <pepsiblue.com>, and <pepsitwist.com>.
- The Respondents' domain names are nearly identical or confusingly similar to the PEPSI mark, because they fully incorporate said mark. That the mere addition of common terms such as "sports", "basketball" or "soccer" to the PEPSI mark is of no import (and cites *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001) addition of "400" and "southern500"; *Sony Kabushiki Kaisha (also trading as Sony Corporation) v. Kil Inja*, WIPO Case No. D2000-1409 (December 9, 2000) addition of prefixes or suffixes to a world-famous mark; and *America Online, Inc. v. Chris Hoffman*, WIPO Case No. D2001-1184 (November 19, 2001) addition of short phrases to well-known mark).
- The Complainant's long-time involvement in sponsoring and promoting various sports and sporting events make it easier for consumers to reasonably believe that Respondents' domain names are related to Complainant, thus creating a likelihood of confusion.

A.2 Respondent's lack of rights or legitimate interests in respect of the domain name

The Complainant argues that:

- Its adoption and extensive use of the PEPSI mark for nearly a century predates the first use of the domain names, and that therefore it is Respondents' burden to establish their rights or legitimate interests to the domain names (and cites *PepsiCo, Inc. v. Amilcar Perez Lista d/b/a Cybersor*, WIPO Case No. D2003-0174 (April 22, 2003)).
- Respondents have no rights or legitimate interests in the domain names.
- Respondents have been granted no license, permission or other right to use any domain name incorporating Complainant's famous PEPSI mark.
- Use of the acronym P.E.P.S.I. ("Partite Emozionanti Per Sportivi Italiani", or "Leave the Histrionics for Italian Sports Fans") does not grant Respondents the right to conduct business under a domain name using Complainant's famous PEPSI mark (and cites *PepsiCo, Inc. v. "null", aka Alexander Zhavoronkov*, WIPO Case No. D2002-0562 (July 30, 2002) a recent creation of company using the initials or acronym P.E.P.S.I. does not create rights or legitimate interests to conduct business under PEPSI mark, since that mark corresponds with another's universally recognized trademark; and *National Deaf Children's Society and Ndcs Limited v. Nude Dames, Chat, Sex*, WIPO Case No. D2002-0128 (April 19, 2002)).
- Respondents are using the disputed domain names to divert traffic to <pepsisport.com>, a gaming website that allows participants to create fantasy sports teams to compete for prizes. That site appears to be commercial and it appears to gather personal data from participants for marketing, advertising and promotional purposes.
- Since the PEPSI mark is famous and Respondents have no rights in it, the only reason why Respondents could have wanted to register and use domain names fully incorporating the PEPSI mark was that they knew of this mark and wanted to use it in the Domain Names in order to confuse Internet users and divert them to another website for their own benefit and profit, and not for any legitimate noncommercial or fair use purpose.

A.3 Bad faith registration and use

Complainant argues that:

- Respondents have registered and are using the disputed domain names in bad faith.
- Bad faith is evidenced by Respondents' use of the contested

domain names to attract and divert web traffic to an apparently commercial sports gaming website (and cites *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001) where the use of domain names to capture goodwill of PEPSI mark and profit from the goodwill associated with complainant's sponsorship of certain sporting events was found to be in bad faith).

- The fact that the Respondents have registered without authorization domain names that fully incorporate the Complainant's famous PEPSI mark, despite being aware of Complainant's rights in that mark, is in and of itself evidence of bad faith (and cites *Veuve Cliquot Ponsardin, Maison Fondée en 1772 v. The Polygenix Group Co*., WIPO Case No. D2000-0163 (May 1, 2000) bad faith is found where a domain name "is so obviously connected with such a well-known product that its very use by someone with no connection with the product suggests opportunistic bad faith"; and *PepsiCo, Inc. v. "null," aka Alexander Zhavoronkov*, WIPO Case No. D2002-0562 (July 30, 2002) blatant appropriation of a universally recognized trademark [PEPSI] is of itself sufficient to constitute bad faith).
- Respondents' use of the P.E.P.S.I. abbreviation for the name of its business further indicates their bad faith (and cites once again *PepsiCo, Inc. v. "null," aka Alexander Zhavoronkov*, WIPO Case No. D2002-0562 (July 30, 2002) the inference that the company name was chosen because its acronym matched Complainant's PEPSI mark, and that domain name was chosen in the expectation that some users looking for a Pepsi website would be led to it, is "so strong as to be inescapable", and constitutes bad faith).
- Respondents only could have registered domain names confusingly similar to Complainant's mark to capitalize on Complainant's goodwill.

B. Respondents

The Respondents did not reply to the Complainant's contentions.

6. Discussion and Findings

In accordance with the Policy, paragraph 4(a), the Complainant must prove that:

"(i) the domain name in question is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and

(ii) the Respondent has no rights or legitimate interests in respect of the domain name; and

(iii) the domain name has been registered and is being used in bad faith."

In the administrative proceeding, the Complainant must prove that each three of these elements are present.

As the Respondents have failed to submit a Response to the Complaint, the Panel may accept as true all of the allegations of the Complaint. *Encyclopaedia Britannica, Inc. v. null John Zuccarini, Country Walk*, WIPO Case No. D2002-0487 (August 12, 2002); *Talk City, Inc. v. Michael Robertson*, WIPO Case No. D2000-0009 (February 29, 2000).

A. Identical or Confusingly Similar

Having analyzed the evidence submitted by the Complainant, the Panel finds that the disputed domain names are confusingly similar to Complainant's trademarks PEPSI. All of the contested domain names fully incorporate the trademark PEPSI, which is a distinctive mark. The mere addition of common terms such as "sports", "basketball", "soccer", "volleyball", "rugby" and the like to the PEPSI mark, does not change the overall impression of the designations as being domain names connected to the Complainant (see *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001); *Sony Kabushiki Kaisha (also trading as Sony Corporation) v. Kil Inja*, WIPO Case No. D2000-1409 (December 9, 2000); and *America Online, Inc. v. Chris Hoffman*, WIPO Case No. D2001-1184 (November 19, 2001)).

The other difference between the contested domain names and the Complainants' trademark PEPSI, is the addition of the generic top-level domains (gTLDs) ".com" and ".net" to the said domain names, which is completely without legal significance. See *Ahmanson Land Company v. Vince Curtis,* WIPO Case No. D2000-0859, (December 4, 2000) (citing in *turn Monty and Pat Roberts, Inc. v. J. Bartell,* WIPO Case No. D2000-0300 (June 13, 2000); *J.P. Morgan v. Resource Marketing*, WIPO Case No. D2000-0035 (March 23, 2000)).

Numerous UDRP decisions have recognized that incorporating a trademark in its entirety can be sufficient to establish that a domain name is identical or confusingly similar to a registered trademark. See for example the following decisions: *The Nasdaq Stock Market, Inc. v. Green Angel*, WIPO Case No. D2001-1010 (September 30, 2001) (citing in turn *Kabushiki Kaisha Toshiba d/b/a Toshiba Corporation v. Distribution Purchasing & Logistics Corp.,* WIPO Case No. D2000-0464 (July 27, 2000); *The Stanley Works and Stanley Logistics, Inc. v. Camp Creek Co., Inc.*, WIPO Case No. D2000-0113 (April 13, 2000); *World Wrestling Federation Entertainment, Inc. v. Ringside Collectibles*, WIPO Case No. D2000-1306 (January 24, 2001); *Bayerische Motoren Werke AG v. bmwcar.com,* WIPO Case No. D2002-0615 (August 27, 2002); *Compagnie Générale des Etablissement MICHELIN v. Lost in Space, SA*, WIPO Case No. D2002-0504 (August 1, 2002); *Oki Data Americas, Inc. v. ASD, Inc.*, WIPO Case No. D2001-0903 (November 6, 2001); *Magnum Piering, Inc. v. The Mudjackers and Garwood S. Wilson, Sr.*, WIPO Case No. D2000-1525 (January 29, 2001)).

Thus, Complainant has complied with the first requirement of the Policy.

B. Rights or Legitimate Interests

The following are examples of circumstances where Respondent may have rights or legitimate interests over a contested domain name:

"(i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue." (Policy, Paragraph 4(c)).

The Respondents have not submitted any evidence showing that they have any rights or legitimate interests in the disputed domain names.

The Complainant claims that it has not granted the Respondents any license, permission or other right to use any domain name incorporating the Complainant's trademark PEPSI (see *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001)).

By the time the Respondents registered the contested domain names, i.e., March 15, 2002; April 5, 2002; May 24, 2002; May 31, 2002; July 9, 2002; and November 2, 2002, the Complainant had been using its trademark PEPSI-COLA for more than 100 years (since 1898), and its trademark PEPSI for more than 90 years (since 1911).

Other Panels have found the PEPSI trademark to be famous (*PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001), and *PepsiCo, Inc. v. "null", aka Alexander Zhavoronkov*, WIPO Case No. D2002-0562 (July 30, 2002)).

This Panel finds no legitimate reason for the Respondents to obtain more than seventy domain names, all of which incorporate a famous, well-publicized trademark belonging to a third party. See, *mutatis mutandis, Dixons Group Plc v. Mr. Abu Abdullaah*, WIPO

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Case No. D2000-1406 (January 18, 2001), in that: "Legitimacy" in this context presupposes that there must be some justification in the choice or adoption of a particular domain name and, in the present case, such a justification seems lacking. The Respondent's domain name is virtually the same as the style adopted by the Complainant on its website) and the latter has been widely advertised. In view of this, it is difficult to describe the Respondents' use of the disputed domain name as "legitimate".

Therefore, there can be no *bona fide* offering of goods or services, when the Respondents are actually using the trademark PEPSI in connection to more than 70 domain names, without authorization, permit or license granted by the owner of said trademark.

The P.E.P.S.I. acronym, which supposedly stands for "Partite Emozionanti Per Sportivi Italiani", or "Leave the Histrionics for Italian Sports Fans" is identical to the Complainant's trademark PEPSI. The dots that separate every letter forming the word PEPSI are irrelevant, particularly since said dots are not reproduced in the disputed domain names. The Respondents have not shown any right to the said acronym and thus are not entitled to use the Complainant's trademark PEPSI as incorporated into such acronym or otherwise. See *PepsiCo, Inc. v. "null", aka Alexander Zhavoronkov*, WIPO Case No. D2002-0562 (July 30, 2002), where a recent creation of company using initials or acronym P.E.P.S.I. does not create right or legitimate interest to conduct business under PEPSI mark, since that mark corresponds with another's universally recognized trademark, and *National Deaf Children's Society and Ndcs Limited v. Nude Dames, Chat, Sex*, WIPO Case No. D2002-0128 (April 19, 2002).

The Respondents have not provided any evidence showing that they have been commonly known by any of the contested domain names. In fact, it has been the Complainant who has been commonly known by the trademark PEPSI for more than 90 years, a trademark which is often associated with sports and sporting events, like the ones described in the contested domain names (e.g. "basketball", "soccer", "volleyball", "rugby" etc.).

The Respondents are misleadingly diverting Internet users to a gaming website, which appears to be commercial. This Panel has found no legitimate, noncommercial, *bona fide* or fair use of the contested domain names, which in turn resolve to the above mentioned gaming site.

The second requirement set forth in the Policy has thus been fulfilled.

C. Registered and Used in Bad Faith

According to the Policy, paragraph 4(b), the following circumstances shall be evidence of registration and use in bad faith:

"(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your website or location or of a product or service on your website or location."

The Complainant has proved that the Respondents have intentionally attempted (and apparently succeeded) to attract, apparently for commercial gain, Internet users to Respondents' website, by creating a likelihood of confusion with the Complainant's trademark (Policy, Paragraph 4(b)(iv)). See *PepsiCo, Inc. v. Diabetes Home Care, Inc. and DHC Services*, WIPO Case No. D2001-0174 (March 28, 2001), where the use of domain names to capture goodwill of PEPSI mark and profit from the goodwill associated with complainant's sponsorship of certain sporting events was found to be in bad faith. It is difficult to believe that any party would undergo the difficulties and expenses relating to the registration of more than seventy domain names, all of which encompass the trademark PEPSI, and then have such domain names resolve to a electronic gaming facility, in order to conduct a non-commercial operation. Thus, commercial use is presumed.

The Panel agrees with the decision rendered in *Veuve Cliquot Ponsardin, Maison Fondée en 1772 v. The Polygenix Group Co.*, WIPO Case No. D2000-0163 (May 1, 2000), in that bad faith is found where a domain name "is so obviously connected with such a well-known product that its very use by someone with no connection with the product suggests opportunistic bad faith".

The third requirement of the Policy has been therefore fulfilled.

7. **Decision**

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain names listed herein below be transferred to the Complainant: <pepsi3d.com>, <pepsi3d.net>, <pepsiadventure.com>, <pepsiadventure.net>, <pepsiarcade.com>, <pepsiarcade.net>, <pepsiatletica.com>, <pepsiatletica.net>, <pepsibaseball.net>, <pepsibasket.com>, <pepsibasket.net>, <pepsibasketball.com>, <pepsibasketball.net>, <pepsicalcio.com>, <pepsicalcio.net>, <pepsiciclismo.com>, <pepsiciclismo.net>, <pepsicricket.com>, <pepsicricket.net>, <pepsif1.com>, <pepsif1.net>, <pepsifondo.com>, <pepsifondo.net>, <pepsifootball.net>, <pepsiformula1.com>, <pepsiformula1.net>, <pepsigame.com>, <pepsigame.net>, <pepsigames.com>, <pepsigames.net>, <pepsigiochi.com>, <pepsigiochi.net>, <pepsigolf.com>, <pepsigolf.net>, <pepsihockey.com>, <pepsihockey.net>, <pepsimanager.com>, <pepsimanager.net>, <pepsimondiali.com>, <pepsimondiali.net>, <pepsimoto.com>, <pepsimoto.net>, <pepsimotogp.com>, <pepsimotogp.net>, <pepsirugby.com>, <pepsirugby.net>, <pepsisail.com>, <pepsisail.net>, <pepsisci.com>, <pepsisci.net>, <pepsiscommesse.com>, <pepsiscommesse.net>, <pepsisimulator.com>, <pepsisimulator.net>, <pepsiski.com>, <pepsiski.net>, <pepsisoccer.com>, <pepsisoccer.net>, <pepsisport.com>, <pepsisport.net>, <pepsistrategy.com>, <pepsistrategy.net>, <pepsisuperbike.net>, <pepsitennis.com>, <pepsitennis.net>, <pepsivolley.com>, <pepsivolley.net>, <pepsivolleyball.com>, <pepsivolleyball.net>, <pepsiworldcup.com>, <pepsiworldcup.net>

Kiyoshi I. Tsuru
Sole Panelist

Dated: October 28, 2003

The Kolpak Case: Bosman Times 10?

Football Fears the Arrival of Bosman, Bosmanovic and Osman

by **Roberto Branco Martins***

1. Introduction

The Maros Kolpak case has put an end to what was known as the "foreigners' rule" in professional sports. This foreigners' rule, broadly speaking, is a rule of play laid down by a federation. This rule of play or federation rule in many professional sports limits the number of non-EU players that a team may sign up or line up. This article first discusses the Kolpak case and second the Malaja case, which can be considered the predecessor of the Kolpak ruling. It then goes on to indicate the consequences of the Kolpak case as they are feared to emerge by Europe's professional sport sector. I will not examine the sector of sport in general, but will focus instead on professional football in Europe, given that this sector is illustrative of the other sectors of European professional sport. Finally, the article attempts to offer a possible way to avoid the dreaded consequences of this case for European professional football. Such avoidance should be based on an arrangement which respects the legal hierarchy of rules and also has an eye for the special characteristics of this branch of sport. I therefore conclude this article with a proposal for uniform European rules concerning the admission of non-EU players to the labour market[1] of the European Union's professional football sector.

2. The Kolpak Case[2]

Maros Kolpak, a Slovak national, is the goalkeeper of the second division handball club TSV Ostringen in Germany. He is in the employ of the club and he concluded his first contract with them in March of 1997. This contract was to expire on 30 June 2000, but was renewed in the interim to be valid until 30 June 2003.

Kolpak is a foreign player in the German competition. As a result and in accordance with the regulations of the German Handball Federation (hereinafter: DHB) his players' permit or licence is marked with the letter A. This letter is used to indicate players who are not nationals of an EU/EEA Member State and are not otherwise entitled to equal rights compared to EU/EEA nationals. One of the rights in question is to participate in the free movement of workers. Article 15 of the DHB regulations[3] states that clubs in the *Bundesliga* or *Regionalligen* are only allowed to line up two players with A-licences per competition match.

Kolpak argued that he belonged to the group of third-country nationals who are entitled to the same freedoms as EU nationals. He claimed that for this reason his players' licence should not be marked "A". In addition, he should not be hindered in the performance of his work by the fact that only two A-licensed players are allowed to be lined up. The Court found in favour of Kolpak.

In its reasoning, the Court applied the following arguments. Kolpak is a Slovak national. Slovakia has concluded a treaty with the EU termed an association agreement.[4] This association agreement entitles Slovak nationals to treatment that is equal to that of the nationals of the Member States in whose territory they reside. This equal treatment concerns working conditions, remuneration and dismissal.

This provision, Article 38 of the association agreement between the EU and the Slovak Republic, applies when the Slovak national in question has legally concluded an employment contract with an employer residing in the territory of a Member State.

The Court further held that in the case of professional footballers, participation in competition matches forms part of their working conditions. Moreover, Article 38 of the association agreement is directly applicable and Kolpak and his club are addressees of the Directive, as Kolpak is lawfully employed by his club in the territory of Germany, which is an EU Member State.

The Court thus concluded that Article 38 of the association agreement between the EU and the Slovak Republic is directly applicable. A rule of a sports federation restricting the number of players who are not EU or EEA nationals is void when, contrary to Article 38 of the association agreement, the worker in question is discriminated against as compared to national workers.

The consequences of this conclusion are not restricted to players from Slovakia: the EU has concluded similar agreements with 22 other countries. These 22 countries are: Poland, Armenia, Azerbaijan, Byelorussia, Bulgaria, Estonia, the Czech Republic, Georgia, Hungary, Kazakhstan, Kirgistan, Latvia, Lithuania, Moldova, Romania, Russia, Slovenia, Ukraine, Uzbekistan, Tunisia, Algeria and Morocco.

The principles of the Bosman judgment, where it was held that there was discrimination when a club applied a limit to the number of EU players,[5] as of Kolpak applies to another 23 countries. For clarity's sake I should add that this involves equal rights with respect to EU Member State nationals. The association agreement, and thereby

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1 I use the starting point of a single labour market now that in reality, due to the international transfer system, there is a common framework for regulation which is applicable to the players when they change employers internationally. Furthermore, the entire labour market for professional footballers from Europe consists of 21 627 players, according to the FIFPro report "Representation and members in 2003, analysis of the FIFPro representation for the conference on Social Dialogue in professional football", a number which justifies the perception of European football as one single European labour market.

2 C-438/00, Deutscher Handballbund and Maros Kolpak, EVJ 8 May 2003.

3 The DHB regulations are available at www.dhb.de.

4 Available at http://europa.eu.int/comm/enlargement/pas/assoc_agreements.htm.

5 C-415/93 ASBL Union Royale Belge des Societes de Football Association and Others v Jean Marc Bosman (1996) 1 CMLR 645. The standard work concerning the Bosman case is: Blanpain R., De Bosman Case (1996), Leuven, Peeters. With respect to the quota system before Bosman another interesting work is: Jean-Phillippe Dubet, La Libre circulation des sportifs en Europe, (2000), Bruylant Bruxelles, Staempfli Berne, especially p. 248 et seq.

6 I propose not to examine too deeply in this article the Cotonou agreement which the EU has concluded with the ACP countries. I will merely point out here that Article 13 of the Cotonou agreement guarantees the same rights to nationals of the countries involved. A footballer from one of these countries therefore has the same workers' rights as nationals and EU nationals residing in an EU Member State. Limiting the number of non-EU players by means of a federation rule comes under the heading of working conditions. I was given this information in an email dated 2 May 2003 which was sent to me by Fiona Kinsman, of the EC Directorate-General for Employment and Social Affairs. The result is that an ACP footballer has the same rights to employment as a national. The consequences of Kolpak therefore apply to another 77 countries: "Bosman times 10". The 77 countries are: South Africa (partially), Antigua and Barbuda, the Bahamas, Barbados, Belize, Botswana, Cameroon, Congo (Brazzaville), the Cook Islands, Ivory Coast, Dominica, the Dominican Republic, Fiji, Gabon, Ghana, Grenada, Guyana, Jamaica, Kenya, the Marshall Islands, Mauritius, the Federal States of Micronesia, Namibia, Nauru, Nigeria, Niue, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, the Seychelles, Surinam, Swaziland, Tonga, Trinidad and Tobago, Zimbabwe, Angola, Benin, Burkina Faso, Burundi, the Cape Verde, the Central African Republic, Chad, the Comorres, the Democratic Republic of Congo, Djibouti, Ethiopia, Eritrea, Gambia, Guinea, Guinea Bissau, Equatorial Guinea, Haiti, Kiribati, Lesotho, Liberia, Malawi, Mali, Mauritania, Madagascar, Mozambique, Niger, Rwanda, Samoa, Sao Tome and Principe, Sierra Leone, Solomon Islands, Somalia, Sudan, Tanzania, Tuvalu, Togo, Uganda, Vanuatu and Zambia.

the judgment, does not create rights concerning the cross-border movement of workers within the EU.[6]

The judgment expressly mentioned the fact that players in the professional competition only have the same rights as Member State nationals *when they have concluded a valid employment contract*.

3. Predecessor of Kolpak:[7] the Malaja Case in France[8]

Lilia Malaja is a Polish basketball player who wanted to transfer from a Polish club to the French club Strasbourg. The French basketball federation prevented this transfer, as it limits the number of non-EU players which its members, the basketball clubs, may sign up. Malaja relied on the fact that Poland had signed an association agreement with the EU and that under this agreement she could not be discriminated against as compared to EU citizens after having signed a valid employment contract.

The French *Court d'Appel* at Nancy found in her favour. The judgment caused much commotion in the French sports community.

The decision in the Malaja case is identical to that in the Kolpak case discussed above, with the only exception that it took place at the national level.

4. The dreaded consequences of the Malaja and Kolpak Cases

"*European football may expect to be flooded by cheap labour from all over the world, placed on the market by clever brokers. Clubs will see their investments into youth training dwindle and fade, players will face reduced salaries, unemployment among national footballers will rise, fans will gradually no longer be able to identify with their team and eventually the stadiums will empty. As a result of the arrival of these cheap workers every aspect of the game, from youth training to national teams, will be affected."*

This doom scenario is a summary of the reactions in the media after France's Malaja ruling which had the same purport as the Kolpak decision. These reactions included those of FIFA president Mr Blatter as given by him in interviews.[9] It is the last thing football needs in these economically hard times, which are the result of the "first" Bosman case and the collapse of the television market. At the national level, this view is substantiated by the wave of unemployment that hit the football sector[10] and the precarious financial situation of many clubs which are kept afloat, by means both lawful and unlawful,[11] with government subsidies.[12]

5. True cause of the commotion

For the true cause of this doom scenario, however, we need to go back one fundamental step. The source of the misunderstandings, because that is what they are, between the regulations in European football and the rules prescribed by the EU lies in the antagonism between the sport sector which is outgrowing its legal framework and the EU institutions.

A lack of mutual understanding stands in the way of the efficient translation of the legal concepts of the EU into the language of football and vice versa.

As appears from case-law[13] and from the policy of the European Council[14] and the European Commission[15] with respect to sport, the sport sector and, more in particular, professional football, finds itself on the borderline between different legal regimes. The fact that both regular law and federation rules claim to regulate professional sport highly complicates matters.

That this complexity may lead to paradoxy is self-evident. Two examples may illustrate this.

6. Professional European clubs are undertakings

The activities of professional football clubs are considered to be economic activities. For this reason, European law considers clubs to be undertakings.[16] As a result, legislation, directives, treaties, etc. in force for undertakings also fully apply to professional football clubs. In addition, the club must operate in a market which is regulated by the regulations of associations. The FIFA obliges the clubs to respect the federation rules. Clubs that will not may be cast out of the market.[17]

7. Labour law in sport

In the European Union Member States, the relationship between a player and a club is regulated by labour law.[18] Both national and European labour law have to be obeyed as imperative law. In reality federation rules, by means of the transfer system discussed above, also claim the power to regulate the employment relationship, which leads to legal conflict.[19]

8. Hierarchy in law

The Court's case-law and the EC's policy documents are quite clear on one point.

According to the Helsinki report, the federations have several specific functions. Their task is to support the necessary solidarity between the different levels of top sport, to offer security and democracy in the field of sport, to organise sport, to select national teams and to organise competitions. In performing these tasks, the federations must exercise due regard for Community law and national law.

The golden rule is therefore that the relationship between the different systems of law is as follows: European law - national law - federation rules.

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7 Editions Legislatives, droit du sport 'La CJCE élève la jurisprudence Malaja au niveau européen' avalaible at http://www.editions-legislatives.fr/aj/actualites/droit_specialise/droit_du_sport/2003/DP21-03-05-12-1.html.

8 CE 30 December 2002, n° 219646, Fédération Française de Basket-Ball, affaire Malaja.

9 Inter alia News Magazine, Friday 24 January 2003, "Malaja to become the new Bosman" available at www.uefa.com, Transferts Magazine, 28 January 2003, "Arrêt Malaja: le sport perd-il la face?", available at www.sport24.com, CNN Sports Illustrated, Monday 3 February 2003, "Bosman times ten, new Malaja rule could change soccer forever".

10 Brabants Dagblad, "Ontslaggolf voor voetballers nabij", 15 February 2003, De Telegraaf, "Herscholingscursus voor bestuurders", 22 Februari 2003.

11 Marjan Olfers, " Overheidssteun aan betaald voetbalclubs, (On)geoorloofde staatssteun of legitieme ondersteuning publieke zaak", NJB 4 April 2003; see also: State Aid to Professional Football Clubs: Legitimate Support of a Public Cause?, in: The International Sports Law Journal (ISLJ) 2003/1 pp. 2-9.

12 Pieter Verhoogt, " Betaald Voetbal verdient overheidssteun", de Volkskrant 9 May 2003.

13 Key judgments as regards sport and the EU are: C-36/74 Walrave & Koch v. Association Union Cycliste (1974) ECR 1405, C-13/76 Dona Mantero (1976) ECR 1333, C-51/96 Bosman en C-191/97 Christelle Deliège v. Ligue Francophone de Judo (2000), C-176/96 Lehtonen & Castors Canada Dry Namur-Braine v. FRBSB (Belgian Basketball Federation) (2000), ECR 13 April 2000.

14 The Council's policy has been laid down in the Treaty of Amsterdam; the Declaration is available at http://europa.eu.int/abc/obj/amst/nl/. The Council has also dealt with the sport sector in the Nice Treaty. All official communications of the European Commission concerning the Nice Treaty are available at http://europa.eu.int/comm/nice_treaty/index_nl.htm. Finally, a Council Communication was annexed to the Nice Treaty: the Nice Declaration on the specific character of sport and its social function in Europe, December 2000

15 The EC has made a declaration in a working paper of September 1998. In essence this said the following: "Sport has a number of special characteristics which must be left intact so as not to turn sport into something else. The difficulty lies in determining how Community law should be applied to the economic aspects of sport and at the same time allow sport to retain its unique nature." As a result of this declaration the European Commission published "The European Model of Sport" in September 1998; more on this in: Stephen Weatherill, The legal framework of the "European Sport Model", in The International Sports Law Journal (ISLJ), July and September 2000. A further general policy document is the Helsinki report on sport, available at http://europa.eu.int/comm/sport/doc/key/a_doc_en.html.

16 C-41/90, Höfner and Elser v. Macroton GmbH, 1991, ECR I-1997, 1993 4 CMLR 306.

17 The background for this is the licensing system of the national football federations. The Royal Dutch Football Federation (KNVB) also has a licensing system. The Dutch clubs have to abide by the provisions of the regulations, because if they do not, they will not receive a licence and will be cast out of the market. The KNVB licensing system is available at http://www.knvb.nl/knvb1/pdf/Reglementen_KNVB_rules.pdf. An interesting comment concerning the licensing system is the article " Het licentiesysteem ondermijnt zelfstandig ondernemen", Het Algemeen Dagblad, Monday 9 December 2002.

18 For a detailed description of labour law and professional football from a European law perspective see R.C. Branco Martins, Introductie van de Sociale Dialoog in het Europese professionele voetbal, wenselijk of noodzakelijk?, in Arbeid Integraal 5, November 2002.

19 See also C.A. Segaar, Over twee jaar terugkomen, het nieuwe transfersysteem voor voetballers, Arbeidsrecht 2001/10, p. 28-31.

This hierarchy in the law has applied in every European Member State since the signing of the EC Treaty. By signing the Treaty, the Member States have created a legal system which is both binding on themselves and on other Member States. This principle was emphasised in the Van Gend en Loos case.[20]

The conclusion of all this is that federation rules do not apply when they conflict with national law and/or European law. These two legal systems rank above federation rules in the hierarchy of law. When speaking of federation rules which aim to regulate certain situations, one should always first ask whether this particular circumstance is not governed by national law rules or European law rules.

9. Essence of the problem

This last remark gives rise to an interesting consequence. Let us once more take a look at the outcome of the Kolpak case: the federation rules do not apply in this particular case. This means that the rules on the employment and lining up of players must be left to one side. These federation rules in fact regulated the flow of migration in European professional football. The only way for football to still have some influence on migration flows is to take a legal step back.

This step back concerns the requirements which have to be fulfilled for the conclusion of an employment contract. An employment contract with a non-EU worker can only be validly concluded when the worker in question is able to obtain a work permit.

For this reason, I will examine below how four different Member States have regulated the granting of work permits to professional footballers. This is necessary to be able to tell whether the dreaded consequences of the Kolpak ruling will become the reality for these countries or whether they have a legally correct system to regulate migration. The Member States which I will examine are Spain, Italy, Germany and the Netherlands. (So, northern - "autonomy of sport" - and southern - "public intervention in sport" - European countries are equally represented. *Eds*).

I will carry out this examination from the general to the specific. First I will give an outline of the general rules concerning the granting of work permits and then I will examine them for the specific case of professional football. The research will be carried out in accordance with the following questions:

- Which bodies are responsible for regulating and implementing the granting of work permits?
- What is the most relevant legislation for the granting of work permits?
- What is the general system of granting work permits in the Member State in question?
- Have exceptions been made for the sport sector or for the professional football sector?
- Have the national football authorities established rules of their own?

The first country I will examine is Spain.

10. Spain[21]

Several organisations used to deal with the granting of work permits in Spain. The different organisations also came under different Ministries. This proved inefficient in practice. For this reason, the government decided to establish an interdepartmental committee to handle foreign affairs, the Comisión Interministerial de Extranjeria.[22] The committee is composed of representatives from the Ministries of Foreign Affairs, Social Affairs and Employment, and Justice.

Besides this, the Consejo Superior de Politica de Immigracion, a court competent to hear cases involving aliens, was established by the same law.[23]

The law regulating the practice of granting work permits is the Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (Ley 4/2000).

Article 35(1) of this Law provides that in order to be employed in Spain, one must have a work permit (permiso).

According to Article 39 of Ley 4/2000 no work permit is needed in Spain by the following groups of persons:

- Foreign technicians and engineers employed by the state;
- Foreign professors employed by Spanish universities;
- Executives, foreign teachers and professors from prestigious foreign institutions recognised in Spain and carrying out cultural activities;
- Civilian or military public servants from abroad who are in Spain for the purpose of cooperation programmes;
- Foreign correspondents lawfully residing in Spain;
- Participants in scientific research carried out in the territory of Spain;
- Artists visiting Spain for particular performances without any continuity involved;
- Representatives of religious organisations that are recognised in Spain (listed in the Registro de Entidades Religiosas);
- Foreigners representing internationally recognised trade unions.

Nor do the following persons require a work permit:

- Spaniards who were born in Spain, but lost their Spanish nationality;
- Foreigners who are married to Spanish nationals and take care of descendants or parents who are Spanish nationals;
- Foreigners who were born in Spain and still live there;
- Foreigners who are entitled to permanent residence.

As appears from the above, professional footballers do not come under any of these exceptions. Consequently, the player in question needs to obtain a work permit before he can lawfully be employed.

The future employer has to apply for a Spanish work permit in his country of origin. With the application an offer of employment from a Spanish employer must also be submitted, i.e. in the framework of this study: from a Spanish professional football club.

However, the football club in turn must apply Article 35 of Ley 4/2000, which provides that a positive decision on an application for a work permit depends on the situación nacional de empleo, the national employment situation.

What this boils down to is that foreigners are only eligible for a work permit when there are no unemployed Spanish or EU workers. This has to be clear from the fact that the future employer published the position in or on a publicly accessible source.

It must further be pointed out that Spain has concluded bilateral treaties with a number of countries. Employees from almost every country in Latin America have certain preferential rights on the Spanish labour market, as do employees from Spanish Guinea, Andorra and the Philippines.

Although in practice it is quite difficult for football to fulfil al these requirements, the rules mentioned above do apply to professional football in the same way as to any other sector. Reality, however, works rather differently. In practice, a player only has to submit an employment contract from his future club in order to be granted a work permit.

Spanish football has drawn up a further specification of these rules. In this context, the parties involved are the Spanish football federation (REF), the Liga de Fútbol Profesional (LFP)[24] and the union AFE.

Clubs from Spain's first division, which has twenty teams playing in it, can have a maximum of 25 players under contract. This is the same for the second division, although this presently consists of 22 teams.

As regards rules concerning non-EU players, the following applies: for the season 2003/2004, the highest division teams may have four

20 C-26/62 Van Gend en Loos, 1963,3.

21 For my research into the various Member States I have used a study assigned by the European Commission: ECOTEC Research and Consulting Limited, Admission of third country nationals for paid employment or self-employed activity, available at www.ecotec.com. The study is from 2000; I have updated the information. In addition, I was employed by FBO (Netherlands Federation of Professional Football Clubs) as a European Affairs officer until 1 June 2003; this research has been partly carried out during my time with FBO.

22 Real Decreto 511/92, 14 de maio.

23 Idem.

24 The LFP has two functions. Its aims are primarily commercial, but under the articles of association it also has the power to represent the clubs in socio-economic issues. For this reason, the LFP could also be regarded as an employers' organisation.

such players under contract and of these four they may only line up three at a time. For the same year, second division clubs may only have two non-EU players under contract, but they may both play at the same time.

From the information sent to me by the Spanish players' union it can be concluded that the arrangement mentioned above has the support of the Parliament.[25] However, this support does not take the shape of an Act of Parliament.

11. Italy[26]

The Ministry of the Interior is responsible for admitting non-EU nationals onto Italian territory. This responsibility has been delegated via de questura, the police or national security service branch, to the provincial level

The questuras are in charge of supervising the admission of aliens. Despite the provincial character of the questuras, they come directly under the Ministry and there is little room for flexible application of the law

The law regulating the admission of aliens in Italy is the Testo Unico 286/98. This law has been amended by the law of 30 July 2002, the legge sull'immigrazione, or immigration law. However, the legislation in force continues to be called Testo Unico.

Italy's legislation has a layered structure. The Testo Unico is the "main law" and Article 3 indicates that further, practical regulation is to take place by a yearly presidential decree, the Quote dei flussi di ingresso di lavatori extracommunitari per il 2002. The decree entered into force on 15 October 2002.

In addition to the practical rules concerning the admission of aliens onto Italian territory for employment purposes, the ministerial decree includes the detailed Italian quota system. The quota system in Italy is established annually by the relevant ministry, the Ministry of Social Affairs and Employment, in accordance with a tri-annual policy plan, the documento programmatico per il trienno 2001-2003. The institutions involved in the establishment of this policy plan are the Council of Ministers, the relevant ministries, the CNEL (Social and Economic Council), the permanent conference of coordination between the State and the Regions, the representatives of the Regions, the autonomous provinces and other institutions and associations with an interest/vote in immigration and employment issues.

In the establishment of the annual quota a number of aspects are taken into consideration:

- Last year's quota; for 2002 this was 83,000;
- The demand for labour on the labour market as specified in the abovementioned policy plan;
- Sectors such as tourism, agriculture, construction and services demand temporary labour and seasonal labour;
- Some sectors are in need of higher-qualified technical personnel;
- Priority will be given to workers from direct Italian descent up to the third generation;
- Priority will be given to non-EU citizens lawfully residing in Italy;
- The fact that the economic crisis in Argentina has resulted in unemployment among many workers from Italian descent.

The quota system does not reflect an abstract percentage, but gives a numerical indication of the number of aliens from a certain category that are allowed to enter Italy. For 2003, the system has been established as follows.

There are a total of 79,500 jobs. Of these, inter alia:

- 56,000 are reserved for seasonal labour;
- 3000 for self-employed persons;
- 2000 for self-employed persons in science, undertakings that contribute to the national economy, the professions, famous artists, highly qualified persons from public bodies;
- 500 for paid employment for highly qualified staff;
- 4000 for employees from Italian descent, descendants of Italians in Argentina;
- 10,000 for nationals of neighbouring countries and countries with bilateral agreements, of which 3000 Albanians, 2000 Tunisians, 2000 Moroccans, 1000 Egyptians, 500 Nigerians, 500 Moldavians and 1000 Sri Lanki.

However, the Testo Unico includes several categories which do not come under the quota system, making it easier for these categories to be granted a work permit. Some of these categories have been affected by the amendments of the law in 2002. They were brought under the scope of more specific rules. Below, I will indicate the changes as compared to the old law and the underlying reasons.

The old law excluded a number of categories from the quota system:

- Managers of undertakings from ILO Member States;
- Teachers of their native tongue;
- Professors at universities;
- Domestic staff;
- Employees visiting Italian undertakings for training purposes;
- Employees of international organisations operating in Italian territory;
- Sailors;
- Entertainers;
- Circus artists;
- Dancers;
- Musicians;
- Journalists;
- Au pairs;
- Professional athletes with an employment contract as referred to in the Sports Act, the lege 23 marzo 1981, n.91 Norme in materia de rapporti tra società e sportivi professionisti. The federations oblige the clubs to offer professional footballers an employment contract in accordance with the Sports Act. Professional footballers were therefore automatically excluded from the quota system.

Only one amendment has been introduced in the new law. It concerns professional athletes.

One of the reasons for this amendment was a judgment of the Reggio Emilio court.[27] The Italian football federation had drawn up some rules limiting the number of non-EU players on a team. However, these rules imposed various restrictions.

For example, a club from the A series could employ 5 non-EU players and a club from the B series could employ 3 non-EU players. Clubs from the C series and below (Italy has seven divisions where professional players can play) were not allowed to employ non-EU players. These regulations resulted in a situation where, in case of the relegation of a club from, e.g. the B series to the C series, the non-EU players could no longer perform their jobs.

The Nigerian footballer Ekong found himself in this position. He started proceedings against the federation regulations and the court found in his favour. Consequently, the sports federations' rules regulating the employment of non-EU players ceased to be valid.[28]

The revised Testo Unico was given a separate subsection in Article 22 which introduces the quota system for professional sport.

Article 22(b) provides that a decree of the Minister of Welfare and Culture, on the recommendation of the CONI (Italian Olympic Committee) and in consultation with the Minister of Social Affairs and Employment, shall determine the annual quota of non-EU nationals who may be employed in the professional sport sector, either as paid employees or remunerated in other ways. This is followed by a distribution among the different federations.

The CONI is responsible for the distribution. The decree regulating the distribution is subject to the approval of the supervising Minister of Welfare and Culture.

By the same decree, general criteria are established for appointments and membership for every competition season. This is to secure youth training facilities.

With the new competition season 2003/2004 the new quota will be introduced in Italian sport for the first time. The CONI has called on the federations connected with it through compulsory CONI mem-

25 Information received from Gerardo Movilla, the president of the Spanish players' union, on 17 October 2002.

26 See footnote 21.

27 Tibunale di Reggio Emilia, 2 November 2000, Ekong vs. FIGC.

28 See also Dr. Luca Ferrari, Stranieri tutti uguali, in Lavoro Sport, 11-24 November 2000.

bership to indicate the number of non-EU employees in their specific branch of sport. The CONI will then be able to adopt the proposals of the federations for every individual branch. The total number thus arrived at can be adjusted annually. The CONI has already adopted a maximum number of non-EU employees for the professional sector: 1850. The distribution among the federations/branches of sport depends on the input of the federations.

Unfortunately, little action has yet been taken by the different federations, including the football federations. It is therefore as yet unclear what the distribution in professional football will be. The clubs have mutually agreed to employ as few non-EU players as possible until these matters, i.e. the quota and possible criteria, have been clarified.[29]

12. Germany[30]

The organisation that grants work permits in Germany is the Arbeitsamt, the employment office. The Arbeitsamt comes under the Bundesanstalt für Arbeit, the federal institute for employment.

The Arbeitsamt also plays a role in the granting of residence permits. Before persons who wish to work in German territory may actually enter Germany, they have to have a residence permit. To this end, the Arbeitsamt has to issue a guarantee, a Zusicherung, to the Ausländerbehörde (aliens authority) that a work permit will be granted.

The rules with respect to the granting of work permits are layered in structure. The Act heading the structure is the Sozial Gesetz Buch III (SGB3), the main source of social legislation. Particulars for specific sectors and categories are laid down in decrees.

Article 285 SGB3 (1) provides that the Arbeitserlaubnis, the work permit, may be granted if:

- The appointment of the aliens does not affect the structure of the distribution of labour in the industry, regions and sectors;
- The appointment of the alien does not impede the appointment of German employees or employees who lawfully reside in German territory;
- The alien's working conditions are not poorer than those of employees in comparable positions.

The same subsection includes the provision that German employees or employees considered equivalent thereto have priority on the labour market.

Subsection 2 provides that exceptions are possible. Such exceptions must, however, be based on a regulation or decision or follow from a bilateral agreement.

Article 285 SGB3 further states that the permit may be valid for a specific sector and in specific circumstances.

As mentioned above, the relevant German regulations are layered in structure. The decree dealing with the granting of the work permit in greater detail is the Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (ArGV).

The ArGV among other things includes provisions concerning special circumstances in which the permit is granted, the fact that the permit only applies for the work for which it was granted, that the permit applies during the term of the contract with a maximum duration of three years, conditions for its withdrawal and the expiry of the work permit.

The most important provision in the light of the present research is Article 9 of the ArGV, as it indicates the categories of persons exempt from the regulation. These categories do not need to obtain a work permit before they can be employed.

One striking feature of this list is its length. Despite the fact that German legislation is relatively strict and Germany no longer considers itself a migrant nation now that the time of migrant workers is over, this long list of 17 exceptions appears quite paradoxical. It would go too far to name every category here and therefore I will only discuss a few:

- Professors;
- Diplomats and embassy personnel;
- Scientists;
- Teachers;
- Staff of international organisations operating in Germany;
- Students as part of an internship;
- Professional athletes.

In general, the period of employment involved for this category is three months at the most.

In addition, a number of categories have easier access to the labour market when society so requires. These include, for example:

- Seasonal workers;
- Chefs;
- Nurses;
- Spiritual workers;
- Artists;
- Models;
- Recently graduated students;
- Etc.

The latter category comes under the heading of specialists. They are given easier access to the labour market when society so requires.

It was already mentioned above that professional footballers do not require a work permit for Germany. The requirement that the employment may only last three months at the longest does not apply to them either.

Article 9(12) of the ArGV is the provision specifically referring to professional athletes. The requirements that must be fulfilled are:

- The federation for which the athlete will play must submit evidence of the player's ability;
- The club must support the player.

How such evidence is to be supplied depends on the point of view of the federation. The Deutscher Fussballbund (DFB) has established an additional requirement. The maximum number of non-UEFA players permitted to be employed by first and second league clubs is 5. This concerns players from countries that are not members of UEFA, the European umbrella federation for football. There are 55 members of UEFA.[31]

13. The Netherlands[32]

The principal rule is that employers have to apply for work permits for every foreign employee they wish to appoint.

Work permits are issued to employers by the work permit department of the Central Organisation for Employment and Income (CWI). The permit entitles the employer to appoint foreign employees.

The main source of Dutch government policy with respect to foreign employees is the Foreign Nationals (Employment) Act (Wav). Secondary to this Act are the Delegation Decree, which among other things regulates the powers of the CWI, and the Implementation Regulations. The Wav entered into force on 15 September 1995.

Because of the restrictive admission policy, work permits are generally refused if there is a supply of employees available on the Dutch (or European) labour market, who are entitled to priority.

Such a priority supply exists if there are workers available in the Netherlands to take on the position the employer is seeking to fill. Whether there is a priority supply can often be established through (temporary) employment agencies.

Not all employees need a work permit. There are a few exceptions. The following categories of persons do not need a work permit in order to be employed in the Netherlands:

- EU/EEA nationals;
- Persons coming within the scope of a bilateral treaty;
- Persons who will work in the Netherlands for a period of less than 4 weeks;
- Staff of international organisations.

For some categories it is easier to obtain a work permit. They are the following:

- Expatriates;

29 After consultations with the CONI and the Italian football league's lawyer, Dr. Giovanni Pifarotti, I uncovered this information on 19 October 2002.

30 See footnote 21.

32 See footnote 21.

- Scientists;
- Musicians;
- Entertainers;
- Interns;
- Trainees;
- Students with part-time jobs;
- Chefs;
- Athletes.

There is a simplified arrangement for professional footballers. It is therefore not necessary to examine whether there is a priority supply. This task is usually performed by (temporary) employment agencies.

In the market for professional sport, however, these agencies do not operate very often, if at all. The labour market in sport has very specific characteristics. This has also been acknowledged by the Dutch government. In order to be able to answer the question whether there is a priority supply special guidelines have been developed for sport. The Ministry of Social Affairs and Employment in consultation with management and labour in professional football has established guidelines for this sector on the basis of which the CWI can issue work permits.

Management and labour in the Netherlands are the Federation of Professional Football Clubs (FBO), VVCS and ProProf.

The special rules concerning the sport market are laid down in paragraph 13 of the Implementation Regulations. In this paragraph four criteria have been laid down for the professional football sector which are used to implement the admission policy for professional footballers.

The four criteria are:
- The employee must play in the highest division of the game;
- The income criterion;
- The quality criterion;
- The contingency principle.

Below, I will discuss these criteria in some detail, with the exception of the first criterion. This has been further defined for professional football to mean that both clubs in the premier league and in the first division can apply to the CWI for work permits. Given the fact that this means that the rule applies to the whole of professional football, it needs no further elaboration here.

A general statutory restriction which also affects employers in football is that in addition to the four specific sports criteria mentioned there is also an age limit of 18. The CWI can refuse work permit applications for employees below the age of 18. What this boils down to in practice is that the application is always refused, unless an exceptional talent is involved. For an answer to the question whether such a talent is at stake, the cases of Ronaldo (PSV Eindhoven) and Kanu (Ajax Amsterdam) are often referred to. However, they received their permits under the old legislation, the Foreign Workers (Employment) Act (Wabw).

Also after the introduction of the Wav some work permits have been granted to 17-year-old players, but it is not entirely clear with what kind of track record a young player is to be considered an exceptional talent. This assessment is made on a case-by-case basis.

Apart from the general criteria "age" and "highest division" which were already mentioned, there are three important specific criteria for employers in football. These are the income criterion, the quality criterion and the contingency principle.

In professional football, the income criterion and the age criterion are the most objective of all the criteria used by the CWI. In the past, employers had to explain to the authorities with no grounds specified why a foreign player was considered more suitable than a Dutch player. With the establishment of the income criterion the employer no longer needs to have this discussion. If the employer is prepared to pay the player a minimum salary that has been established beforehand this will indicate that the player is considered suitable to play for the club. Further interference from the authorities concerning the ins and outs of this suitability does not take place.

The income criterion is established annually by the CWI in accordance with the average gross annual income in the Premier League in the previous season. The salary information is supplied by the KNVB (Royal Dutch Football Association). Employers in football have to be prepared for changes in the income criterion around February of each year.

For non-EEA players the following remuneration is regarded as being in accordance with the market:
- The guaranteed income of players aged 18 and 19 must be at least 75% of the established average gross annual income in the Premier League in the previous season;
- The guaranteed income of players aged 20 and over must be at least 150% of the established average gross annual income in the Premier League in the previous season.

The criterion in calculating the guaranteed minimum income as of 1 July 2002 is € 254,747 gross a year. This results in the following minimum remuneration:
- players aged 18 and 19 € 191,060.25;
- players aged 20 and over € 382,120.50.

In determining whether the income which the employee will receive is in accordance with the established criterion the following salary components can be included in the calculation:
- The basic salary;
- Possible guaranteed premiums;
- Earnest money, apportioned as an annual component;
- The holiday allowance.

In order to be eligible for a permit the employer must be able to show, based on objective information, that the player has certain qualities.

The employer can demonstrate that the player has the necessary qualities based on one of the following two objective facts:

Just prior to his employment, the player participated in a competition which is at least as strong as the highest division of the Dutch competition. A competition is assumed to be as strong when it is the highest of a country which at the time when the work permit was applied for ranked among the top 40 countries on the FIFA country ranking list;
- The player has proven in some other way to have at least comparable qualities.

This quality criterion is entirely based on the player's individual performance. The criterion has been met when the alien played in:
- The national team of his country;
- The Olympic team of his country;
- A national youth selection of his country;
- Recognised international club tournaments such as the Champions League, UEFA Cup, Copa Libertadores, etc.

The player must meet either criterion 1, or criterion 2. This is therefore not a cumulative criterion. It should also be noted that the experience may have been gained at any point during the player's career. It is therefore not necessary that this took place shortly before the application for a work permit.

14. Conclusions of the comparative law study

By and large, for *Spain* the same is true as for Germany. However, in Spain it is required that a professional player has a work permit, although in practice this is very easy to obtain. There is no further legislative basis in Spain for the regulation of the permitted number of non-EU players per team. Here, too, a conversion of federation regulations should take place.[33]

Italy has already changed the legislative basis, mainly as a result of the Ekong case. The conversion of federation regulations into Acts of Parliament was realised by means of the introduction of a quota system. This quota system originated from cooperation between the authorities and the sport federations. Although the new system is not yet operational, the integration of a sports rule into an Act of Parliament has taken place in Italy.

In *Germany* there is a problem. The only source of regulation of the migration of non-EU players to Germany has disappeared. Moreover,

33 See also Juan de Dios Crespo, Comentario de urgencia sobre la sentencia Kolpak, available at www. Iusport.es.

professional footballers do not even need a work permit to work in Germany. In Germany, a conversion will have to take place from federation regulations to Acts of Parliament. If it does not, the negative effects of the Kolpak case can set in.

In *The Netherlands* there is no need to fear the negative effects of the Kolpak case as it has a system based on an Act of Parliament. The present framework for regulating the granting of work permits can therefore remain intact. However, when we look at these rules from an EU-wide perspective the Netherlands is different from the other Member States in that it does not apply any limit to the number of non-EU players which a club is permitted to employ. If it would be the case that in the rest of Europe the federation rules, which manage to somewhat limit the flow of migration, fall by the wayside, the Dutch system would turn out to be quite rigid. The Dutch football authorities would do well to consider their international competitive position.

Summing up I can say that limiting the number of non-EU players in a team is desirable. This follows from the fact that three out of the four Member States that were examined have introduced such a restriction, although two of these three have used the wrong legal instrument to regulate the matter. In these Member States the current rules should be changed.

In addition it should be remarked that all Member States have in common that it is much easier for a professional footballer to obtain a work permit when compared to a "normal" non-EU employee. Professional footballers are given preferential treatment and do not have to fulfil the requirements of the priority supply.

The question is how the dreaded consequences for European professional football may be avoided as efficiently as possible. What is in any case not efficient from a European perspective is a separate conversion of federation regulations into Acts of Parliament in every single Member State. Every country would then have to reinvent the wheel. This could moreover be a lengthy process because adequate structures for turning federation rules into Acts of Parliament are lacking. An individual approach would furthermore lead to a fragmented system, as a central point of coordination is missing. Another thing which needs to be considered at this stage of the evolution of the EU is the accession of ten new Member States. Football has to come up with a smooth "football acquis" and will not achieve this by striving after individualisation.[34]

15. Solution?

A possible solution could be EU-wide minimum rules based on a statutory source of law. These would moreover need to leave room for national specifications of these minimum rules.

The final part of this article discusses a draft directive which could form the basis for uniform European rules.

16. Draft Directive

At the European Council of Tampere in October 1999, the European Commission was given the mandate to draft a proposal for a directive. The title of this draft directive is: "The conditions of entry and residence of third country nationals for the purpose of paid employment and self employment activities".[35] The legal basis of this draft directive is Article 63(3) of the EC Treaty.[36]

The EC has indicated in a communication[37] that it intends to take a two-tier approach to this mandate. The main objective of the draft directive is to erect a legal framework at the EU level as regards the policy for the granting of work permits. In addition, the European Commission attempts to direct this uniform legal framework by means of an open and transparent system in the field of immigration policy at the Community level.

However, the above applies to a general policy. The EC recognises that certain specific categories of employees may be given separate treatment. One of these categories is that of professional athletes. For professional athletes, the harmonisation of the policy of granting work permits should not take place until a later stage.

To introduce harmony in European football and to underline the exceptional position of the football sector a definitive version of the directive might refer to a further refinement of the practice in professional football by means of a professional football directive. It could also be possible that football itself takes the initiative to draft such a directive.[38]

17. European directive drawn up by the designated organisations

Europe-wide rules laid down in a directive would not only lead to uniformity, but also to a solid legal basis. Because the basis would no longer be formed by federation rules the federation could also apply it without any problems.

Because the directive has to ensure minimum harmonisation, it could be worded openly. The competent authorities could then agree to introduce stricter requirements at the national level if they consider this necessary. I will first explain what the rules could be. I emphasise that this is just one possible way of regulating these matters. The system I will describe is based on the research and is in principle "European-law proof" for football. I will subsequently indicate the authorities that would be competent to draft such a directive.

18. Characteristics of uniform European rules

The directive has to include a provision serving to protect youth training. This will preserve the lifeline of European football and emphasise the grass-roots level of the sport. This provision could be formulated in general terms but could also be linked to a duty, for example, depositing a percentage of the transfer fee in a special fund whenever a club employs a non-EU player. The money could then be invested in the youth training facilities.

The permit should further apply for a fixed number of years for one employer only. This way, the stability of contracts is retained and trade in players prevented.

A possibility to introduce minimum harmonisation by means of open wording is to establish a maximum number of non-EU players which a club may employ. This would result in a European quota system. The quota would serve to prevent the forced resignation of national employees. Furthermore it should ensure that the amount of remuneration does not differ too much from one player to the next.

This quota could be established through an annual decision and apply equally in all the Member States of the Union. In order to establish the quota for the highest division of a country, the average of all highest divisions in Europe, with the major football countries counting three times and a sliding scale down to one time for smaller football countries, could be used as a benchmark.

The second division of a country would be allowed to contract half the number of non-EU players permitted to the highest division. This would be explained from the fact that the second division is more like a training facility which has to ensure the training and moving up of national players. When a club is relegated from the highest division to a lower division it can continue to employ the player until his contract expires.

A quota system for Europe based on an average reflects the current

34 The original research which forms the basis of this article discusses these matters more in-depth. (Cf. also the consequences of the fact that present individual EU Member States almost without exception temporarily maintain restrictions in some way or other of the free movement of workers from the ten accession countries after 1 May 2004. This in fact keeps the accession countries in their previous position of non-EU countries in this regard. Eds).

35 Available at http://europa.eu.int/comm/justice_home/common/content/backgroundoc_accesswork.pdf.

36 "The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt (...) paragraph 3: measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion, (b) illegal immigration and illegal residence, including repatriation of illegal residents".

37 Communication on a Community Immigration Policy (COM(2000) 757 of 22 November 2000).

38 See hereon R.C.Branco Martins, Europe's First Collective Labour Agreementl, published by EFFC in 2003.

practice. When a fixed number of work permits is granted an economic needs test is no longer necessary. This economic needs test is currently not carried out for football in Europe. Minimum rules by means of quota moreover allow a certain equivalence to remain between clubs. Because of the maximum, the wealthiest clubs will not be able to contract all the best-performing non-EU players.

Of course, clubs must be able to employ a non-EU player in contingencies. The conditions for this must, however, be objectively determinable. One could think of a situation where in mid-season a club suddenly needs a player for a specific position and because of circumstances is only able to find such a player in a non-EU country. For such cases a wild-card system could be introduced. When a club plays their wild card, it must make an extra donation to the youth training fund.

Finally, a ceiling could be put on the number of permits per club. This way allocations of work permits become valuable in money. Clubs that do not contract any non-EU players can sell their permits on. This is especially advantageous to smaller clubs from the highest division.

19. Which institutions are competent in case of regulation by means of a directive?

The EC takes the initiative for uniform rules in the draft directive. Therefore, an EC organisation will probably wish to launch a dialogue with the sport sector. However, this is the crossroads between labour law, aliens law and sport. Two observations should be made here.

First of all, in accordance with established policy of the European Commission, it is self-evident that federations are not competent where labour law or aliens law are concerned. Secondly, the EC has no direct authority where issues of sport are at stake; for this, it lacks a treaty or statutory basis.

This leads to the conclusion that there is a gap between the EC and the federations, which could, however, be filled by management and labour. This is actually a logical step when one considers that e.g. in the Netherlands and Spain management and labour are involved in determining the criteria for the employment of non-EU players.

When one realises that the EC, the federations and management and labour should cooperate, the appropriate setting is not hard to locate: the Social Dialogue.

The Social Dialogue is a structure for consultation between employers and employees (management and labour) at the European central level and at the level of the European sectors. The Social Dialogue is included in the EC Treaty in Articles 138 and 139 EC.[39]

20. Conclusion

The Social Dialogue is the appropriate instrument for creating a solid legal basis for an EU-wide "foreigners' rule". A directive drawn up by management and labour in consultation with the umbrella federations and supervised by the EC would enable the different institutions to operate within their own jurisdiction and powers. At the same time, such cooperation would guarantee the legally correct regulation of different legal aspects of European football. Following this path, the possible adverse effects of the Kolpak case could be avoided.

39 For more on the Social Dialogue see footnote 38 and in R.C. Branco Martins, Introductie van de Sociale Dialoog in het Europees professioneel voetbal, wenselijk of noodzakelijk?, Arbeid Integraal no. 5, 2002.

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Legal Regulation of the Relationship between Football Clubs and Professional Players in Lithuania

by **Raimundas Jurevicius and Dovilé Vaigauskaité***

1. Introduction

The last decade of the 20th century witnessed significant change in the nature of professional sports, especially professional football. Football has gone from being a mere social activity at which crowds of fans gather to a successful sector of the economy with a turnover of € 10 billion in 2002 in the European sector alone.[1] This shift has triggered much debate among the professionals in the field concerning various aspects of professional sports which have never come under this kind of scrutiny before. Among these new issues is the legal nature of the relationship between the football club and the professional football player. Is the player an employee or is he a contractor providing services to the club?

The status of employee certainly grants more rights to professional football players than that of service contractor. More rights for employees also mean more obligations for the employer, in this case: the club. Despite the increased importance of the commercial aspects of the clubs' activities, the advantage for clubs of having employer status in professional football is on the whole questioned.

2. The current situation in five EU Member States

There is no universal or commonly accepted answer to the issue of clubs as employers and solutions vary from Member State to Member State. According to the research performed by the Dutch Federation of Professional Football Clubs (FBO) together with the ASSER International Sports Law Centre, most of the five different Member States covered by the research treat professional footballers as employees,[2] although the means by which employee status is established differ per country. For instance, in Belgium, Portugal and the United Kingdom, special laws provide that the conclusion of an employment contract between clubs and their players is obligatory. Dutch national courts have established the precedent that professional footballers are employees under Dutch labour law. In the case of Germany, there is no special law on sports contracts and they are not exempted from the application of general employment law. Nevertheless, the practice in the German football sector indicates that it is commonly understood that the club-player relationship is an employment relationship by nature.

3. Harmonized rules at the European level - ECJ case-law

European Union law could be a possible source of harmonized rules in relation to the club-player relationship. However, there is no article on sports contained in the EC Treaty. The competence of the EU institutions in this respect is limited to the spheres where sports intertwine with certain economic activities that are covered by the EC Treaty (such as competition, intellectual property or broadcasting). Nevertheless, the European Court of Justice (ECJ) has delivered several judgments where sports were involved in some way.

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1 According to the 12th edition of the Deloitte & Touche Annual Review of Football Finance, available at www.deloitte.com/dtt/press_release/0,2309,cid=22163&pv=Y,00.html.

2 R. C. Branco Martins, *European Sport's First Collective Labour Agreement*, (2002), FBO/EFFC.

In the controversial *Bosman*[3] case the Court held that the then valid rules for the transfer of footballers were contrary to Article 39 (ex 48) of the EC Treaty, which protects the free movement of workers in the EU. The Court did not raise the question whether the relationship between the football club and the player is an employment relationship by nature. The Court considered Jean-Marc Bosman, a professional football player, an employee under the Treaty, who is entitled to all the rights conferred upon him by the freedom of movement for workers.

The ECJ also affirmed the status of employee in other cases before it.[4] One of them involved the rules of the Belgian national basketball association in relation to the fielding of non-Belgian nationals in the matches of the national championship.[5] In the *Lehtonen* case the Court was expressly asked whether Mr Lehtonen, a Finnish professional basketball player, could be regarded as an employee under the EC Treaty. The Court defined the term 'employment relationship' as a relationship whereby a person "for a certain period of time (...) performs services for and under the direction of another person, in return for which he receives remuneration".[6] All these objective criteria were found to exist in the club-player relationship. Therefore Mr Lehtonen was entitled to freedom of movement, just like any other employee under the EC Treaty.

Following the above, it is important to note that the ECJ accepted that professional athletes should only be treated as ordinary workers in cases where the agreement between the club and the athlete was already concluded in the form of an employment contract.[7] In some countries, this was also a requirement of relevant national legislation (Belgium)[8] or common practice in the professional football sector (Germany).[9] Whether the club-player relationship is one of employment or a service contract is left to the national legislator and judiciary to determine.[10]

As mentioned above, most EU Member States treat the club-player relationship as an employment relationship, although by different means (i.e. as provided by laws, case-law or common practice). Where the future EU members are concerned (ten countries to join as of 1 May 2004), the situation is very much the opposite.[11]

4. Other accession countries than Lithuania and the regulation of their national football sectors

In the Slovak Republic, for example, general employment law does not exempt professional sports or football from its application. Nevertheless, professional footballers usually conclude civil law contracts with their clubs which are termed 'contract for the performance of a sporting activity' and which give the players the status of a self-employed person. In addition, the rules of the Slovak Football Federation provide that the legal nature of a club-player contract does not determine how they should be registered with the organization.

Slovenia does not have a special law according to which a certain type of a contract would be mandatory for football players either. This means that agreements between clubs and their players could be governed by either employment law or civil law. What happens in practice is that football players are employed by the Ministry of Sports, but perform their work for a football club. This way, players are guaranteed the right to social security benefits.

The Czech football sector, although it could choose between labour law and civil law, opted to use the means of a commercial contract to take on footballers: nearly 90% of all club-player contracts are concluded under company law and regard footballers as entrepreneurs.

In Poland, the situation is more complex. Instead of opting for just one type of contract, clubs make use of both employment contracts and contracts under company law. A footballer playing for a Polish club will usually get a fixed minimum salary (e.g. € 200 a month) under the employment contract, and a much higher annual amount (e.g. € 8000) under the company law contract. The trick here is that the rules of the Polish Football Federation only protect the player for the extent of his employment contract.[12]

5. The case of Lithuania - ambiguity concerning the status of footballers

The regulation of sports relations, i.e. club-player relations, in Lithuania is very specific. Although the issue is covered by legislation and has been the subject of judicial decision making, the actual rules are still unclear in the sense of defining the legal status of the club-player relationship. Different laws provide different approaches to the status of athletes in their relations with sports club, showing that the legislative authorities have not yet succeeded in presenting a clear vision of the position of professional sports in the legal system as a whole.

Such uncertainty at the governmental level of sport regulation also negatively impacts the regulation of sports relations in Lithuanian football. As a general requirement, laid down in the Competition Regulations for 2003 (Regulations) as adopted by the Lithuanian Football Federation (LFF), every professional football player must have a written contract with his club for the performance of sports activities before he is allowed to play for the club. The Regulations define the sports activities contract as a contract between an athlete and a club whereby the athlete undertakes to prepare for and participate in the competition under the internal rules of the club and the club undertakes to pay the athlete the agreed salary, ensure proper training conditions and fulfill other obligations under the contract.[13]

The definition of the contract for sports activities is similar to the definition of the employment contract provided under the Lithuanian Labour Code,[14] which appears to be evidence of a link between sports and employment law. However, certain theoretical and practical issues in this field make it questionable that such a link exists.

The regulation of employment relations in Lithuania is quite formal and strict. The Labour Code is employee-orientated and provides a very limited amount of flexibility for changing the terms of employment it lays down where such changes would adversely affect the position of the employee. The Labour Code does not include a list of instances in which changed conditions might be regarded as adversely affecting the position of the employee, but experience with the application of labour law may provide a general understanding of the implications of the possible regulation under this law of club-player relations.

The applicability of legal provisions governing employment in order to regulate sports would cause problems of practical implementation in respect of certain provisions of the Labour Code as they conflict with the current practice in sport. One of the areas of conflict is the termination of the employment contract.

The Labour Code provides[15] that employees are entitled to terminate their employment contract (either fixed-term or for an indefinite time) with 14 days' notice. In certain cases, termination may even become effective after only 3 days' notice. This provision basically grants the employee an unrestricted right to terminate the employment contract at any time he/she sees fit. In addition, the Labour

3 Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, [1995] E.C.R. I-04921.

4 See e.g. Case C-438/00, *Deutscher Handballbund eV v Maros Kolpak*, [2003] E.C.R. I-04135 (2003).

5 Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, [2000] E.C.R. I-02681 (2000).

6 Ibid., para. 45.

7 Both Jean-Marc Bosman and Jyri Lehtonen had valid employment contracts with the relevant national sports associations.

8 In Belgium the law concerning professional athletes (in force since 1984) provides that professional athletes must have fixed-term employment contracts.

9 See Case C-438/00, *Deutscher Handballbund eV v Maros Kolpak*, [2003] E.C.R. I-04135 (2003), para. 16.

10 See e.g. *Lehtonen* case, para. 40.

11 The ASSER International Sports Law Centre in cooperation with the EFFC Project undertook this research into the regulation of professional football in 10 EU candidate states. The research was commissioned by the European Commission under budget heading B 3-4000.

12 This happened to Edward Cecot, a football player in the club KS Ruch Chorzów. More information about this case can be found at www.fifpro.org/index.php?mod=one&id=12398.

13 Art. 116 of the Competition Regulations for 2003, adopted by the Lithuanian Football Federation (only available in Lithuanian).

14 Labour Code of the Republic of Lithuania, adopted by *Seimas* on 4 June 2002, available at www.lrs.lt/Dpaieska.html.

15 Ibid. Art. 127.

Code does not contain any provisions on compensating the employer for damage incurred as the result of such termination, save for reimbursement of the actual costs of training, internships, improvement of qualifications, etc., paid by the employer during the final calendar year of the employment.

These conditions of termination of the employment contract, when applied to football player-football club relations, undoubtedly threaten the stability of sports contracts, as they give players unlimited freedom to terminate their contract with the club at any time during the season or off season.

Another example of the possible incompatibility of labour law and its application to sports relations is the existence of disciplinary sanctions. In sports, it is common practice to fine athletes for various disciplinary violations, i.e. being late for practice or the game, unsportsmanlike behaviour within the club or in public, etc. However, Lithuanian labour law does not permit that financial sanctions are imposed on employees (fines, reduced wages, etc). Under labour law, disciplinary violations could only be punished by a warning, a grave warning or termination of the contract. Furthermore, employers are not allowed to interfere in their employees' personal life (as a general principle, which lies outside the scope of what is regulated by labour law), while football clubs usually try to maintain control over their players even when they are "off duty".

From the above it emerges that the direct application of labour law to the realm of sports could lead to legal conflict between legislation and practice. These specific issues and the possible legal conflicts had to be regulated by a special law, which became the Law of the Republic of Lithuania on Physical Culture and Sport of 20 December 1995.[16] Sadly though, this Law, although intended specifically to regulate sport, has generally failed to achieve this aim where professional sports are concerned.

6. The Law on Physical Culture and Sport

The Law on Physical Culture and Sport mainly concerns amateur sport and governmental policy concerning sport as a social activity. The objective of formalizing the social role of sport was clearly defined in the Explanatory Memorandum to the draft Law on Physical Culture and Sport, which is a mandatory document in the legislative process and is designed to explain the purpose and possible implications of the law submitted to the parliament (*Lietuvos Respublikos Seimas*) for its approval.

The regulation of professional sport, however, was fragmented at best. The Law included provisions on professional athletes and professional sports clubs, the contents of the contract for sports activities concluded between athletes (or coaches) and clubs, and provisions concerning social security.

These regulations did not constitute a comprehensive system of rules for professional sport and were also insufficient to determine the legal status of club-player relations.

By the provisions of the Law on Physical Culture and Sport it was intended to establish a link between the contract concerning sports activity and the employment contract. The definition of the contract for sports activities is almost identical to the definition of the employment contract[17] and, for example, the Law refers to the compulsory insurance of athletes.[18] The link was, however, not expressly intended to concern employment relations, as the Law on Physical Culture and Sport did not contain any reference to the applicability of employment law to relations in the sports sphere. Furthermore, the Law specifically regulated the contents of the contract for sports activities[19] in a way that was quite different from that of the employment contract stipulated in the Lithuanian Labour Code. Taking into account the highly formalized regulation of employment relations in Lithuania, it was necessary to consider the club-player relationship as a special relationship, closely linked with but more specific than the employment relationship.

The idea of regarding professional sports relations as employment relations was strongly supported by the tax and social insurance authorities. Although no specific provisions on the taxation of athletes were in force and their status was not clearly linked to that of regular employees, for taxation purposes athletes were treated as ordinary employees and taxed along the same rates (33% for income tax, plus 3% for social security contributions payable by the athletes and 31% for social security contributions payable by the clubs on top of the athletes' salaries). Athletes were also entitled to the same social security benefits as regular employees.

7. Romanas Safronovas v Vilnius BC "Statyba"

The prevailing practice was not challenged until the year 2000 when the *Safronovas* case[20] was decided by the Supreme Court of Lithuania. Romanas Safronovas, a basketball player, had a contract for sports activities with the basketball club "Statyba" (Vilniaus "Statybos" krep_inio klubas). The contract was prematurely terminated by the club on the ground that Mr Safronovas had failed to perform on a professional level and meet the standards applicable for professional athletes. Mr Safronovas argued that his contract with the club was an employment contract and challenged its termination in court, where he claimed that as the club had failed to follow the legal procedure for termination of an employment contract, the termination had been illegal.

The Supreme Court held that sports relations, including those in professional sports between an athlete and a club, are regulated by a special law, namely the Law on Physical Culture and Sport. The Supreme Court admitted that the playing of sports as the object of employment is a special kind of employment activity, but that it was nevertheless governed by the Law on Physical Culture and Sport instead of by labour law. Moreover, the Court specifically stated that legal rules regulating the relationship between employers and employees do not apply to the relations between athletes and clubs.

By its decision, the Supreme Court set aside the generally accepted and widely used definition of the nature of club-player relations. In fact, the Supreme Court even went so far as to challenge the existence of any connection between sport and employment, a connection which was at least partially included in the Law on Physical Culture and Sport. This decision has clearly shown that sport relations are still not regulated adequately and that their statutory regulation must be adjusted.

8. Taxation of athletes' income

The special nature of sport that was recognized in the *Safronovas* case was insufficiently considered by the authorities. The special relationship between athletes and clubs failed to find specific regulation e.g. where taxation was concerned. As far as tax authorities and social security authorities were concerned, athletes' income remained income derived from an employment relationship.

The next step that was taken to clarify the status of player-club relations was the adoption of the new Law of the Republic of Lithuania on the Taxation of Income Earned by Residents (Law on Income Tax).[21] This Law specifically addressed the issue of the taxation of income derived from sports activities. The enactment of these specific provisions was the result of the debate on sports and athlete-club relations launched after the *Safronovas* case and it was warmly welcomed by the sports society. This was not surprising, as the Law on Income Tax established a different, lower, rate of taxation to apply to the income of athletes. The law put athletes on the same footing as sole traders, i.e. self-employed persons without an employment contract.

Following the *Safronovas* case, which by comparison made less impact in achieving practical shifts in the legal status of sport relations, the Law on Income Tax completely altered the system of taxation that had applied before and which still retained the connection with employment relations. As a result, the income earned by athletes is now taxed at a 15% rate. Neither athletes nor clubs need pay social security contributions anymore, but this did deprive athletes of practically all social security guarantees they had enjoyed before.

16 Available at www.lrs.lt/Dpaieska.html.
17 Art. 30(1).
18 Art. 31.
19 Art. 30(2).
20 Case no. 3K-3-602/2000 *Romanas Safronovas v Vilniaus "Statybos" krep_inio klubas.*
21 Available at www.lrs.lt/Dpaieska.html.

The International Guide to the Taxation of

Sportsmen and

Sportswomen

The most important topics
Income taxation of athletes
Treatment of income from sponsoring
Exploitation of image rights
International tax issues
Tax treaty provisions
International tax planning possibilities

Authors and editor
The country chapters have been written by tax practitioners on the basis of their practical experience. The publication is edited by Rijkele Betten.

Target audience
- international tax attorneys
- lawyers representing athletes in contract negotiations
- international sports organisations
- sports management bureaus
- sports law specialists

Detailed description of country chapters
This loose-leaf service contains country chapters in which the income tax aspects of income from sports and related activities are described in detail. The chapters are between 30 and 75 printed pages. Each country chapter starts with an analysis of the income tax status of amateurs and professionals and describes the precise domestic tax rules on income from sports activities and related income (for example, income from the exploitation of image rights). The application of withholding taxes to non-resident athletes is an important topic.

The second part of each country chapter deals with international situations and covers:
- the taxation of foreign income earned by resident athletes
- the application of tax treaties to resident and non-resident athletes
- the content and interpretation of the applicable tax treaties
- avoidance of international double taxation
- case law (coverage will be further expanded)

International tax planning techniques are described in chapter three. This includes, for example, discussion of the tax treatment of rent-a-star companies, and of residents in tax havens like Monaco. The information is also of use for international tax planning with regard to high income individuals.

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Recent developments in case-law and tax legislation indicate that the Law on Physical Culture and Sport, instead of being the main source of sports regulation, in practice usually proves difficult to implement as it does not correspond to the current developments in sport. Attempts have recently been made to amend the Law on Physical Culture and Sport and the first drafts of the amendments have already been completed.

9. A new Law on Physical Culture and Sport

As amateur sport is already extensively and adequately regulated in the current Law on Physical Culture and Sport, the emphasis in the new draft must be on professional sport. The main task of the working group which is preparing the draft is to clearly determine the nature and status of professional sports relations. The initial drafts indicate a tendency to isolate these relations from the influence of labour law, thereby affirming the independent nature of the club-player relationship. If this approach is followed, a number of other related issues will have to be examined and regulated carefully: the state's social policy in respect of athletes, their integration into 'normal society' after ending their careers, the collective representation of professional athletes (e.g. by creating a possibility for trade unions to represent athletes as independent contractors), etc. Obviously, it would be impossible to regulate all these issues by means of a single law. Therefore, a complex revision of legislation will have to be performed for the purpose of defining the legal status of sports and this we can expect to be a lengthy process, especially taking into account the integration of Lithuania into the EU and all the related consequences which would also affect the regulation of sport. Lithuanian football must make sure it plays an active role in this process and help sport find a suitable place within the Lithuanian legal system.

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The Greek Transfer System for Athletes

by **Dimitrios Panagiotopoulos***

1. Introduction

Sports and physical education in general are of essential importance for the full development of the human personality[1]. The free participation in sports activities is recognized[2] as a fundamental right[3] for the education and development of citizens[4]. International treaties and agreements between states in international organizations protect this right[5]. The Greek Constitution, through physical education and sports, directly sets educational goals[6] and exercises control over the development of the students' personality and all persons participating in sports activities. Consequently, law texts that regulate the related sports institutions and organizations, particularly for the protection of those exercising and primarily for children and adolescents, are considered necessary and demand constant adjustment.

2. Basic principles on sports activities

The principle of personal freedom in sports activities

The exercise of the right of participation in sports activities is directly related to personal freedom and the free participation in sporting activities. The competitive spirit in humans is connected with their sense of personal freedom, which is protected by constitutional provisions and specific regulations of sports law[7]. There are limitations on personal freedom, only when specifically permitted by special laws to this effect, which meet the need for the protection of the ideals and general perceptions of sports and athletic morals[8]. The Constitution and the Law can allow these limitations to a permissible degree, and only if they are not too restrictive and there is no harm done to the personality of athletes. Also these limitations can be allowed when there are no violations of the rights of others, and the standards of common sports morals are maintained. Limitations that place restrictions on personal freedom are related to the freedom of opinion, freedom of congregation, economic freedom and the free development of the athletes' personality. Restraints on participation in sports, and the characterization of a legal entity or natural person in the sporting world as 'non-sportsmanlike'[9], is an example of the reduction of personal freedom in sports. In these cases, there is not only a limitation of freedom for the purposes of sports behaviour in general, but it also implies its annulment [10].

The principle of the free development of personality

'Personality' is the intrinsic right of a person over his/her own self, while being a member of an organized society and having the ability to act within a law-based context and at the same time to demand the legal defence of his/her other rights. A person's personality is intrinsically related to his/her character that provides the particular properties of the person's behaviour[11].

The development of personality is incorporated in a network of rights, as a 'context of rights', which is composed of the value of being human[12] and the accompanying characteristics which make

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1 See Charter of UNESCO, International Physical Education and Sport, 21.11.1978, Paris. Also see D. Panagiotopoulos, (1990) "Physical Education and Sports according to the UNESCO Charter" (in Greek), *STADION*, I: 1, pp.31-38

2 See Sports for All, European Declaration, Meeting of European Ministers of Sports, Brussels, 1975 and Rhodes 1992.

3 European Sport for All Charter (people with special needs), Recommendation no. 86, 18.11 Also see I.C. of PES, Art.1, par.1.

4 According to the IC of UNESCO 'One plan of development and operation of PE must be supported by: a) the material infrastructure, b) the research and validation, c) the national institutions, and d) the national co-operation', Also see A. Bredemas (2000), "UNESCO's IC of PES- Legal, Political Dimension and Perspective", in: *Proceedings of 2nd IASL Congress*, Oct.29-31, Olympia 1993.

5 As the European Declaration, op. cit., also see UNESCO IC of PES, Op. cit., art.1-2 and foreword p.159.

6 Greek Constitution, art.16, par.2.

7 Council of State 2944/1980.

8 D. Panagiotopoulos (1998), "Legal Aspects and Protection of Fair Play", in: *Proceedings of International Olympic Academy*, Olympia, 1997, pp.318-332.

9 Art. 130, L.2725/99, as amended by Law No 3057/2002.

10 According to the Law, the characterization of a person as a non-athlete is not a simple limitation of his/her personal freedom, but is its annihilation, since the sports related activities of a person are closely tied to his/her personal freedom. Council of State 1724/1965.

11 See G. Statheas (1996), *Interpretation of the new law on the press 2243/1994*, (in Greek), p.33.

12 G. Karakostas (1991), *Personality and the press*, A. Sakkoulas, p.36.

humans valuable: their physical, spiritual, psychological and social dimension [13].

Among other things one's personality is made up of characteristic elements of one's physical, psychological and emotional health. In the context of protecting the development of one's personality we include privacy[14], one's characteristic image, the immunity of one's home, one's honour[15] and freedom, which 'is intrinsically related to the sporting and competitive character of each individual in general'[16]. The right for uninhibited development of one's personal capabilities, respect for one's personality, physical integrity and the sporting environment for sports-related activities should be guaranteed by rules of law[17]. In Greece the development of one's personality through participation in sports is protected by the Constitution. The problem, which interests us here, is focused on: a) the participation in sports related activities and b) the protection of this right under the guarantee of the educational system and other aspects of social life[18]. Sporting activities implies rights and obligations for the athlete, the sources of which do not differ from those, which exist for general individual rights. Through participation in sporting activities we achieve full development of our personality[19], which is a right[20], and which is conducive to the cultural, social and financial life of a country[21]. Any attempt to make laws or regulations, which are intended to limit the right of free participation in athletic games and sports is directly contrary to the provisions of the relevant articles of the Constitution [22].

The principle of the free choice of a sports club

In the context of the principles of personal freedom and the development of the personality there exists the right of the free choice of the sports-related club or association, as well. The athlete has the right to choose the sports club or association, which he/she trusts for the appropriate cultivation of his/her physical traits through one or several sports[23]. The athlete also has the right of free participation in sporting activities, for the development of his/her personality, the manifestation of his/her physical abilities and the determination of his/her sporting education. The right to join a sports club or association freely and the right to transfer to another are absolute rights, but within the context of the general principle of law that meeting one right cannot override one's obligation to meet another right. By this we mean that the rights of the athletes should not override the rights of the sports club to which they belong.

The right of transfer fundamentally safeguards the basic freedoms of the athlete as a human being to the extent that this right is not abused. For sports clubs have also the right to develop its own characteristics through the sport that it supports. For this reason it organizes the appropriate facilities, it pays the fees of the coaches and trainers, it buys the appropriate equipment. With regard to sports clubs sometimes there is also an abuse of rights and many times there are athletes who are a club's "captives" or in general cannot exercise their own rights freely (especially the right of transfer). This is obvious in the case of professional sports. In every day social life there are needs and problems that influence sporting life and are an important reason for, or a strong force behind the necessity of an athlete's transfer. To avoid unnecessary conflicts and for the satisfaction of this right, there are limitations on the freedom of choice of a sport club or association. However, these limitations should not reach the point of nullification of the rights of joining freely a sports club and of transfer.

The principle of the distinction between an amateur and a professional athlete

The athlete, through his Athletic Registration Card is entitled to the exercise of his rights and is deemed responsible for the consequences of his activities in the sporting environment, to his sport club and to higher-level sports associations or federations[24]. According to Greek Law and jurisprudence, athletes are perceived as people who engage in sporting activities and through this achieve records of significance[25]. Sports law separates sports into two basic categories, i.e., team sports and individual sports[26]. A team sport is that in which the final distinction, winning, depends on participation and successful teamwork of athletes, who compete as a team[27].

Athletes can be divided into: a) amateurs, b) remunerated athletes, who have a contract with an otherwise amateur sports club which has a Remunerated Athletes Department (hereafter: RAD), and c) professional athletes who have a contract with a sports SA (professional) [28].

13 See Georgiades- Stathopoulos, Civil Code, art.57, no.1, and compare the definitions of the Court of Appeal of Athens 1819/1955, EEN 23.241, of Patras 89/1958, Legal Tribune 7.94, of Athens 3385/1958, Rec. N10.428, First Instance Court of Thebes 293, 294/1950, EEN 18.379, First Instance Court of Athens 10024/1950, Rec. L 2.212.

14 On privacy see related decisions: Hellenic Supreme Court Judgment 60/1969, Legal Tribune 17, 562, First Instance Court of Thessalonici 2964/1956, EEN 24, 416.

15 See Greek Constitution, Art.2, par.1. According to Karakostas p.36, above, 'the value which is bestowed upon each person by society, known as 'reputation' can not be compromised by any interest and is a nucleus of inviolable rights of one's personality, as it is determined by the Constitution'.

16 See Council of State 1724/1965.

17 These clauses can be found in the articles of the New European Sport Charter, which was signed during the 7th Conference of Ministers of Sports in Rhodes, 14-15 of May 1992.

18 See related decisions of the European Ministers of Sports on Sport for All, Council of Europe, Decision No. (76) 41, MSL-6 (88) B1-E, 24 September 1976, 1st Meeting of the European Ministers of Sports, Decision, No.2, MSL-6 (88) B1-E, 20-21 March 1975, 4th Meeting of European Ministers of Athletes, Malta 15-16 May 1984, Decision 2, MSL (88) B1-E, 25 September 1984, ibid, 5th Conference, Recommendation R (86) 18, Dublin, 30 September-20 October 1986, MSL-6 (88) B1-E, 4th December 1986, EU, Vote on sports in EU and Europe for citizens, Strasbourg, 17th of February 1989, EU 2/84, 17-2-1989, see also D. Panagiotopoulos, P. Naskou-Perraki, "Sports and Physical Education" (in Greek), Op. cit, pp.180-315. Also see "European Sports Charter", 7th Conference of European Ministers responsible for Sport, Council of Europe: Rhodes 13-15, May 1992, in: *ISLR/Pand.* I: 2, 1992, pp.333-336.

19 Greek Constitution, art.5, par.1, in combination with art.2, par.1 of the Constitution, on the basis of the recognition of the individual, as under the law, i.e., as a bearer of rights and obligations.

20 D. Panagiotopoulos (1994), 'The Right to Sports', (in Greek), Bulletin of Sports Law I, A. Sakkoulas, Athens, pp.72-73.

21 Constitution, art.5, par.1 in combination with art.16, par.9, 1, and 12. See also I. Drosos (1991), 'Sports in the Constitution' (in Greek), in the Proceedings of the One-Day Conference of HCRSL, 'the New Law on Sports under the name Sports Law Code', HCRSL, 1993. See El. Venizelos (1993), 'The Constitutional Acceptance of Sports' (in Greek), in the Proceedings of the International Conference on the Institution of Olympic Games- Multidisciplinary Approach, Olympia 3-7 September 1991, and *ISRL/Pandektis*, I:2, 1992, pp.212-214, also (1993), "Sports and state of law- the limits of law deregulation and the return to the Constitution" (in Greek) in *Proceedings of the 1st International Congress on Sports Law*, Athens, 11-13 December 1992, HCRSL, Athens, pp.125-30, see also D. Panagiotopoulos (1993), "Le Droit en Sport- la protection Selon la Constitution", Op. cit, pp.109-116, Ibid (2003), *Sport Law*, Op. cit, pp. 160-214.

22 See Art.16, par.9, 4, and 1, and art.5, par.1, see also Council of State 3699/1998, in which the Ministerial Decision No.C4/232/5.3.1998 is deemed as unconstitutional, which is related to the right of participation of a high-school student in the Panhellenic Gymnastics Competition and his selection as a member of the representative team, see also Council of State 4914/1988, 235/1990, 2636/1990, 936/1991, see also D. Panagiotopoulos (1993), "Issues in Scientific Determination and Application of Sports Law", in *Proceedings of the 1st IASL Congress,* HCRSL-Telethrion: Athens, pp.81-2.

23 See Council of State 1812/1990, *I.S.L.R/Pandektis* (1993), I: 3, p. 446 and Council of State 3586/1995, see St. Giakoumelos (2000), *Sports Law,* Athens, pp.89-94.

24 See Council of State 3190/1986 which cancels the canceling decision of ASEAD on the decision of the Board of Management of EPO regarding a petition from a Club which requests an ID sports card for an amateur soccer player, on the justification that between the Club and the higher Federation there is a private law relationship and thus the judge for arbitration should be the civil court.

25 See Council of State No. 3046/1989 (Section C) and Law 1351/83 and 2009/92, see also D. Panagiotopoulos, Sports Code, (in Greek) 1993, p.386. See also V. Avgerinos, A. Kriemades (1999), "Amateurs and professional athletes"' (in Greek) in: *Proceedings of the 1st Congress on Sports Law*, Ion, Athens, pp.116-123.

26 Team Sports are soccer, basketball, tennis, water polo, bridge, cricket, ice hockey, hockey on grass, baseball, and softball. The rest is considered individual sports, see art.6, par.1, of Decision 15460/24.6.1999 of the Ministry of Culture (Government Gazette 1339/B/30.6.1999).

27 See Council of State 2636/1990 (section C) and 3251/1990 (section C). These decisions cancel the decisions of the Committee for evaluation of Candidates TEFAA, who as athletes could not participate in team sports as a group. See also in this context, Article 34, par.14c, Law 2725/1999, as amended by Law No 3057/2002. The sports using motorized vehicles and their branches are sports-related activities which belong to sports law; see Article 134, par.8 in the Sports Law Code, Addendum, and p.201.

The sporting identity of all above categories of athletes is maintained only as long as they undertake their activities in accordance with the sporting spirit[29]. The relations that exist between athletes and sports clubs or associations[30] are regulated by particular provisions in the charters or special regulations of the sports club or association they belong to. According to law, the competitive activities of athletes who are paid by an RAD or those who work professionally for a Sports SA, are an exercise of their professional sporting activities[31]. The financial or other benefits that are provided by sports clubs, associations or federations to amateur athletes, in support of their sporting activity, are not fees, but only means to meet the challenges put forward by the requirements of training and physical exercise[32].

3. The transfer system for amateur athletes

The terms, prerequisites and all the details of registration, transfers, contract engagements and disengagements of athletes in amateur associations and clubs are controlled by special regulations that are issued by the federation of each sport. The legality of these regulations is determined by the Ministry of Sports[33].

The transfers of athletes are divided into: a) Those which fulfill the terms of free transfers in team and individual sports and for which there is a reason for dis-engagement from the club or association to which they belong, i.e., after their registration with it, b) Those transfers for which there has to be consent by the sports club, and c) Those for which an important reason exists. A general rule for the transfer of athletes of amateur clubs and associations is that they are not allowed without the consent of the sports club the athlete belongs to. This means that the right of transfer of the athlete from one sports club to another both in team sports as well as individual sports is determined by the consent of the sports club in the case of a transfer. This consent is issued after the Board of Directors of the sports club has made the relevant decision. The consent clause therefore is met only when there is consent from the sports club to which the athlete already belongs. If there are extraordinary reasons, according to the law, then the athlete is disengaged from the sports club and he/she is registered with another sports club according to his/her wish[34].

The transfer of the athlete is executed by an agreement between the athlete and the sports club. Conditions and prerequisites for transfers should include the following:

a) As to the prerequisites for transfers due to the consent of the club[35]: dis-engagement, lack of competitiveness, change of residence of the athlete with his family[36] or for educational and professional reasons of the athlete or his parents[37];
b) As to the prerequisites for transfers due to the free transfer of the athlete below or above a certain age: regulations which are opposed to the right of the athlete to obtain a free transfer are in violation of the constitutional principles on the free development of personality[38], the protection of family and of childhood[39] and the protection of sports[40]; and
c) As to the prerequisites for transfers due to the dissolution of the sports club or the suspension of the operation of one of its departments or the loss of its special recognition[41]: in the case of the dissolution of a sports club, this is an adequate reason for a free transfer to another sports club[42]; the same holds for the case of suspension of the activities of a sports club: in this case the athlete also has freedom to transfer to another sports club[43].

In addition, issues related to the transfer of the athlete according to law have to do with the participation in sports which are protected by public institutions[44] and serve the public interest[45]. Restrictions on the transfer of athletes, which are provided by law, are in many instances unnecessary, and these restrictions are a serious problem for the participation of athletes in the sports world and result in hindering the free development of the personality of the athlete.

There are also grounds for transfer in the case of activities of a sports club resulting in the creation of a situation that makes it impossible (emotionally and psychologically) for an athlete to remain with the club and participate in sports and further develop his/her physical abilities[46]. Those who exercise parental custody over an adolescent or a child athlete must consent to transfer. Transfers are allowed only during one period of transfer each year, with the exception of the transfers of Greek athletes from abroad for which there can be a different period of transfer[47]. An athlete from an amateur sports club who registers with a sports club abroad, without the prior consent of his/her home club, upon his/her return to Greece will be automati-

28 See Law 2725/1999 (as amended by Law No 3057/2002), Article 33, par.1 and 2 with the reservation of article 85 of the same Law, par.1 and 2. See D. Panagiotopoulos, I. Anagnostopoulos, Ip. Alexiou (1998), "Athletic Contracts in Greece" (in Greek), in: *Proceedings of the 5th IASL Congress*, Nafplio, 10-12 July 1997, Ion, Athens, pp.123-142.

29 See Articles 130, 132, Law 2725/99 (as amended by Law No 3057/2002).

30 Ibid, Article 33, par.2.

31 The provisions of article 33 of Law 2725/1999 (as amended by Law No 3057/2002) are applied to athletes who do not compete as members of the Departments of Remunerated Athletes of a Club, or a sports Company.

32 As to fees: the provisions of article 85 and 86 of the sports law are applicable only in relation to the activities of those athletes who are under the jurisdiction of sports clubs, associations or federations, and not to other athletes. According to law the regular expenses for the training of athletes, such as travel expenses, are the object of a claim because of loss of profit, whereas premiums cannot take the form of a salary, since this is forbidden. See Supr. Court, 921/1998.

33 Article 27, Law 2725/1999 in combination with article 33, par.3. In the law which existed before, the related terms and conditions were defined by the minister by the issue of a Ministerial Decision, after the recommendations of Federations. In every sport of course, there are certain deviations in relation to issues of transfer, in particular as far as the age of athletes, time periods etc. are concerned, but there are no important differences. For all the sports to which the above regulations apply, the provisions of the decision 15460/24-6-1999 of the Ministry of Culture (Government Gazette 1339/B/30-6-1999) are still valid, with the exception of soccer and basketball.

34 See the decisions of the Council of State 2336/1990 and 3251/1990 (team sports), and article 6, par.1 and 7 of the Ministerial Decision 21451 (Government Gazette 475/1-7-1991 on the provisions for transfers.

35 According to law, the consent of the club for the transfer of the athlete, can be given only after a decision of the Board of Management, and an a priori form of consent is inconceivable, according to the will of the athlete. Such a possibility would cause a great amount of insecurity in the relations between athletes and clubs, and it would seriously harm the amateur sports which are protected by the Constitution. Council of State 1379/1997.

36 Council of State 4914/1988, *I.S.L.R Pandektis*, I: 1, 1992, p.96.

37 Limitations of this kind as well as limitations, which exist and are related to student athletes who, because of serious reasons cannot continue their sports activities in the club of origin, are considered unconstitutional. See Council of State 2998/1994, 361/1991 and 4914/1988, *ISLR/Pandektis*, I, 1, p.96, Council of State 2491/1986, Armenopoulos 1987, p. 969 and 1738/1986 and ASED 200/1988.

38 Constitution Article 5, par.1.

39 Const. Art. 21, par.1.

40 Ibid. Art. 16, par.9.

41 See Const. 27, par.3 of Law 2725/1999 (as amended by Law No 3057/2002).

42 Ibid, article 8 and 9.

43 See related Hellenic Supreme Court Judgment 155/1991, according to which the penalty for a club of loss of the right to vote in a General Meeting of a Federation means the postponement of its operation.

44 The provisions which place limitations on the right to develop freely one's personality in transfers from one club to another, see Council of State, 4914/1988, in: *ISLR/Pandekt*is, Vol. I: 1, pp.96-98 and Council of State 963/1991, according to which the change of one's place of residence due to studies, is a reason of paramount importance for a transfer and any provision which is against this freedom is superfluous and against the Constitution, see also the Council of State 1812/1990, So ASEAD, 157/1991, and 20 and 38/1986. The change of residence due to studies in a secondary school is not related to the free transfer provisions, as well as claims in relation to work by the athlete before his/her application for a transfer, since this indicates that the change of residence occurred with the only purpose of transfer. See ASEAD 80/2000.

45 See Council of State 2491/1986, and 1505/82, 1532, 1533/82, 2121/84, 4914/88, 963/91, 2998 and 3876/94 below. Also see D. Panagiotopoulos (1993), "Issues on Scientific Determination and Application of Sports Law", Op. cit., pp.80-81.

46 See Council of State 2998/1994, 3876/1994, with which the unjustified exclusion of an athlete from competing in swimming competition through a decision of the Club was deemed as a valid reason for a transfer, due to the serious harm to the free development of the personality of the athlete and the psychological distress caused by his club. In the case of an insult to the personality of the underaged athlete, the limitation, i.e., the demand for consent by the club of the athlete, is opposed to articles 5, par.1 and 16, par.9, as well as provision 21 par.1 of the Constitution, which protects childhood and in consequence this limitation is powerless (a similar limitation existed in the provisions of 2027/1989 Ministerial Decision).

47 See Article 27, par.3 of Law 2725/1999 (as amended by Law No 3057/2002). The duration of the transfer period according to these provisions should not exceed the period of thirty (30) days.

cally registered with the home sports club to which he/she belonged initially[48]. The transfer of an athlete with financial benefits from one sports club to another is allowed with the consent of the sports club, if for the release of the Athletic Registration Card the sports club issues a receipt from its financial records, with the appropriate VAT and this transaction is recorded in the incomes and expenses books of both clubs[49].

There can be a free transfer of an athlete from one sports club to another, without the prior consent of the sports club and the consequent disengagement, only due to reasons of a special nature, which are recorded in the contract or agreement or the constitution of the club[50]. If the athlete is going to study abroad or in another part of his/her country[51], this is a sufficient reason for his/her free transfer to a sports club of his/her own choice.

For team sports the free transfer of an athlete[52], without the consent of the sports club, can be carried out only in particular cases stipulated by law. All sports clubs for team sports have the right to transfer up to three athletes only. Any other petition for more transfers is denied and the athlete remains with the club to which he belongs, without any further procedure[53].

Prerequisites for transfer of an athlete to amateur sports clubs in which there is no need for the consent of the sports club also included the following cases, according to which:

a) The athlete has not participated in a national team during the two previous sports seasons (commencing on the date indicated in the relevant ministerial decision). In the case of individual sports he/she should not have won a place amongst the first three athletes in Pan Hellenic (national) games or national championships; or an athlete is changing his/her place of residence for an important reason[54].
b) He/she has not been punished in accordance with the provisions of sports law for a refusal to provide his/her sports services[55]. The application of this stipulation on behalf of the clubs and federations, in case of top class athletes, is related to the major interests of the sports clubs. In these cases sports clubs, in order not to be obliged to disengage the athlete, sometimes find a good solution in punishing the athlete for a certain period, so that his/her right of free transfer is revoked[56].

An appropriate board, which is formed by the sport federation approves or disapproves[57] the application for the transfer of the athlete. The federation confirms the decision of the board, which can be challenged in the Supreme Sports Dispute Tribunal (ASEAD), the decision of which can be annulled by the Council of State [58].

For athletes who achieve exceptional records in individual and team sports there are financial benefits and allowances[59]. Allowances for athletes who are students and who are members of national teams include (in addition to the usual provisions for transfers according to law) transfers into the corresponding institutions of tertiary education[60]. The usual problems with which the athletes have to deal in relation to transfers are related to the constitutional provisions about equal treatment, the free development of personality, improper interpretation of terms[61] and the unconstitutional character[62] of many of the texts of sports clubs' regulations.

4. The transfer system for remunerated and professional athletes

The first systematic interference in the area of professional sports in Greece, and exclusively in professional association football occurred with the introduction of Law 879/1979. Law 1958/1991 was an attempt to intervene "top-down" for the formulation of specific terms and conditions for the organization and development of professionalism in the sporting world[63]. The category of athletes who are remunerated for their sports services includes the 'Remunerated Athlete' (basketball, tennis)[64]. He/she signs a contract with a sports club, which has a Remunerated Athletes Department (RAD) and a 'professional athlete'[65] signs a contract to provide remunerated services with a sports SA (Sports SA)[66]. Adolescents and child athletes below 18 years of age are not allowed to sign a contract of remunerated services[67].

In the context of the contract there is a group of terms and conditions, which in essence make up the contract and can have the general form of a contract of work. The remunerated professional athlete is obliged according to the terms of the contract which he/she signed to provide his/her sports services. The athlete who refuses to provide his/her services to the national team without a justification is punished with the penalty of exclusion from championships or other official games[68]. A rule for all changes of residence of remunerated athletes before the termination of their contract is the necessity of the

48 See Law 2725/1999, article 33, par.10. According to the law of ASEAD 98/1997, a Greek amateur athlete who signed a contract at the age of 18 years in a professional team abroad, did not get the characterization of 'a professional athlete' according to the Greek Law and the FIBA regulations, and after his return to Greece any transfers were deemed illegal. To the contrary,, it was ruled that for an athlete of 19 years of age upon his return to Greece there were no legal ties to his former club in Greece; signing a contract as a remunerated athlete of the A1 league is legal and binding.

49 The regulations of the Federations as related to the provisions for registrations and transfers of athletes can not be modified, if there is not a period of two years from the time of approval by law. See Article 27, par.3 of Law 2725/1999(as amended by Law No 3057/2002).

50 Registrations and transfers are under the regulatory regime of article 27, Law 2725/1999 (as amended by Law No 3057/2002), and former Article 20, Law 75/75, Council of State 2488/86, ASEAD transfer of an athlete, 24, 28/1989, 58, 155/91, 8/92, 20, 38/92, 20/93, control of Doping 176/91 in*, ISLR /Pandektis*, Vol. I. According to the Council of State 2049/1981 the 95/1990, 14, 84, 92, 110/1991, 20, 38/1992. See K. Remelis (1993), 'The limitations of the contractual freedom of professional athletes' (in Greek), in Proceedings 1st IASL Congress, pp.554-555.

51 Ministerial Decision C/17290/1996, art. 6 and 8.

52 See General Secretariat of New Generation and Sports, Decision no. 21451 (Government Gazette, 475/1-7-1991 TB).

53 Ibid, article par.2.

54 See Ministerial Decision 15460/30-6-1999.

55 See Law 2725/1999, article 33, par.5 (as amended by Law No 3057/2002), and the law which was previously in force Law 75/75, Article 49

56 See ASEAD 80/2000 by which a petition from a judo athlete, who was a member of the national team, was rejected with the justification that he refused to participate in the Panhellenic (All Greek) games representing his club; he was punished with six months of exclusion from competition. As a result he was not considered eligible for transfer during the time in which he could not compete (two years).

57 There is a Special Committee for Transfers the decisions of which are ratified by the Board of Directors of a Federation, and whose decision is controlled by the Council of Arbitration of Athletic Disputes and especially for association football by the Judicial Committee of Appeals of the Federation, in a 15-day period for foreign clubs and in a period of 8 days for home clubs from the time that the interested party was notified in any possible way.

58 See Law 2725/1999 (as amended by Law No 3057/2002), article 121, 123 till 127.

59 See Law 2725/1999(as amended by Law No 3057/2002), article 34, par.4-21. Also see Decision of the Ministers of Finance and Education No. 252.25/B6/200 dated 4/6.4.2000. These law provisions describe the way athletes with special distinctions can be registered as students in tertiary education, and the freedom of transfer of student athletes in tertiary institutions, as well as the selection process for these athletes by tertiary institutions.

60 See article 34, par.15 of Law 2725/1999 (as amended by Law No 3057/2002).

61 See Council of State 4322/1998, according to which the management overruled the petition of an athlete 'because it mistakenly considered as applicable the program of the Olympic games which was in force at the time of the petition, in which there were no provisions for Tae-Kwon-Do', whereas it should take into account the program which was in force at the time that the distinction came about and the above game was included as a show sport.

62 See D. Panagiotopoulos, E. Vouzika (1994), "Regulations on the motives of the selected athletes in TEFAA" (in Greek), in: *Sports Science, Theory and Practice*, Vol.9: 2, pp.51-61. Also see Council of State 2586/1955, only one participation of an athlete in a team sport for 21 matches is considered as non-conclusive for winning the entrance in TEFAA. Council of State 2376/1993 and 2636/1990, as well as Council of State 2871/1994 are related. The law-abiding interest, Council of State 5757/1995, is extended till the time limit of the registration of the person who has a right of entrance in the tertiary institution.

63 This intervention was necessary, since, according to international practice, professional sports and especially association football were already a reality. Examples of such reality are: in Italy, Law 91/1981, in France Law 610/1984, but also in other European countries.

64 See Law 2725/99 (as amended by Law No 3057/2002), article 85, par.1, 3.

65 Ibid, article 85, par. 2, 3.

66 Ibid, article 85, 90, par.1 and 94. For basketball players who are remunerated and professional athletes, see also article 113, par. 4 and 5. Also see D. Panagiotopoulos, (2000), *Labour relations in Sports* (in Greek), Athens, in which there is an extensive discussion of labour issues.

67 See Law 2725/99(as amended by Law No 3057/2002), article 90, par.1. The provisions of the labour legislation and of Law 2725/99, article 85, par.4 and 5.

consent of the club or company with which the contract was signed. The details for registrations, transfers and movements in general of athletes between a RAD and a Sports SA are governed by special regulations, which the appropriate federations, clubs, or associations issue from time to time. The legality of these regulations is controlled by the Ministry of Sports and they are published in the Government Gazette [69].

There is a considerable limitation of the athlete's rights, especially as regards his/her free transfer among clubs or companies (RAD or Sports SA), as distinct from any other worker, who is free to work for any employer by signing a contract of work at any time[70]. There is also the legal option for the club to unilaterally renew the athlete's contract for a total of five years[71], as long as the financial conditions of the renewal are agreed upon beforehand (at the time of signing the contract) and are included in the contract. In this way, even after the termination of his initial contract the athlete is obliged to provide his services to the club, as long as the club unilaterally renews the contract; only in the case of non-renewal is the athlete free to negotiate his/her registration with a club or association of his/her choice. The signing of a private agreement or preliminary agreement between the interested parties for the transfer of an athlete between a RAD and a Sports SA before the transfer period is forbidden[72].

An athlete registered with a contract to provide services with a sports SA or a club which maintains a RAD who then transfers to a team abroad, before having become 18 or before the termination of the period of engagement specified in the contract if he/she is over 18, cannot be transferred to another club, RAD or Sports SA in Greece without having obtained the consent of the RAD or Sports SA, but he/she is incorporated in the club he/she formerly belonged. He/she is also obliged, even if he is 21 or more, to fulfill his/her obligations which existed at the time of the transfer to a team abroad[73].

For Greek clubs or companies, any agreement of the athlete with a Sports SA or RAD for the provision of benefits by the athlete upon the termination of the contract, or the prior agreement on offers and counteroffers upon the termination of the contract is deemed invalid[74].

In the case of the remunerated or professional athlete whose team is relegated to the amateur category, the contract may be terminated without any losses on either side of the contract (the athlete and the RAD or Sports SA). When the contract of the athlete with the Sports SA or the RAD, which has been relegated to amateur status has not been terminated, the club is allowed to retain the athlete either till the termination of the contract, if this ends within one year from the relegation. After one year the athlete is free to negotiate his/her registration without the prior consent of his club with any amateur club as well as RAD or Sports SA of his/her choice, in order to continue his/her sporting activities[75].

Until its harmonization with European rules and the Bosman Case and the consequent proposal and vote upon a new sports law, the Greek system of transfers denied the right of free transfer to athletes and in essence annulled their basic right to work and freely choose an employer. In this way there were limitations which were not warranted by the Constitution and which placed restraints on the freedom of contracts.

The laws and regulations of national and international federations are under review and should be improved taking into consideration the basic freedoms and the provisions of the law on competition. It is of paramount importance to relieve the tension in the relation between the autonomy of the clubs and the federations and the provisions of European Law[76]. The principle of proportionality is one of the fundamental principles of Community law[77]. For professional athletes problems exist in the system of transfers at the national and European level, as well as for athletes who come from non-EU countries and cannot participate in matches due to their nationality[78]. Today, more than ever, it is known that according to International Law all states have the exclusive right of control of the entry of foreigners into their territory. They exercise this exclusive right with extreme caution, especially with regard to non-EU foreigners, who enter the country and intend to enter the labour market [79].

The national professional athletes of a third country (outside the EU), which has signed a treaty with the EU concerning non-discrimination as regards nationality, and who are under contract in one of the Member States of the European Union cannot be excluded from a team sport, based on nationality[80].

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68 See ASEAD 65/1993, according to which there is a penalty of exclusion of a basketball player from a club for denial of sports related services, in: *ISLR Pandektis*, Vol. I: 4, pp.594-598.

69 Article 88, Law 2725/1999 (as amended by Law No 3057/2002).

70 Article 90, par.5, of Law 2725/1999 (as amended by Law No 3057/2002).

71 Article 90, par.5 of Law 2725/1999 (as amended by Law No 3057/2002). The legality of the right of a RAD or Sports SA to the unilateral renewal of contracts without the consent of the athlete is under serious dispute in science. In favor of the non-legality of the unilateral renewal, see D. Panagiotopoulos (1998), "Field of application and effects of the European Community Law on sports activities" in: *5th IASL Congress Proceedings*, Nafplio, July 10-12, 1997, Hellin, p.67, P. Dedes (1999), "Unilateral sports contracts" (in Greek) in *Sports Law in the 21st century, Sports activity according to profession* (D. Panagiotopoulos, ed.), Ion, pp.367-384. According to this view, the unilateral renewal of contract is opposed to the Civil Code (art.185, 195), the Constitution (art. 5, 22), the European Convention on Human Rights (art.4, par.2) which was ratified by the ND 53/1974, the UN Convention on economic, social and cultural rights (art.6, par.1), which was ratified by the Law 1532/1985, the UN Convention on civil and political rights (art.8, par.3), which was ratified by the Law 2462/1997, the provisions of the European Union Treaty on the free movement of workers (art. 48) which was raified by the Law 945/1979, and the decisions of the European Court (cases of Walrave 36/74, Dona 13/76, Bosman C-413/93). In opposition to this is the current law perspective in Greece. According to the Council of State 296/1994, this regulation on the unilateral renewal of contracts is not violating the financial and contractual freedom of the article 5, par.1 of the Constitution, because it seeks the facilitation of the needs of the basketball players and it avoids their exploitation by the financially powerful clubs, but it also does not violate the principle of equality (art.4, par.1 of the Const.). The majority of the Council of State 1898/1995 notes the same. But it is worthwhile to note the view of the minority, according to which the law on remunerated athletes does not have the direct purpose of the promotion of sports, but mainly regulates the financial interests of both parties, and does not have in view the public interest, which is an important reason for the limitation of financial freedom, taking into consideration the principle of judicial equality. In the unilateral renewals of the contracts the athletes cannot negotiate the financial terms of the renewal.

72 Article 91, 92 of Law 2725/1999 (as amended by Law No 3057/2002).

73 Ibid, Art.90. par.7. Hereto subparagraph (a) of the same par.7 is related. In this case it is noted that: 'a) Football players for the whole duration of their training can neither be registered nor transferred as professional, remunerated or amateur soccer players to any club of the country or abroad, without the consent of the club to which they belong. It is forbidden for the Federation to approve such registrations or transfers and it is also forbidden to issue the required international certificate (blue card)'.

74 Article 90, par. 4, of Law 2725/1999 (as amended by Law No 3057/2002).

75 See Conclusions of the 1st Congress of Sports Law on the topic of 'The Sports Law in the 21st century-Sports Action according to Profession', Trikala 4-6 June 1999, in: *Legal Tribune*, Vol.48, and p.1085.

76 See the decision of 15-12-1995 in the Bosman Case (C-415-93), of the 11-4-2000 in the Deliege Case (C-51/96 and C-191-97), as well as the decisions of the Walrave case (36/74) and Dona (13/76).

77 Ibid, p.1087. Recently, the European Union and FIFA decided that for an athlete under 18 years of age no transfer should be allowed with the justification that he/she should not be exploited by the team of origin and the team with which he/she is going to sign a contract. From 18 till 24 years of age, the team to which he/she belongs has the right to a sum of money as a compensatory profit, and the athlete over 24 is free to find another club and to have a new contract. See Vimasport, 1-9-2000.

78 See European Commission, (Directorate-General), Consultation Document of DGX- 'Bosman case-Transfer system at the end of the contract'. In this text there are answers to the possible cases of transfer within the EU, in Member States of the European Union and regarding transfers of professional athletes from third countries.

79 See Court of Arbitration for Sport (CAS), decision no.92/80, which is related to the dual citizenship of the athlete. For the sports country of origin issue see A. Grammatiki-Alexiou (1999), "The importance of sports country of origin" (in Greek) in: *Armenopoulos*, Vol.10, pp.1397-1398. The FIFA regulations governing the national status of players, according to the writer of the above article, pose barriers for an equilibrium in the relations of the teams, while reference is made to the issue of the nationality of basketball players and the choice for athletes to become a citizen or not. In addition, the issue of athletes who do not have the required nationality status is discussed. Ibid, p.1398.

5. Protection of the athlete's personality

An essential prerequisite for the personal and natural development of athletes as human beings is the fundamental right of self-determination[81]. The ability of the person to exercise his personal rights autonomously, i.e., without any legal representative[82], does not have the same validity when the person is not an adult. The athlete who has become 10 has a limited ability to enter into legal transactions[83]; he/she is capable of entering into a legal transaction only if he/she has a legal benefit from the transaction. This ability is extended to all transactions of the minor. A minor who has not become 15 can be employed in artistic and related work under the condition that this work does not harm his/her physical or psychological health[84] and the free development of his/her personality[85].

The Constitution and sports law provide the legal context of protection of the athlete's personality. We can mention the honour and prestige of the athlete[86], which have to be protected from slanderous or insulting statements which are made within or outside the sports environment, as well as health, the protection of which is secured through a prior medical examination. Also in the case of injury and disease of the athlete he/she is protected with restraining measures against audio-visual recording of his/her distress. The athlete also finds protection in the unhindered choice of an educational establishment with a parallel continuation of his/her sports activities and participation in championships[87]. Additionally, there are protective measures for the freedom of choice of place of residence and the change of place of residence for professional reasons without hindering his/her sports activities; for financial freedom, expressed among other things in the form of contracts for advertisements or sponsorships[88]; for working freedom[89] , which is expressed in the ability to sign contracts with freely negotiated terms[90]; and the freedom of transfer. There is also protection of the athlete's right to seek to protect his/her interests before the Courts and Official Arbitration Panels[91]. Finally, the athlete is protected from actions against his/her rights[92] by third parties and in general he/she is protected in the free development of his/her personality within the context of law through sports activities[93].

While law tends to promote the interests of the athlete and especially the minor athlete, it limits dangerously the absolute right of the free development of personality, placing the control of his/her choices in the hands of his/her representatives and, in essence, his/her guardians. The signing of a contract with a sports club is an unequal legal transaction, which means the acceptance of obligations of sports responsibility, evidence of which is the Athletic Identification Card. Constant and systematic participation in sport through the sports club is permeated with a mixture of legal transactions with the athlete at the receiving end. Thus, the freedom of expression of the athlete's will is of paramount importance for the athlete not to be turned into a hostage by managerial decisions and not to become a victim of sports interests. Age limits of remunerated and professional athletes for their registration in the records of a club or federation are laid down in the above legal context[94].

The increased competitiveness of sports clubs is placing the freedoms of the athlete and his development according to his abilities under attack. The term self-determination of minor athletes is taken as meaning the ability of consent rather than his/her full autonomy; it should related to decisions to be taken and the essential effect the process of sport training and development might have on him/her. The obligatory acceptance of sports services under the weight of achievement of records and for unlimited physical improvement makes the continuous provision of sports services the only right of athletes. From this perspective, the athlete and indeed the minor is forced to identify his sporting rights with the interests of the club, to increase the hours of dedication to his/her sport not according to his/her will, but in accordance with decisions of the management.

The development of personality also includes the protection of the physical integrity of the young athlete. This means that the athlete takes upon him/herself the risk of his/her participation in the game, keeping within the prerequisites of the rules and regulations of participating in the game. For any other loss or injury, there is the right to compensation and restoration of his/her physical integrity, with a parallel right to claim compensation before the courts for the loss he/she has incurred[95].

The minor athlete, according to the law, is called upon to provide the same sports services as an athlete who is over 18 years of age. In this case there is an issue in relation to how much legal protection is necessary for the athlete and indeed the minor, as regards the choices and the decisions of the management bodies of sports clubs. In addition, important related issues are a) the guarantee of the protection of the right of development of the athlete in general in the sporting and competitive process, b) free access to sporting activity, with respect to personality, c) determination of the criteria for the entrance to extremely competitive championships[96].

The legislator remains silent on athletes and especially the minor athlete, and in general denies him/her the privileges granted by labour law, characterizing his/her services as sporting services, and setting them apart from labour law. We have to note however, that the athlete on many occasions is systematically engaged in sports; he/she has increased obligations and offers services similar to any other worker in the services sector.

Coaches are often of doubtful education. They feel that they are employees of the club and are guided solely by club interests, through which they see the improvement of their own situation. Parents as legal representatives, many times act based on their own social expectations, prejudices and immeasurable ambition. There are many occasions when parents discourage the constitutionally enshrined right of their offspring to engage in sporting activity, and become an obstacle to his/her sporting development and individual achievement, justifying dedication to sports only to the point of non-interference in his/her other obligations (such as school). This phenomenon is a result of ignorance of sporting issues and the prejudiced correlation of sports to various negative aspects of it (i.e., violence, doping, etc.).

The only source for the rights of the child or adolescent athlete is the Constitution, to the extent that it secures access of the citizen to sporting institutions. Legal support also comes from general provisions

80 Similar agreements with the EU were signed by Morocco, Tunisia, Algeria, Turkey, Poland, Hungary, Slovakia, Czech Republic, Bulgaria and Romania. In reality this means that if a Turkish basketball player signs a contract with a Greek team he cannot be excluded from taking part in matches due to nationality.

81 All individual rights start with the birth, while the ability of autonomous exercise of individual rights can be gained with the completion of the 18th year of age, and provisions for this exist in the General Principles of the Civil Code. Particularly on the rights of the children in sports, and in relation to the competition, training and psychology of underaged athletes, the work, the freedom in the clubs and other similar issues. See David P. (1999), "'Children's Rights and sport'" in: *Olympic Review*, XXVI, pp.36-45.

82 Council of State, 921/1995, according to which 'the parents of the child, to whom the parental custody belongs, and in which the legal representation of the child in relation to his/her financial and personal matters is included, are his/her legal representatives.'

83 See Gr. Civil Code, Article 129.

84 See Civil Code, article 134. If there is no special legal adjustment, this general regulation of the Civil Code is extended to all activities and legal affairs of the underaged.

85 See related Guidance of the Council of Europe, EU, C 84/1992, as amended in EU, C 77/1993 and re-examined in COM (94) 88.

86 Article 5, par.2 of the Constitution.

87 Ibid, article 16, par.2.

88 Id, Article 5 and 33, par. 4 of Law 2725/1999 (as amended by Law No 3057/2002).

89 Id, article 22.

90 Article 86, Law 2725/1999 (as amended by Law No 3057/2002).

91 Articles 8 and 20 of the Constitution.

92 Ibid, Article 25, par.3.

93 Id, article 5 and 16.

94 According to the pre-existing law, a person who was to be registered as a semi-professional or professional football player, had to be over 16, see article 6 and 7 of the Ministerial Decision 41167/1991 (Government Gazette, 989/29-11-1991, Vol. II). For basketball players see Ministerial Decision 37495/1991 (Government Gazette 965/22-11-1991, Vol.II) and 31189/1992 (Govt Gazette 500/4-8-1992, Vol. II), while for tennis players see Ministerial Decision 41117/1991 (Govt Gazette 1035/19-12-1991, Vol. II).

95 Whichever damage is judged according to the particularities and the specific rules of the sport in question, see L. van De Velde (1993), "Right to Physical Integrity of the Professional Sportsman" in: *ISLR/Pandektis*, I: 2, pp.259-265.

96 By article 7, par.1, of Law 2433/1996 the sports of the handicapped are recognized as a particular section of sport and are protected by the State according to the Law 2725/99 (as amended by Law No 3057/2002).

and mainly consists of: a) the provision of equal opportunities for acquiring basic sporting abilities; b) the abolition of all forms of discrimination which are related to the participation in sports activities[97]; c) the guarantee for a safe, healthy sporting environment; d) the protection of athletes from any political, commercial and economic exploitation or any other interest, and from practices which have as a target the maltreatment and debasement of the young minor athlete; e) the creation of ethical principles of conduct and the protection of decency and safety. The young talented athlete can be a much easier object for financial exploitation, since usually others determine his/her will and his/her progress in the sports club, for which he/she provides services. The athletes have no control over the decision to conclude agreements and especially those made with sponsors [98], over the terms of contracts, the meetings of coaches, club boards and specialists, while on many occasions they first become objects of exploitation by their parents and their coaches[99]; f) a very serious issue that involves legal support is the protection of athletes and especially young athletes from the consumption and use of doping substances[100] .

As a result, there is the issue of the protection of the athlete and particularly of the young athlete and the control of the length of training or the control of his/her intense dedication to sports[101]. Informing the minor athlete on issues of finance, disciplinary issues and those relating to transfers, is of paramount importance so that he/she is not turned into a passive receiver and observer of the sporting transactions of the club to which he/she belongs.

The active participation of the athlete in the management transactions of the sports club is non-existent, not even indirectly, since the athlete is the receiver of the choices of the club's management. The obligations of the athlete to his/her club, his/her participation in matches, the determination of the particular place- and time-related conditions of training, do relate the nature of the services provided to labour law, with the result of the need for an appropriate legal protection, especially when the athlete enters without his/her will into an area of intense competitiveness.

Particular provision for minors exists in the UN Convention on the protection of children's rights[102]. In this Convention opportunities for the child are offered so that the child is able to overcome the difficulties of his/her sport in a healthy manner and under conditions of freedom and decency[103]. In the Geneva Convention[104], which was ratified by law in Greece[105], the age limits for professional work have been determined for the protection of health, life, safety and spiritual development of minors in their professional work[106] .

In terms of elite sport, the free development of the personality of the minor athlete is dangerously limited and the minor is just a simple carrier of sporting distinctions for the club, a piece of an impersonal sporting machine. It is necessary to provide all possible opportunities for the development of his/her own self according to his/her own will.

For the development of the personality of athletes, as a basic philosophy in the organization of sports, the right to full information on sporting processes is necessary. When this relates to young athletes and children of 5-12 years of age we have to be particularly careful. Training methods need to be placed under scientific control, due to the developmental situation of the athletes and their constitution as human beings according to experts in the medical, biological and social sciences[107]. The consumption of substances without the prior knowledge and agreement of the athlete, the increase of the length of training and the subsequent restriction of other obligations, the exhausting techniques of training with the risk of serious damage to physical integrity and health, and the abuse of parental custody, are unjustified treatment of the minor athlete and are not supported by any law.

6. Conclusion

The free participation in sports activities is a fundamental right for citizens' education

and culture. The exercise of the right of participation in sporting activities is related to personal freedom. Limitations are permissible only when there are no infringements on others' rights as well as social, sporting and competitive morals and are not unnecessary, so that they do not place uncalled-for restrictions on sporting life. In the context of the principles of personal freedom and the development of personality, the right of the free choice of the sports club also exists. Special regulations control the prerequisites and every detail of registration, transfers, disengagement and in general the movements of athletes between amateur clubs.

For remunerated and professional athletes there are terms governing the contract on the provision of sports services and its dissolution. Minors under 18 years of age are not allowed to sign a service provision contract. For minor athletes in particular there is a considerable problem regarding the rights of participation in sporting activities with many aspects touching on issues of equal treatment. Dominant rights for children thus are self-determination, the right to information regarding training methods and the programme of training, protection from abuse, the choice of team, self-respect and being respected by others.

We propose the adoption of a Code for Training Methodology, which among other things can provide strong measures for the protection of athletes and especially minors. It can be a shield of protection for the rights of children athletes.

We also propose the creation of a special Committee for Minor Athletes, composed of a jurist, a sports scientist, and a psychologist or a social worker[108], which can help in the safeguarding of the rights of minor athletes.

Alternatively, there should be an institution such as the Legal Defense of the Athlete[109].

97 Similar discrimination occurs according to sex, race, colour, language, religion, political or other conviction, national or social origin, the relation to a national minority, property, birth or other special circumstance or characteristics. According to the Council of State 2480/1993, the Board of Directors of the City Gymnasium which forbids the swimming athletes of a sports club the use of the facilities, while it allows the use of facilities by other clubs, acts against the constitutional principle of equality, according to which the use of facilities should be allowed to all with the purpose of cultivation of the sporting spirit and the development of the club sports of the area.

98 CAS judged by its decision of the 91/45 of the 31-3-1992 that the athlete is free to engage in other additional sports and does not break the contractual obligations to his/her sponsor, as long as he/she lets them know prior to this engagement. In this case the sponsor cannot force the athlete not to participate in another sport. See D. Panagiotopoulos (1999), "'Court of Arbitration for Sports', in: *Villanova Sports & Entertainment Law Journal*, Vol. VI: 1, pp.49-77.

99 D. Panagiotopoulos (1994), "The right to sports."' (In Greek), Op. cit., p.76.

100 For a long time it has been maintained that such acts end in the destruction and incapacitation of the athlete, from being handicapped to loss of life. G. Ayutantis, G. Kampouroglou, N. Tzartzanos (1968), "Doping, (Public conversation - Symposium Sports Medicine Association)", in the *Journal of Sports and Medicine (Athliatriki)*, 5:7, pp.7-11. Very little appears to be done for the eradication of doping, if we take into consideration the intense competition in sports and especially the struggle for records of international standards. Proof of this is the great change of opinion during the 80s regarding the East German female discus athlete, to whom anabolic steroids were administered from a very young age which ended up in irreversibly changing her gender characteristics completely, see relevant report in the Magazine *METRO*, March 1998. For the problem of Doping, see also A. Koutselinis (1986), *Doping, Synoptic Presentation of the Problem*, Parissianos: Athens. See too K.Vieweg (1991), "Doping und Verbandsrecht", in: *Neue Juristiche Wochenschrift* (NJW), Heft 24, pp.1511-1516, of the same (1992), "Doping und Verbandsrecht, Zum Beschluss des DLV-Rechtsausschusses im Fall Breuer, Krabbe, Moller", in: *Neue Juristiche Wochenschrift* (NJW), p.2539 fol., see too Tr. Lemmens (1994), "Sports, Doping and Clashing Values", in: *Pandektis International Sport Law Review*, II: 1, pp.3-16. Related to this issue are the provisions which are contained in the Law 1646/1986, the European Anti-Doping Convention and the provisions for anti-doping in the Olympic Charter, see D. Panagiotopoulos (1997), *Sports Law Code*, Sakkoulas, Athens, pp.153-157 and Law 2371/1996 by which the European Anti-Doping Convention was ratified, op. cit. pp.370-394. For the Charter see P. Naskou-Perraki, D. Panagiotopoulos, Op. cit., pp.86-93, as well as the International Olympic Committee (2000), *Olympic Charter Anti-Doping Code*, pp.3-70. See too Law No 2725/1999 as amended by Law No 3057/2002 Art. 128A- 128 IA, in: D. Panagiotopoulos (2003) *Sports Law Code*, ANT. Sakkoulas:Athens pp.269-314, also WADA anti-doping Code (2003) and European Council.

101 See Law 1837/1989, which limits the time of the engagement in work.

102 See Law 2101/1992, by which the international treaty for the rights of the chil-

dren was ratified, see P. Pararas (1996), *Constitution and the European Treaty of the Rights of Man*, Sakkoulas, Athens, pp.490-522.

103 P.J. Galaso (1984), "'The Rights of Children in Organized Sport"', op. cit., see D. Panagiotopoulos (1997ed.), *Country sports and scientific support*, Lamia, ADV, Athens. Davis P. (1999), "The Rights of Children...", Op. cit., pp. 37-40.

104 This Treaty has been ratified in Greece from 138/1973, "On the lower age limit for work"

105 Law 1182/1981. See also Law 1837/1989 "On the protection of minors during work and other provisions".

106 For the protection of the underaged during work and other provisions, see Law 1182/1981. See also the Law 1837/1989. Related thereto is the Directive of the European Council for the protection of the youth in work, OJ C84/92, 4.4.92, which was amended in EU, C77/93, 18-3-1993 and re-examined in COM (94) 88. See European Commission (1994), The consequences of the EU in sports, No F09318/2414, p.57.

107 See in relation to this issue the findings of the 1st Scientific Symposium, Lamia 1997, in the newspaper Ta Nea, 12th of April 1997, p.12; see also Proceedings, edv Group, Athens 1997, pp.13-123.

108 In the case of violation of the rights of an underaged athlete the Committee makes a recommendation to the Minister of Sports. If there are legal wrongdoings against underaged athletes, then the Committee starts a lawsuit in the Public Attorney's Office.

109 See St. Kolokotronis (1998), "Justice in the Sport Activity" (in Greek), in: *Sports Law and European Community Law,* 5th IASL Congress, op. cit., p.247.

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Brazilian Sports Law: An Overview

by **Luiz Roberto Martins Castro* and Fábio Laudisio Corrêa****

1. Introduction

This study briefly aims to inform the reader of the main aspects of Brazilian sports law. Brazil is widely known in the world as the number-one football country. For this reason, as we will demonstrate, most of its sports legislation was created bearing football in mind and leaving aside most other sports.

Legislation plays a major role in the financial, economical, political and social situation of Brazilian sports, especially in respect of Brazilian football. The law has been a very important instrument in inducing both national and international investors to provide funding recently. However, the instability in Brazilian football caused by constant changes, misinterpretation and a lack of professionalism on the part of the clubs' directors have all contributed to diminishing its attractiveness for business purposes.

The first law to concern sports in Brazil dates from 1941. At that time, Brazil was under the influence of strictly authoritative governments, most notably the Italian fascist regime, and the legislation in question therefore provided for a great deal of government interventionism in sports.

Despite its basically fascist nature the law remained unaltered until 1975 when under a military dictatorship which had ruled the country since 1964 a second sports law was enacted. However, also under the new law, the direct strict control of the state over sports activities continued.

The laws were known as the "shall-not" laws, referring to the wording of their provisions which prohibited all acts that were contrary to government interests. Clubs were further obliged to comply with all state orders unquestioningly.

Brazilian sports law would not evolve significantly until the promulgation of the 1988 Federal Constitution, the first *Magna Carta* to address the subject of sport, more precisely in Article 217.

This Article provides that the initiative for sport lies with the Brazilian Federal Government, but its promotion is left to private entities. Furthermore, the freedom of association is a constitutional guarantee which covers the internal organization of sport-promoting entities.

This implies that any intervention of the state in sports is now prohibited, for as from 1988, according to the Constitution, the Brazilian government is no longer allowed to interfere in the internal activities of entities which promote sports.

After this provision in the Constitution, national sports law began to develop rapidly. The military rule and dictatorship had come to an end when another sports law was enacted, named the *Zico* Law. Zico had been a footballer who was then the Sports Secretary with the Federal Government.

This law had as its objective to adapt Brazilian legislation to the world system in sport. The most important amendment, among many others, was the introduction of the possibility to establish clubs as companies. Although the law was subject to much criticism, it was still a huge step forward in the process of professionalising Brazilian sports.

2. Pelé Law

In 1994, Edson Arantes do Nascimento Pelé was assigned to the newly created Special Ministry of Sports. Among his responsibilities was the reviewing and updating of the Zico Law. Due to Pele's considerable influence and because of the potential and recent growth of the business of football, a new sports law was enacted called the *Pelé* Law (Law 9.615/98) together with some subsidiary legislation (Law 3.944/01). Nearly 60% of the provisions of the Zico Law were retained in the new Law.

However, two important new achievements of the Law were, first, that it intended to make sports more attractive to investors and thereby improve the competitive position of Brazilian clubs in the increasingly globalized market and, second, that it abolished the practice of the "passe".[1]

The Pelé Law covers all aspects of Brazilian sports, although its main focus is on football. Among other things, the law regulates:

- The Brazilian internal sports organization. The Law provides for complete autonomy for all sports entities.
- The establishment of sports for profit. The Law had a major impact on the influx of investments from 1998 onwards. Forcing the clubs to become enterprises would make their management more transparent and professional and would attract investors to this potentially substantial market. It can be argued that for medium-sized or small clubs, this scenario does not seem to work as well. These clubs lack the financial resources and capacity for organizing themselves as competitive companies. However, for the major clubs, this was not so much a matter of adjusting to new legislation, but a real need to equip their organization to compete in the new global industry that sports, and especially football, had become.
- The possibility for the clubs to become organized in an independent and autonomous league, with or without the authorization of the national Federation. The leagues are private legal entities and are allowed to negotiate on behalf of its members on issues such as sponsoring, advertising, merchandising and broadcasting agreements.
- The abolishment of transfer fees. This took place exactly like it happened in Europe after the Bosman case. Athletes are now completely free to move to a second club after the termination of their employment contract with the first. In order to allow the clubs to

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1 "Passe" was the legal stipulation that an athlete would remain "tied" to his club even after his employment contract had been terminated. This involved the payment of a sum of money to the old club by another club if this other club wished to offer the athlete a new employment contract.

adapt to this amendment of the law, a transitional phase of 3 years was provided.

- New rules concerning employment contracts. The rules provided that contracts must be in writing and may be valid during a minimum of three months up to a maximum of 5 years. Both the club and the athlete must sign the contract, i.e. they cannot be represented by agents. The payment must be clear and included in the contract (apart from earnings from image rights). A penalty clause in case of unilateral rescission, breach of contract or default was introduced (limiting the amounts payable and annually reducing the penalty for national transfers, but not limiting or reducing the amount for international transfers). The penalty clause in case of a national transfer is calculated at a maximum of 100 times the player's salary, with the automatic reduction of 10% after the first year; 20% after the second year; 40% after third year and 80 % after the fourth year.
- Arena rights and image rights. The clubs were obliged to pay 20% of their broadcast revenues to the athletes and pay individual players for exploiting their personal image.
- Compulsory insurance. Athletes had to be insured against personal injury and accidents suffered in the course of their employment. The indemnity payable must be related to the player's annual salary.
- New disciplinary codes and a new system of sports tribunals.

The new legislation contained some articles that were severely criticized and some that could even be considered unconstitutional. However, nothing justifies the extensive criticism from the amateur presidents of the clubs who were afraid of losing their power as a result of the more business-oriented way of managing football.

First major amendment of the Pelé Law (Law 9.981/00 and Bill 2.141/01)

In 2000, Law 9.981/00 amended some important provisions of the Pelé Law, especially those related to the financial situation of the clubs. Most of the changes were the result of a lobby in Congress of the presidents of football clubs who wished to maintain their power, even though this does not necessarily aid the development of the industry.

Law 9.981/00 made it optional for clubs to be organized as companies. As mentioned above, in our view this was the correct decision, as the obligation to organize oneself as a company could be considered unconstitutional (under Article 217 of the Constitution) and could result in serious losses for smaller clubs.

The law also included a provision prohibiting investors to have shares or voting power in more than one club in the same division. Furthermore, the clubs must hold at least 51% of the voting capital, which means that no company or investor can gain a majority share in any club.

However, the legislator also included some exceptions. Contracts for stadium management, sponsoring, brand management, licensing, merchandising and publicity do not have to comply with this provision.

Another important change in the legislation related to the financial situation of sport entities. In March 2001, Bill 2.141/01, besides introducing other changes, affirmed and elaborated the abolishment of transfer fees for players who had served out or terminated their contracts. More importantly, it introduced fiscal liability for Federations, Clubs, their presidents and directors, regardless of whether the clubs are organized as profit-making companies or non-profit entities. By this measure, the clubs are obliged to publish yearly financial statements, audited by independent consultants.

Second major amendment of the Pelé Law (Laws 10.671/03 and 10.672/03)

On 15 March 2003, the Pelé Law was once again amended. Law 10.671/03 and Law 10.672/03 were both enacted on that date, resulting in radical changes in the structure of Brazilian sports law.

Law 10.671/03: Supporters' Statute

Law 10.671/03 mainly focuses on football, although its scope is still a subject of discussion in the Congress and the judiciary.

The most important aspect of this Law is that it considers football fans as regular consumers. According to this new law, any person who supports his club of choice and is against rival clubs and derives enjoyment from this is a consumer and should be treated as such.

The Law provides that all stadiums in Brazil must have numbered seats and a video security system and that tickets must be numbered and correspond to specific seats. It also states that spectators must be informed during the match about the income generated and total attendance. Any failure to abide by this law implies heavy fines or even suspension from the championship.

Legally speaking, this Law was not necessary, as the original Pelé Law already included a provision which established that all spectators of a football match are considered regular consumers whose rights are protected by consumer law.

However, despite this lack of legal necessity, the new Law, helped by the strong support of the sports media and by additional powers of inspection and supervision for the authorities, significantly improved the situation in Brazilian stadiums, even though this still lags far behind that in Europe.

Law 10.672/03: Football's Moralization Law

Once again, a new sports law was enacted, and once again, legislators who tend to consider football as the only professional sport in the country drafted it. All other sports practised in Brazil were left to one side in this new piece of legislation.

Law 10.672/03 is really the conversion into law of Bill 2.141/01, as nearly 95% of the provisions of this Bill are repeated in the Law.

The only relevant new aspect in this Law is that it provides a legal regulation of agency agreements in Brazilian football. According to these provisions, contracts for the representation of players may not be concluded for the duration of more than one year and may not be automatically renewed.

If an agent wishes to continue to represent a player after the termination of their contract, the parties must first conclude a new agreement which terms may differ significantly from that of the last.

3. Conclusion

As has become obvious, Brazilian sports legislation has always exclusively addressed football, as is evidenced by the fact that two of the main laws are named after footballers (*Zico* and *Pelé*). Unfortunately, the reality of Brazilian football today holds no promises for a bright future as the sport is going through difficult times.

A huge number of players are currently bringing legal action against their teams for lack of payment. In Brazil, it is widely known that no more than five teams pay wages on the established paydays. All major clubs in Brazil are in debt with the national social security institutions.

In the past few years, the Brazilian media have focused on what is happening outside the pitch, rather than on it. A number of corruption charges have come up. Lawyers and judges are interviewed more frequently than players. The game does not finish when the referee blows his whistle, but when the courts decide. The star of the game is not the guy who wears shorts and scores the goals, but the guy who wears ties and comes up with the perfect sentence.

This state of affairs is potentially very dangerous and could have a snowball effect. Once the game leaves the pitch to be decided in the courts, the fans lose interest which in turn serves to reduce TV audiences. Broadcasting companies will then be inclined to pay less for the right to show matches, which will further aggravate the financial situation of Brazilian clubs.

All this demonstrates that the mere existence of new, modern legislation does not imply an immediate solution to all the problems facing Brazilian sports. Laws can be easily changed, but the behaviour and morals of sports directors cannot.

For this country to become a sporting power, much investment is required, as well as a professional view of sports taken by its directors, who will have to abandon their notions of sport as a means of self-enrichment.

2003: Annus Horribilis for South African Sport?

by **Rochelle le Roux***

1. Introduction

2003 was not a good year for South African sport. Despite being the host of the 2003 Cricket World Cup, the South African team failed to proceed beyond the first round of the tournament. The performances of the *Bafana Bafana*[1] left much to be desired and the failure of the national rugby team to proceed beyond the quarterfinal of the 2003 Rugby World Cup played in Australia was an embarrassing performance by a team once heralded as one of the top teams in world rugby.

All sportsmen and women know the capricious nature of sport. Losing is often simply a reflection of this truth and accepted as such by athletes, coaches, administrators and supporters alike. However, if one considers some of the off-the-field incidents in South African sport during 2003, there is clear evidence that the poor results should be blamed on the failure of administrators and coaches to adapt to the challenges of modern sport rather than the capricious nature of sport. This article is a reflection (from a legal perspective) on the best and worst moments of South African sport during 2003. Where applicable, the concomitant litigation will also be discussed.

2. Football

The judgment in *McCarthy v Sundowns Football Club and Others*[2] was handed down during October 2002, but only reported in the 2003 law reports. A footballer wishing to play professional football in South Africa must be registered with the National Soccer League (NSL). Like elsewhere, a player leaving a club after his contract has ended must obtain a clearance certificate from his former club to enable his new club to register him with the NSL. In South Africa, clubs must register new players during the period 1 October to 31 October. Regulation 17.14 of the NSL regulations provides that a contracted player who has reached the age of 23 and whose contract has expired (thus a free agent) is entitled to a clearance certificate without the payment of a transfer fee or compensation.

In casu the player (McCarthy) contracted to play for Sundowns for two years from September 2000 to 30 September 2002, subject to the condition that "Sundowns has the irrevocable option to renew this contract for a further period of two years." While the player had already contracted to play for another club after September 2002, Sundowns refused to issue the clearance certificate on the basis that the club was still attempting to exercise the "irrevocable option" to renew the contract. McCarthy urgently approached the Labour Court on 25 October 2002 for an order to the effect that the clearance certificate be issued in light of the fact that the period for registration of new players closed on 31 October 2002.

The court held[3] that the option only gave Sundowns the right to negotiate a contract with the player and nothing more. In the absence of an actual agreement to renew the contract, the player was a free agent and the club was accordingly ordered to issue the clearance certificate to enable him to be registered by his new club by 31 October 2002. This, however, is not the most significant aspect of this judgement.

Until recently, South African sport has not been subject to much litigation and few guidelines have hitherto emerged that can form the basis of a South African *lex sportiva*.[4] While the comments by Waglay J in respect of the urgency of the application may sound familiar to a European ear, it certainly is the first time that the special nature of sport has been recognized by a South African bench: It is trite South African law that if an applicant approaches the court on an urgent basis the court must be satisfied that the applicant has acted with the necessary urgency. The player was aware by 16 October 2002 that the club did not intend to issue the clearance certificate but nonetheless waited until 25 October 2002 to lodge his application. While Waglay J noted that the player did not provide any reasons for the delay, he was satisfied that the delay of 10 days did not display conduct that should cause the court to refuse his application.[5] Sundowns also argued that the Federation Internationale de Football Association (FIFA) has taken a decision that professional players who are not bound by contract to any club may be registered outside the registration period. Although the judge agreed that FIFA rules make it possible for players faced with the applicant's dilemma to register late, he was nevertheless satisfied that the applicant's claim should be entertained. The judge's reasons for this decision, it is suggested, reflect an appreciation for the special nature of sport:

"The court must, however, be mindful of the fact that, unlike any other employees, professional footballers only have a relatively short period within which to practise their profession, a profession which is inherently risky as they may suffer injuries which may ruin their careers; they are subjected to the vagaries of selection not faced by other employees; they are required to earn sufficient to sustain themselves and their families in a relatively short period and cannot simply, like any other employee, decide to move from one employer to another. Here we have a class of employees who face restrictions in carrying out their trade which restrictions can have an effect on their earnings that cannot be calculated with any degree of certainty."[6]

Hitherto, the Commision for Conciliation, Mediation and Arbitration (CCMA) - the tribunal that would ordinarily hear employment disputes before it is referred to the Labour Court - despite having the authority to do so[7], has refused to entertain disputes referred to them by football players registered by the NSL on the basis that the NSL has its own private arbitration procedures and is better suited to deal with disputes in the football industry.[8] Sundowns raised this argument, but Waglay J held that, while the court will always be reluctant to get involved where private arbitration procedures are in place, it is not improper for a court to deal with the matter where such private procedures do not provide for matters to be heard on an urgent basis.[9]

3. Rugby

South Africa won the Rugby World Cup in 1995, but, since then, performances have declined, culminating in South Africa losing dismally in the quarterfinal of the 2003 World Cup. Considering that two particularly unfortunate incidents preceded the World Cup campaign, this result is no surprise. These two incidents are now general-

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1 The nickname for the South African national football team.

2 (2003) 24 *ILJ* 197 (LC).

3 At 204I.

4 A number of judgments dealing with sport have been passed in recent years by South African courts but none specifically dealt with the special nature of sport. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C); *Cronjé v The United Cricket Board Of South Africa* 2001 (4) SA 1361 (TPD); *Golden Lions Rugby Union v Venter and Others* (Unreported) Case No 2007/2000; *George Igesund and Ajax Cape Town Football Club [Pty] Limited* 2002 (5) SA 697 (C) and *Santos Professional Football Club [Pty] Limited v Gordon George Igesund and Ajax Cape Town Football Club [Pty] Limited* (Unreported) Case Number A786/2002

5 At 203A.

6 204A-D.

7 See s147(6) of the Labour Relations Act 1995.

8 See *Treswill Overmeyer & Jomo Cosmos Football Club* WE 39134 (unreported); *Vaisili Sofiadellis & 2 Other v Amazulu Football Club* KN 51728 (unreported) and *Brendon Augustine and Ajax Football Club* (2002) 23 *ILJ* 405 (CCMA).

9 At 205A.

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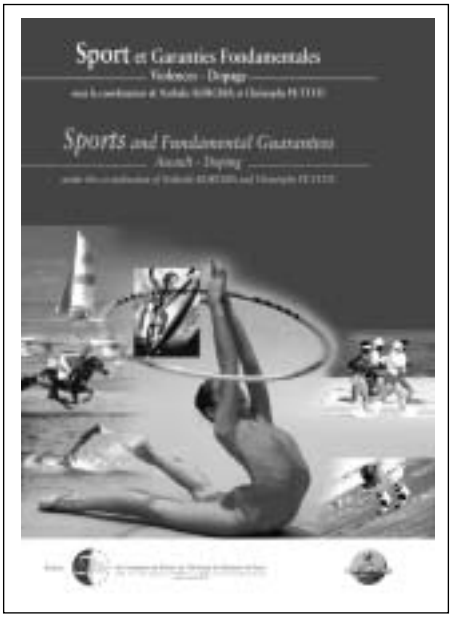

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ly referred to as the '*Cronje/Davids*' incident and '*Kamp Staaldraad*" (Camp Steel Wire). While these two dramas received wide attention in the media, the judgment of the Cape High Court in *AJ Venter v South African Rugby Football Union and Others*[10] received almost none, but is still of importance to those responsible for disciplinary inquiries in sport.

Cronjé /Davids

Preceding the announcement of the team to play at the 2003 Rugby World Cup in Australia, invited players attended a training camp in Pretoria. Although the facts remain vague, it was reported in the newspapers that a white player (Cronjé) apparently refused to share a room with a black player (Davids). The team's media manager (Mark Keohane) resigned in protest of the team management's poor handling of the incident and produced a report on racism in rugby. Both the coach (Rudolph Straeuli) and the team manager (Gideon Sam) accepted responsibility for the poor handling of the room-sharing incident. As a result of this incident and the Keohane-report, the South African Rugby Football Union (SARFU) commissioned judge Edwin King to investigate racism in South African rugby. The nature of this commission must be distinguished from the King Commission of Inquiry into Match Fixing in Cricket established in 2000 (and headed by the same judge).[11] The South African government established the latter commission in terms of national legislation[12] whereas the commission established by SARFU was intended to be a private commission of inquiry. The SARFU commission's inquiry never started: The South African Broadcasting Corporation (SABC) applied to court for approval to televise the proceedings of the commission after Judge King refused such approval. Furthermore, the players indicated that they would seek an interdict from the court unless they were allowed legal representation.[13] (The SABC's application to court failed on a technicality: section 25 of the Supreme Court Act 1959 provides that a judge shall not be cited as a party in any civil action except with the consent of that court. *In casu* consent to cite Judge King was not obtained.)

As a result of the delays caused by these interventions and the looming World Cup tournament, SARFU postponed the inquiry until 2004. However, in light of the election of the new SARFU board and president *after* the World Cup during December 2003, the resignation of both Straeuli (discussed below) and the Chief Executive Officer (Riaan Oberholzer) of SARFU and the non-election of Sam to the board of SARFU, it was decided to cancel the SARFU investigation and to leave it to the government to lead a broader investigation into South African sport. Since most of the people central to the (mis)management of the Cronjé/Davids drama have left the scene, coupled with the fact that this has not been the only allegation of racism[14] in South African sport, a broader based inquiry is probably more appropriate. While some of these allegations have turned out to be false[15], the mere fact that such charges are frequently made, suggests there is still a culture of suspicion and doubt in South African sport that must be addressed.

Kamp Staaldraad

Most of the detail of this camp only emerged after the Springboks returned from their World Cup campaign (and only via the media since no official inquiry was held). In short, the team was taken on a 'survival' camp as part of their preparations for the World Cup where they were subjected to extremely demeaning activities.[16] (These activities ranged from being forced naked into a pit for hours listening to the national anthems of opponents while being sprayed with ice water to being given a live chicken to kill and cook - but not to eat - while being deprived of food.) The complete disregard for basic human rights that prevailed at the camp led to a public outrage and calls for the coach (Straeuli), who was already under pressure as a result of his poor record as coach and his poor handling of the Cronjé/Davids incident, to resign. Eventually his employers (SARFU) agreed to pay him a substantial severance package. SARFU's unwillingness to dismiss the coach apparently stemmed from the absence of a 'performance clause' in his contract with SARFU. The absence of such a clause is rather surprising, but it is suggested that it is not the only basis upon which the coach could have been dismissed: The Labour Relations Act 1995 (LRA) provides that an employee can be dismissed provided that there is a fair reason for his dismissal relating to the employee's *conduct* or *capacity* and provided that a fair procedure is followed.[17] Not only were the coach's poor record and his endorsement of such a training camp indicative of incapacity[18], but it is suggested that the endorsement of *Kamp Staaldraad* amounted to misconduct.[19] It is therefore surprising that the SARFU board agreed (without a proper investigation of the camp) to terminate the relationship with Straeuli on such expensive terms when there were *prima facie* grounds to dismiss him (despite the absence of a performance clause). One wonders whether the fiduciary duty of the board did not require it to investigate the matter first before agreeing to pay a substantial severance package, particularly where the package represents close to 40% of SARFU's profit for 2003![20] On the other hand it may also be true that protracted litigation could have caused even more damage - financially and to the already poor image of South African rugby - and that an early settlement negated this. Even so, it is suggested that a thorough investigation into the events at the camp could have facilitated a settlement more favourable to SARFU.

AJ Venter v South African Rugby Football Union and Others[21]

Rugby once again featured in court in the unreported matter *AJ Venter v South African Rugby Football Union and Others.* The applicant (Venter) appeared before a disciplinary committee on a charge of dirty play (he hit an opponent in the face with his fist) and was suspended for 6 weeks. The chairperson of the disciplinary committee also happened to be a judge of the High Court. Without seeking the approval

10 Case Number 6993/2003.

11 See R. Le Roux "Reflecting on Match Fixing in Cricket: The Cronjé Affair" (2002) 2 *The International Sports Law Journal*, 11-15.

12 Subsection 84(2)(f) of the Constitution of the Republic of South Africa Act 108 of 1996 read with the Commissions Act 8 of 1947.

13 See "Further delays for King inquiry", 9 September 2003 - accessed via http://www.rugby365.co.za/LATEST_NEWS/story_30583.shtml .

14 See J. de Jager "Boland accuse Griffons of racism", 5 October 2003 - accessed via http://www.supersport.co.za/article.asp?aId=95856%20&%20sportCategory=SUPERRUGBY/CURRIECUP ; "Kepler faces racism probe", 19 November 2003 - accessed via http://www.supersport.co.za/article.asp?aId=99735%20&%20sportCategory=SUPERCRICKET/domesticCricket and "Wessels cleared of racism charges", 26 November 2003 - accessed via http://www.supersport.co.za/article.asp?aId=100166%20&%20sportCategory=SUPERCRICKET/domesticCricket. A recent survey commissioned by *The Business Day* revealed that 54% of South Africans perceive rugby as a racist sport. See "SA majority sees rugby as racist", 17 December 2003 - accessed via http://www.superrugby.co.za/default.asp?aId=101607&sportCategory=SUPERRUGBY/SARUGBY .

15 Ibid.

16 See M. Keohane and A. Henderson "The naked truth" *Cape Argus*, 21 November 2003. Also see M. Morris & H. Theron "Boks' pit training raises ire among sports scientists" *Monday Paper*, 1 December 2003.

17 Section 188.

18 Item 9 of Schedule 8 to the Labour Relations Act (LRA) provides that if an employee fails to meet a performance standard and the employee was made aware of the required standard and was given a fair opportunity to meet the standard and thereafter still failed to meet the standard, dismissal would be an appropriate sanction. It is widely known that Straeuli was reprimanded for his poor record quite some time before the World Cup whereupon he asked "to be judged on the World Cup". Even if this did not happen, the Labour Appeal Court has held that Item 9 does not apply when the employee has the knowledge and experience to appraise his own performance. See *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 *BLLR* 862 (LAC) and *New Forest Farming CC v Cachalia & Others* (2003) 24 *ILJ* 1995 (LC). It is submitted that Straeuli, being the coach of the national rugby team, was in such a position where prior advice was not required: hence the absence of a performance clause should not have been an issue.

19 J. Grogan in *Dismissal* (7th ed) Juta, Landsdown 2002 at 121 states that: "Employees are duty bound to uphold their employer's good name and reputation. Conduct that tends to bring the name of the employer into disrepute may therefore justify disciplinary action even if, in rare instances, such conduct cannot be classified as another recognized offence."

20 See D. Granger "Oberholzer leaves rugby in red" *Cape Argus*, 8 December 2003. This article can be accessed via http://capeargus.co.za/index.php?fSectionId=49&fArticleId=303405 .

21 Case Number 6993/2003.

of the Judge President (as required by section 25 of the Supreme Court Act 1959), the player (Venter) approached the High Court for an order setting aside the suspension on the basis that the disciplinary committee made a decision before his representative had an opportunity to argue the matter. The governing body (SARFU) was cited as first respondent, joined by the chairperson and the player's provincial union as second and third respondents respectively.

Amazingly, the application failed for exactly the same reason as the earlier (and much publicized) application by the SABC to the same court to televise the proceedings of the SARFU commission into racism in rugby (see above). Cleaver J held that the failure to obtain approval from the Judge President to cite a judge as a party to the proceedings was fatal and that the application should fail on that basis alone. Cleaver J nevertheless dealt with the merits of the application and concluded that Venter in any event had no claim.[22] Venter's case was that the disciplinary committee came to a conclusion before the representative of either party was given an opportunity to argue the matter. The disciplinary committee deliberated the matter privately after hearing all the evidence and concluded that Venter was guilty as charged. On resumption of the proceedings, but before the verdict was announced, the representatives reminded the committee that they were never given an opportunity to argue their respective cases. The court was satisfied[23] that both representatives were then given ample opportunity to argue their cases, that certain video material was revisited and that the committee, after hearing these arguments, again thoroughly deliberated the matter before they concluded for the second time that Venter was guilty. The court was therefore satisfied that the rules of natural justice had been observed and that the applicant suffered no prejudice as a result of the particular order followed by the committee.

Although this judgment cannot be faulted on the facts of the particular case, it is hoped that it is not a signal that disciplinary committees can only observe natural justice if a court-like procedure is followed. While rugby is a multi-million Rand sport and can afford to buy the expertise to ensure the observance of such procedures, most sports in South Africa run on small budgets and cannot afford to involve lawyers to supervise disciplinary proceedings.

4. Cricket

Ordinarily, unfair dismissal disputes in South Africa are referred to the CCMA for conciliation, whereupon, depending on the reason for the dismissal, it will either be arbitrated by the CCMA or referred to the Labour Court for adjudication.[24] In any dismissal case, the onus is on the employee to establish the existence of the *dismissal* whereupon the employer must prove that the dismissal is fair.[25] The meaning of dismissal is defined in section 186(1) of the LRA. Subsection 186(1)(b) defines dismissal to mean *inter alia* that "an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it".[26]

Subsection 186(1)(b) has been central to two recent referrals to the CCMA by two prominent cricketers. Lance Klusener, until March 2003 a regular member of the South African One-day International team, referred an unfair dismissal dispute to the CCMA after he was omitted from the team on the basis that he had a reasonable expectation that his contract with the United Cricket Board of South Africa (UCB) would be renewed.[27] However, the matter was settled before arbitration.[28]

The second matter (*Hylton Ackerman and the United Cricket Board of SA*29) relates to an experienced coach (Ackerman) who was employed full-time (but on informal terms) by the UCB since 1998. His duties included running the Plascon Academy (a national programme for cricket development under the auspices of the UCB), training and mentoring coaches, lecturing and public relations exercises for the UCB and accompanying the South African under 19 and the South African "A"[30] team on national and international tours. However, since 1990 (and before being employed by the UCB on a full-time basis), Ackerman coached the Plascon Academy for 4-5 months a year. In 2000 the parties, partly because Ackerman felt vulnerable, concluded a written agreement of employment, which was to run for two years, expiring on 31 August 2002. During June 2002, the UCB advertised a position for a "senior coach to take responsibility for preparing the SA "A" and SA under 19 teams as well as running the cricketing programme of the national Plascon Academy". Ackerman applied but was not interviewed on the basis that the selection committee was already familiar with his work. Another applicant was appointed and Ackerman's services were terminated. At the time of the dismissal Ackerman was 55 years old. On the basis of the UCB's own admission that, but for the advertisement, Ackerman would have continued in employment, the commissioner found that he had a reasonable expectation that his employment would continue after the end of the fixed term contract and that he was therefore unfairly dismissed.[31] The UCB also advanced Ackerman's age[32] as the reason for not appointing him to the advertised position. The commissioner held that the UCB failed to assess the applicants (including Ackerman) against the requirements stated in the advertisement and more particularly that the UCB's reliance on age was unfair discrimination since age was not related to the inherent requirements of the job. The UCB was thus ordered to pay Ackerman (who had already acquired alternative employment) the equivalent of two years' salary as compensation for the unfair dismissal and unfair discrimination.[33]

This award is a timely reminder to all employers that the end of a fixed term contract is not an unconditional opportunity to terminate an employment relationship, particularly where the job continues and the individual has occupied the position for a long time. How should this principle be transplanted to players and their contracts? It is in this regard that the Klusener dispute would have been useful. The top cricket players are usually contracted for a fixed term by the UCB. This does not guarantee selection for the national team (and often non-contracted players may also be selected), but it does ensure remuneration at a level that is substantially higher than that offered at the next (provincial or club) level. To what extent can a player have an expectation that his contract will be renewed, particularly where he has been playing regularly for the national team and his performances have been reasonable? It is suggested that it would be reasonable for a player to have an expectation in such circumstances. To what extent will preferences of a newly appointed coach, a change in playing strategy or perhaps even a policy to rather select new blood with a long term view of winning a prestigious tournament such as a World Cup, be relevant in this context? It is suggested that as long as these strategies and policies are conveyed to the players, it is unlikely that players will harbour such expectations. In instances where this has not been done, the correct approach would be to retrench[34] the player rather than simply not to renew the contract. It is in this context that on-the-field performances will be relevant when decisions are taken in the boardroom either not to renew a fixed term contract or to retrench a player.

5. Corruption

One of the biggest scandals ever in South African sport was the admission of the erstwhile South African cricket captain, the late Hansie

22 See paragraphs 14-19.
23 See paragraph 19.
24 See section 191(5) of the Labour Relations Act 1995 (LRA).
25 Section 192 of the LRA.
26 See J. Grogan *Dismissal* (7th ed) Juta, Landsdown 2002, 33-35.
27 See " Klusener gears up for war with UCB", 9 July 2003 - accessed via http://www.supersport.co.za/article.asp?aId=88530%20&%20sportCategory=SUPERCRICKET/domesticCricket .
28 See N. Manthorp "Zulu raids HQ cash register", (undated) - accessed via http://www.supercricket.co.za/default.asp?tid=2592&scat=SUPERCRICKET/sateam .
29 Unreported CCMA arbitration award WE 10558-02 dated 6 December 2003.
30 This team ranks just below the national team.
31 See paragraphs 24-27 of the award.
32 See paragraphs 28-33 of the award.
33 The commissioner also held that not interviewing him created the impression that he was not considered in the same way as the other candidates and that this was unfair. See paragraph 38 of the award.
34 In which case the employee would be entitled to severance pay equal to at least one week's remuneration for each completed year of service. See section 41(2) of the Basic Conditions of Employment Act 1997.

Cronjé and two of his team- mates (Gibbs and Williams) that they were involved in match fixing.[35] One of the issues highlighted by this affair was the uncertainty as to whether their actions amounted to any common-law or statutory crime. The Prevention of Corruption Bill 2002[36], currently being deliberated by Parliamentary committees, aims to address this *lacuna*. Section 14 of the Bill makes it an offence (liable to a fine or imprisonment up to 10 years or both) for giving or agreeing to accept an inducement to influence the run of play or the outcome of a sporting event[37]. Applied to the Cronjé debacle, the implication is that Cronjé, who offered money to Gibbs and Williams to play badly, as well as Gibbs and Williams who agreed to play badly in exchange for payment, would have been guilty of an offence. This would have been the case despite the fact that Gibbs 'forgot' about the arrangement and played well and Williams was injured and had to leave the field before he could carry out his part of the arrangement with Cronjé. The mere agreement to influence the run of play is sufficient to constitute the offence irrespective of whether it actually happens.

In view of the fact that it is impossible to determine whether match fixing has actually subsided or not after the measures[38] introduced by the International Cricket Council, this development is to be welcomed.

6. Broadcasting

During 2003 the Independent Communications Authority of South Africa (ICASA), following public hearings during 2002, adopted regulations[39], similar to the "Television Without Frontiers Directive"[40] in Europe, to ensure public access to the broadcasting of *national sporting* events. These regulations identify 'national sporting events' that must be broadcast live, live delayed or delayed by free-to-air television broadcasters. The regulations are the result of section 30(7) of the Broadcasting Act 1999, which provides that subscription broadcasting services may not acquire exclusive rights for the broadcast of national sporting events, as identified in the public interest from time to time by the ICASA in consultation with the Minister of Public Enterprise and the Minister of Sport.

These regulations must be viewed against the backdrop of the socio-economic environment in South Africa where there is a low take up of subscription television and the efforts to develop support for sports such as rugby and cricket, which were previously regarded as elitist sports. These regulations will certainly assist to broaden the audience and support base of these sports. However, the extent to which these regulations will undermine the development of subscription television - often the purchasers of sports rights - and the sports[41] which depend on the sale of these rights, remains to be seen.

7. Conclusion

Clearly not all developments in South African sport (on and off the field) were negative in the year under review. In fact, despite the poor performances in team sports alluded to in the introduction, individual athletes[42] achieved extraordinary heights during 2003 and world events such as the Cricket World Cup and the Presidents Cup were hosted with great success.

It would therefore be unfair to claim that South African sport in general experienced an *annus horribilis* - it was simply a year below par. Rugby, however, cannot escape the fact that 2003 was undoubtedly its worst year ever. Since rugby is such a prominent sport in the South African landscape, its poor overall showing overshadowed the few good things that happened in South African sport. And the debacle has not ended. At the time of writing the selection process for the new national rugby coach was again imbued with controversy, yet to be resolved.

Although it would be presumptuous to suggest the reason behind the rugby debacle (and signs of similar inaptness in other sports), it is clear from the events and judgments alluded to above, that South African sport is currently struggling with the challenge to be the best in the world and to transform from a previously patriarchal system to a system reflecting the socio-political realities of post-apartheid South Africa.[43] More specifically, those responsible for the management of sport have apparently not yet grasped the reality that sport is not a law onto its own and that it functions within the parameters of human rights and concomitant laws. Until this reality dawns, the mistakes of 2003 will be repeated.

35 See R. Le Roux "Reflecting on Match Fixing in Cricket: The Cronjé Affair" (2002) 2 *The International Sports Law Journal*, 11-15.

36 This Bill can be accessed via http://www.pmg.org.za .

37 A 'sporting event' is *inter alia* defined as any event or contest in any sport, between individuals or teams, or in which animals or birds compete and which is usually attended by the public and is governed by rules. See section 1(xx) of the Bill.

38 For more information on the steps taken by the International Cricket Council visit http://www-uk.cricket.org/link_to_database/NATIONAL/ICC/ANTI-CORRUPTION/ .

39 The Position Paper of ICASA and the ICASA Sports Broadcasting Rights Regulations, 2003 can be accessed via http://www.srsa.gov.za/speeches/SportsBroadcastingRights.pdf .

40 See S. Gardiner, M. James, J. O'Leary, R. Welch, I. Blackshaw, S. Boyes & A. Caiger *Sports Law* (2nd ed) 2002, 416-417.

41 The sale of broadcasting rights accounted for 63% of the United Cricket Board of South Africa's total income generated for the 2001/2002 financial year and in 2001 broadcasting revenue accounted for 55% of total revenue generated by the South African Rugby Football Union.

42 E.g. Hestrie Cloete and Jacques Freitag winning gold medals at the Paris World Athletics Championship and Ernie Els who is rated the third best golfer in the world.

43 See H. Gilomee "Teenstrydige kragte in SA rugby beduiwel sake" *Die Burger*, 2 December 2003.

Liability of Referees (Match Officials) at Sports Events

by **Steve Cornelius***

1. Introduction

In the world of rugby union, the year 1995 will probably always be remembered as the year of South Africa's dramatic victory in the Rugby World Cup. However, in the aftermath of the World Cup, the local Currie Cup competition was decided in an almost anti-climactic way. The overwhelming joy of the World Cup victory ensured that a Currie Cup season filled with controversy, would forever be overshadowed. The team of Natal eventually won the Currie Cup final in convincing fashion, but the preceding tournament was fraught with controversial decisions which almost certainly assisted the Natal team to reach the final in the first place.[1]

In one of the early season matches, Northern Transvaal[2] met neighbours Transvaal[3] at the Loftus Versveld Stadium in Pretoria. As regulation time drew to a close in Pretoria, Northern Transvaal held a slender lead of 19-15 over Transvaal. In the dying seconds of injury and stoppage time in Pretoria, Transvaal launched a move which resulted in hooker, James Dalton, being tackled just short of the Northern Transvaal try line. While he was still held in the tackle, Dalton seemed to make a second movement which enabled him to reach the try line and place the ball across it. This second movement should have resulted in a penalty being awarded to Northern Transvaal. However, the referee awarded a try to Transvaal. The conversion was successful and the final whistle blew. Transvaal had snatched victory by 22-19![4]

At virtually the same moment in Bloemfontein, Free State was playing Natal. Free State had lead for most of the game and held a 34-29 lead over Natal. Also, during the dying seconds of injury and stoppage time, Natal launched an all out attack which saw James Small cross the Free State try line. As he crossed the line, Small was tackled from behind and dropped the ball. As a result, the referee should have indicated a knock-on and blown the final whistle. However, the referee awarded a try to Natal. After the conversion, the final whistle blew. Just as Transvaal had done, Natal had snatched victory in the final seconds of the game, beating Free State by 36-34.[5]

In the second half of the Currie Cup Season, Northern Transvaal met Natal in Pretoria. With about 15 minutes remaining in the match, Northern Transvaal lock Johan Ackermann crossed the Natal try line and grounded the ball for what should have been a try that would have placed the match out of reach of Natal. However, the referee judged that the ball had been held up in the tackle and declined the try. This allowed Natal to claw their way back into the match in brilliant fashion and eventually force a 36-36 draw.[6]

As a consequence of the results achieved in the matches, Natal finished on top of the league table with 15 points, while Western Province finished in second place with 14 points. Northern Transvaal finished third, just one league point shy of Western Province and was eliminated from the competition. But suppose the incorrect decisions by the referees in the matches could have been reversed. What would the effect have been on the league and the eventual resting place of the Currie Cup for the 1995 season?

If the referees in the matches concerned had made the correct decisions, Northern Transvaal would have won two more games and Natal would have lost two games which they had won or drawn. The league table would then have looked very different. Northern Transvaal would have ended on the top of the log with 16 points, followed by Western Province on 14 points and Natal on 12 points. The result would have been that Western Province would have met Northern Transvaal in Pretoria, rather than Natal in Durban, in the final for the Currie Cup.

These events have always led me to wonder whether Northern Transvaal or somebody else, for that matter, could have had some remedy at their disposal to undo the wrong decisions which had caused their premature exit from the competition that year. Could an interested party have taken recourse to court or some other forum? Would such a court or forum have overturned the results of the two matches? If not, what would the reasons for their refusal have been? If they had intervened, would this have been desirable. Do we really want to settle matches months later in court or some other forum, or should they be settled on the playing field? Will the public accept results that are obtained in the court room or other forum rather than the playing field? Would it be possible for a judicial officer or other adjudicator to accurately determine the outcome of an event if a certain decision is overturned? In the Northern Transvaal/Transvaal and Free State/Natal examples given above, that would have been simple, since the controversial decisions had occurred right at the end of the games and could easily have been disregarded to determine what the supposed outcome would have been. But suppose the controversial decisions had been taken earlier in the games concerned, as in the Northern Transvaal/Natal example. Taking away the controversial decision in such cases would substantially affect the rest of the game, so that any attempt to determine what the outcome of such an event would have been, would amount to nothing more than speculation.

The problem is not restricted to rugby. More recently, allegations concerning preferential treatment given to certain drivers have been made in respect of Formula 1 motor racing. According to these largely unsubstantiated allegations, Michael Schumacher regularly exceeds the pit lane speed-limit, but is never penalised with the usual 10 second stop-and-go penalty which is customarily applied for such infringements and which has occasionally been awarded against some of Schumacher's main rivals.[7] Much is made of the fact that, in some of the races concerned, Schumacher had finished ahead of the next competitor by a margin which is less than the 25 seconds that are generally lost as a result of a 10 second stop-and-go penalty.

But let us suppose for the sake of argument that, at least in respect of one Grand Prix, these allegations are accurate. Again, one has to question whether interested parties could have some remedy at their disposal to undo the wrongs caused as a result of decisions that are incorrectly taken or not taken at all. One also has to question whether it would be possible for a judicial officer or other adjudicator to accurately determine the outcome of a race if such a decision, or lack of decision, is overturned. These questions become even more acute if one considers the fact that the Formula 1 World Championship has,

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1 Van Rooyen (ed) *Bankfin SA Rugby Writers' Annual* (1996) 112.
2 Now the Blue Bulls.
3 Now the Golden Lions.
4 Van Rooyen (n 1) 114, 149.
5 Van Rooyen (n 1) 112.
6 Van Rooyen (n 1) 112, 114, 147.
7 Sippel "Oor, Uit en Duister..." *Wiel* August 2001 84.
8 Sports Law (1999) 107.
9 1993 AC.

on many occasions, only been decided in the final race of the season, with the result that one incorrect decision could determine the outcome of the Championship in a given year. As with the example of the rugby matches, it may not be possible for a judicial officer or other adjudicator to accurately determine the outcome of a race if a certain decision is overturned. The solution is not as simple as adding to his final race time the 25 odd seconds which a driver may have lost for a penalty and then determining the winner on that basis. It is one thing for one racer to catch up with the driver in front, but it is not that simple to get past. Any speculation on whether or not a particular driver would have been able to pass, can only be that - speculation.

According to Beloff, Kerr and Demetriou,[8] it is so obvious that a court cannot intervene in a decision made by an official, that no authority is required to support that proposition. As an afterthought to cement their stance, they refer to the unreported case of *Machin v FA*9 and *Mendy's case* before the Court of Arbitration for Sport.[10] However, this view seems simplistic. An attorney briefed to defend an action in which a decision by an official is challenged in court, would find it difficult to persuade a court that his or her client's case is obvious without reference to the applicable legal principles. The circumstances of each case may be unique, so that reference to one or two decided cases would not cover the entire field and yield an answer that would deal with the matter once and for all. As with all other matters, judicial remedies may be suitable and available in certain cases, yet unsuitable and unavailable in others. And, as Botein J held in *Tilelli v Christenberry*11

'a boxer's earning capacity is related to his reputation and his reputation is dependent on his success. In the sports world the interested public follows the detailed records and teams with avidity. It flocks to watch the athletes with winning records; and the earnings of those athletes are related directly to the number of paying spectators they can attract. Spiritually, a professional boxer may emerge greater in defeat than in victory. Materially, however, his prestige and the purses he can command are lowered. Any action which may affect his record so prejudicially of necessity impairs economic rights and interests sufficiently to give the petitioner legal standing to sue.'

If a participant has legal standing to sue, there is obviously the possibility that he or she may be successful in an action. For this reason, the applicable legal principles should be considered carefully to determine whether or not a court would be willing to intervene in decisions made by officials at an event. Furthermore, the rules and regulations that govern participation in a particular sport or event, can impact on the availability and nature of remedies.[12]

The purpose of this article, therefore, is to explore the possibilities of judicial and other intervention in decisions taken by event officials, to determine the remedies that may be available to a participant or team that feels wronged as a result of decisions taken by an official and to reflect on the desirability of those remedies. By no means do I purport to provide any conclusive answers on the matter. The purpose of this article is rather to draw attention to a particular issue that could pose (and have in the past posed) severe problems for sport associations, event officials, lawyers and courts. In this way, I wish to stimulate debate on the relevant principles that may apply. For obvious reasons, I have taken the law of South Africa as the basis for my discussion and, where appropriate, compare the position in various other jurisdictions. The choice of legal systems in this regard, depended on the availability of material that could sensibly contribute to a discussion of the topic at hand. Furthermore, I refer to various sports in the process to illustrate the practical implications of what is discussed. The sports to which I refer, were chosen at random from the more popular international sports.

2. Applicable field of substantive law

To determine whether or not it would be possible for an interested party to seek relief against an incorrect decision by an event official, it would firstly be necessary to determine which branch of substantive law regulates the relationship between the official and those who are directly affected by the official's decisions. Each particular branch of substantive law will provide its own rules that will determine whether and to what extent relief will be available to interested parties. It will also determine which interested parties will be entitled to claim such relief, as well as the appropriate forum in which relief can be claimed.

As I see it, there are at least five branches of substantive law that could conceivably affect the relationship between officials, participants and other interested parties. These are the law of contract, labour law, administrative law, the law of delict or torts and even criminal law. I will discuss each of these branches separately to determine whether, to what extent and under which circumstances the law would provide a remedy to a party who feels wronged as a result of a decision by an official at an event.

3. Intervention based on contract

3.1 General

The law of contract forms the basis of sports law. The vast majority of all the legal relationships that occur within the context of sport, are derived from some form of contract or the other.[13] Contracts are the most powerful tool available for the private regulation of matters and can be regarded as sources of *ad hoc* law that are created by the parties to deal authoritatively with certain matters *inter partes*.[14] Of particular importance for the discussion set out in this paper, contracts provide

'the ultimate source of the regulatory jurisdiction of referees and governing bodies in sport, enabling the latter to determine the laws according to which sport is played ... and the former to implement those laws on the field of play'.[15]

As a result, the various participants in a sporting event and, for that matter, the officials responsible for the enforcement of the rules or laws of the game, stand in a contractual relationship to one another.[16] In this regard, one should not be blinded by the simple bilateral contract which is generally used to teach law students the basic principles of contracts. Christie explains[17] that

'[n]ot all contracts fall into the simple pattern of one party on each side. Not only may there be more than one on either or both sides, but in a complex multipartite contract it may not be possible to divide the parties into 'sides' at all because two parties may be on the same side for the purposes of one term of the contract but on opposite sides for the purposes of another'.

Basically any legal system today recognises that contracts may also create multilateral relationships with no limit as to the total number of people who may be parties to such a contract. Furthermore, it is not necessary that parties should regulate a specific matter by means of a single contract. The terms of their contractual relationship may be contained in various instruments that will have to be considered as a whole to determine the extent of the parties' rights and duties. Contractual relationships in sport are probably some of the most complex that people regularly get involved in. Not only is it virtually impossible to divide the parties into sides, but these contractual relationships are usually regulated by a hierarchy of instruments, some of which contain international elements, so that the rules of the conflict of laws become relevant.

3.2 Intervention in terms of a contract

In most legal systems today, the principle of freedom of contract applies.[18] As a result, the parties to a contract are generally free to regulate their contractual relationship in the manner they deem fit. This also means that the parties may establish their own procedures to deal with disputes that may arise from the contractual relationship.[19] However, it is also commonly accepted that the parties cannot com-

10 In fact, there are a number of other cases to which the authors could have referred, such as *Sinclair v Cleary* [1946] St R Qd 74 and *Bain v Gillespie* 357 NW 2d 47. These cases, as well as the ones discussed by Beloff, Kerr and Demetriou (n 8), are considered further below.

11 120 NYS 2d 697 699.

12 Weistart and Lowell *The Law of Sports* (1979) 154 - 156.

13 *Natal Rugby Union v Gould* 1998 4 All SA 258 A. See also Beloff, Kerr and Demetriou (n 8) 9, 22 *et seq*. See also Weistart and Lowell *The Law of Sports* (n 12) 196.

14 Voet *Commentarius as Pandectas* (1829) 18.1.27. See also Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 2ed (1982) 339.

15 Beloff, Kerr and Demetriou (n 8) 22.

16 *Clarke v Dunraven* AC 59.

17 *The Law of Contract in South Africa* (2001) 288.

pletely oust the jurisdiction of the ordinary courts of law. Any contractual clause which purports to do so, will be contrary to public policy and, consequently, void.[20] This means that the parties may only postpone recourse to the courts. Obviously, if the matter is dealt with to the satisfaction of the parties under the contractual procedure, the matter will rest there. However, if either party should feel wronged by the result of the contractual dispute resolution procedure, that party would still have some recourse to court.[21]

As I have already indicated above, the contractual relationships in sport are regulated by a hierarchy of instruments that set out the terms to which the parties are bound. In most instances, one or more of these instruments provide mechanisms to resolve disputes that may arise in respect of the particular sport. Often, the various instruments provide a succession of mechanisms that can be utilised in an attempt to resolve the dispute concerned.

Track and Field Athletics has some of the most comprehensive measures to deal with disputes that may arise from decisions taken by officials at meetings. In terms of rule 146 in the *IAAF Handbook*, protests concerning the result or conduct of an event may be made within 30 minutes of the official announcement of the result achieved in that event. Any protest is made in the first instance to the Referee by an athlete or by someone acting on behalf of an athlete. To arrive at a fair decision, the Referee must consider any available evidence, which may include a film or picture produced by an official video tape recorder. If an athlete in a field event makes an immediate oral protest against having an attempt judged as a foul, the Chief Judge of the event may order that the attempt be measured and the result recorded, subject to the outcome of a protest which may be lodged with the Referee. The Referee may decide on the protest or may refer the matter to the Jury of Appeal established in terms of rule 118. If the Referee makes a decision and an athlete feels aggrieved as a result of his or her decision, a written appeal which is signed by or on behalf of an athlete, may be directed to the Jury of Appeal within 30 minutes of the official announcement of the decision made by the Referee. Significantly, rule 188 expressly states that any decision taken by the Jury of Appeal shall be final, which means that the rules of the IAAF do not provide for any further avenue of recourse if an athlete should feel aggrieved as a result of a ruling by the Jury of Appeal.

Similarly, the FIA rules that govern motor sport contain measures to deal with protests by participants in motor races. In terms of Articles 171 and 173 of the International Sporting Code of the FIA, a competitor may lodge a protest with the clerk of the course or the race stewards. However, Article 176 provides that protests against decisions made by the finish line judges and judges of fact will not be admitted.

In contrast, other sports provide no means for the review of decisions taken by event officials. In Cricket, law 21.10 provides that once the umpires have agreed with the scorers the correctness of the scores at the conclusion of the match, the result cannot afterwards be changed. Similarly, law 5 (a) in Rugby provides that the referee is the sole judge of fact and of law during a match. However, that law significantly also places a duty on the referee to apply the laws of the game fairly in every match. The significance of this obligation will become more evident in the discussion that follows.

The contractual remedies created by sports bodies have received statutory recognition in South Africa. In terms of section 13 of the National Sport and Recreation Act,[22] every sport body must resolve any dispute arising between its members or with its governing body in accordance with its internal procedures and remedies. If the dispute cannot be resolved internally, any member of the sport body concerned who feels aggrieved, or the sport body itself, may submit the dispute to the National Sports Commission, which must decide the matter in a way that best serves the sport concerned. However, the section does not compel any party to refer the matter to the Sports Commission and, since it is presumed that the legislator does not wish to oust the jurisdiction of the courts,[23] a party will not be precluded from approaching the courts directly to resolve a dispute.

3.3 Intervention due to breach of contract

Sport officials are in the business of applying the rules for the carrying out of sport contests.[24] This means that an official is bound, in terms of his or her contract with the relevant sport association (and the participants in that sport), to enforce the rules of play and ensure that they are enforced fairly and consistently. However, this does not mean that it is expected of officials to be perfect and flawless. Officials are bound to make mistakes and, as Lord Bingham LCJ indicated in *Smoldon v Whitworth*,[25] an official

'could not properly be held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast moving and vigorous contest.'

It seems that it is generally accepted as part of any sport that officials will from time to time make mistakes. As long as these mistakes are made honestly and within reasonable bounds, sports people who are adversely affected by such decisions, should abide by them. But if athletes and officials stand in a contractual relationship to each other and to the sport association, what would the legal basis for this acceptance of the occasional erroneous judgment be?

In what has come to be known in English law as the *Moorcock* doctrine, the law draws certain terms from the presumed intention of the parties, in order to give efficacy to a contract.[26] A term can be implied if it is necessary in the business sense to give efficacy to the contract and the officious bystander test is satisfied.[27] In *Reigate v Union Manufacturing Co (Ramsbottom)*,[28] Scrutton LJ indicated[29] that a term can be implied

'if it is such a term that can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: 'Of course so and so will happen; we did not trouble to say that; it is too clear'.'

It is not necessary that the parties should actually have considered the proposed term for it to be implied in their contract.[30] It is sufficient for the implication of a term if the parties would have agreed to the term concerned had their attention been drawn thereto at the time when they concluded the contract.[31] When the parties' answer to the question by the officious bystander is considered, they will be taken to answer as reasonable persons who will not withhold their agreement to the proposed term in an irrational or vengeful fashion.

In the context of mistakes made by officials during sport events, a strong argument can be made for the inclusion of an implied term on the basis of which mistakes will be tolerated within certain limitations. If someone were to ask a participant in a particular event whether he or she expected the officials at that event to be infallible, the participant will most certainly answer: "Of course not. Officials regularly make questionable judgments. It is part of the game and we

18 Van der Walt "Die Hantering van Onbillike Kontraksbedinge in die Verenigde State van Amerika" 1988 *De Jure* 96 107; Schoordijk *Het Algemeen Gedeelte van het Verbintenisrecht naar het Nieuw Burgerlijk Wetboek* (1979) 221; Snijders (editor) *Toegang tot Buitenlands Vermogensrecht* (1996) 462; Hartkamp and Tillema *Contract Law in the Netherlands* (1995) 37 (§19). Herbots *Contract Law in Belgium* (1995) 72 - 73 (§110); Nielsen *Contract Law in Denmark* (1997) 72 (§232); Guest (general editor) *Chitty on Contracts* 27ed (1994) §1-010.

19 Christie (n 18) 406.

20 Christie (n 18) 405 *et seq.*

21 *Davies v South British Insurance Co* 3 SC 416 421.

22 110 of 1998.

23 Kellaway *Principles of Interpretation Interpretation of Statutes, Contracts and Wills* (1995) 191.

24 *Bain v Gillespie* 357 NW 2d 47 49.

25 [1997] ELR 249 CA 256E.

26 Per Bowen LJ in *The Moorcock* 37 WR 439. See also *Lyttleton Times Co Ltd v Warners Ltd* 23 TLR 751; *Midland Ry Co v London & North West Ry Co* 15 WR 34.

27 *Reigate v Union Manufacturing Co (Ramsbottom)* 37 WR 439. See also *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105; *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25; *Avis v Verseput* 1943 AD 331; *West End Diamonds v Johannesburg Stock Exchange* 1946 AD 910; *Graham v McGee* 1949 4 SA 770 D; *Lanificio Varam SA v Masurel Fils (Pty) Ltd* 1952 4 SA 655 A; *Cape Town Municipality v F Robb & Co Ltd* 1966 4 SA 329 A; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 A; *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 D; *Broome v Pardess Co-operative Orange Growers (Est 1900) Ltd* [1940] 1 All ER 603; *Sethia (KC) (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51.

28 1 KB 592.

29 605.

30 Vorster *Implied Terms in the Law of England and South Africa* (1987) PhD thesis, St John's College, Cambridge 161.

31 Vorster (n 31) 50.

have to accept it". In *Shapiro v Queens County Jocky Club*,[32] Pette J stated[33] that

'[w]here there is no charge of bad faith against the stewards, judges, referees or other officials of the sport, it cannot ordinarily be the duty of the court at some remote time to substitute its decision for that of those persons who were actually there at the time and who were specifically charged with the duty of determining the winners.'

This would mean that an official who makes an honest mistake in the course of a sport event, will not be liable for breach of contract as a result of such mistake. To hold otherwise would be to expose officials to boundless liability.

It seems that implied terms, in the sense discussed here, are generally unknown to countries with a Civil law tradition.[34] Greece is a notable exception, where terms which the parties would have stipulated in accordance with good faith and common usages if they had dealt with the matter, may be inferred by supplementary interpretation.[35] In Denmark also, terms which are so obvious that they go without saying, can be implied in a contract.[36] A Belgian court cannot insert new terms into a contract to provide for matters which the parties did not foresee.[37] However, according to Herbots[38] the Belgian courts do occasionally imply a term in a contract when it is required by good faith and Article 1134 of the Belgian Civil Code can be invoked. In terms of Article 6: 258 of the New Dutch Civil Code, a court may modify the effects of a contract in the case of unforeseen circumstances that are of such a nature that the one party cannot, according to the requirements of reasonableness and good faith, expect to keep the other party bound to the contract as it stands.[39]

This means that even in these jurisdictions, the contracts which regulate sport events can be construed to contain unexpressed terms to the effect that mistakes made by event officials will be tolerated to the extent that such mistakes can reasonably be expected and do not constitute a breach of good faith.

However, it is important to note that mistakes by officials will not be acceptable in all circumstances. It has repeatedly been stated that officials will only evade liability *in the absence of fraud or bad faith*.[40] This implies that an official who acts *mala fide* in making an incorrect decision, could and should indeed be liable for breach of contract. *Mala fides* in this context can be manifested in a number of ways, ranging from bribery to unashamed prejudice.

In the Belgian case of *Ancion v ASBL Union Royale Belge des Sociétés de Football Association*,[41] a professional referee had, in two football matches, awarded 5 penalties and handed out a total of 19 yellow and 6 red cards for dubious incidents. The Central Refereeing Committee of the Belgian football authorities found that the referee had failed to comply with his obligations in the performance of his services and terminated the employment of the referee.

3.4 Remedies for breach of contract

If it is accepted that event officials may be held liable for breach of contract if they act in bad faith or grossly unreasonable, the next question would be to determine the nature of the remedy that would be available to the injured party. In South Africa, the remedies that can be applied in cases of breach are a claim for specific performance, an interdict, a declaration of rights, cancellation of the contract and a claim for damages. However, it should immediately seem evident that a particular remedy may not in all circumstances be appropriate.

Specific performance could relate to an order to perform a specified act or pay a certain amount of money in pursuance of a contractual obligation. However, a party will only be entitled to claim specific performance where the other party is in a position to perform.[42] If specific performance would be impossible, a court will not grant an order in that regard. It is not absolute impossibility which is required. Done deals that are in breach of a contractual obligation, are generally not undone for the sake of specific performance.[43] Courts will almost certainly view decisions taken by event officials as done deals that cannot be undone by means of an order for specific performance, with the result that this remedy would not be appropriate to provide redress for incorrect decisions taken by event officials.

On the other hand, if the claim is not aimed at directly challenging the incorrect decision of the official, but rather at the failure or refusal by the appropriate association to comply with or initiate its own internal review procedures, the question of impossibility does not arise and an order for specific performance may well be appropriate. In this case, however, the action is not based on breach of contract on the part of the event official, but rather on the breach of contract on the part of the association concerned.

An interdict is usually the appropriate remedy to stave off impending breach. It is a preventative measure which a party may employ to avoid conduct that would jeopardise performance in terms of a contractual obligation.[44] In those instances where a decision of an event official is challenged, the action has already taken place and a preventative measure, such as an interdict, can serve no purpose. But suppose that there are reasonable grounds to believe that an official will, during a future event, make decisions that are not in accordance with the rules and spirit of the game (such as evidence of bribery or statements that indicate clear prejudice against a participant or team). Would an interdict be an appropriate remedy in such a case? In such a case, an interdict will, in effect, amount to an order not to contravene or ignore the rules of the game. Stated positively, such an interdict would amount to an order to comply with and enforce the rules of the game, which would in effect be an order for specific performance.[45] Consequently, the difficulties associated with the granting of an order for specific performance will also apply in the case of such an interdict. Courts are generally reluctant to grant an order for specific performance if the content of the obligation is imprecise and could lead to lengthy disputes concerning whether or not it has been obeyed.[46] The same will apply to an interdict in terms of which an official is ordered not to contravene or ignore the rules of the game. In most instances of this nature, it could well be nigh impossible to determine whether the official concerned has complied with the terms of the interdict and whether any mistakes that may have been made during the event concerned, were honest mistakes or malicious acts of defiance. The potential for lengthy disputes to result from such occurrences is so great, that courts will in all likelihood refuse to grant an interdict in these circumstances.

A declaration of rights is generally the appropriate remedy to resolve a real and pertinent dispute concerning the rights and duties of parties to a contract.[47] Apart from providing an authoritative statement of the parties position *vis-a-vis* each other, this remedy provides little relief in the case of breach of contract. In particular, in the event where an official may have committed breach of contract, this remedy will provide little assistance to an interested party that may have suffered prejudice as a result of such breach.

If the breach of contract is of a sufficiently serious nature, it may be possible for the injured party to cancel the contract due to such breach. This will usually be the case if the breach goes to the root of the contract, if a party repudiates the contract or if a party renders performance impossible.[48] If the breach of contract affects one in a series of contracts, cancellation of one contract does not necessarily affect the other contracts in the series. Similarly, the various parts of a divisible contract may be treated separately, so that only the effected part is terminated and the other parts remain operative.[49] If one considers the nature of sport contracts, cancellation seems to be an unusual remedy that may not be appropriate in most cases. One

32 53 NYS 2d 135.
33 139.
34 See *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 75.
35 Stathopoulos *Contract Law in Hellas* (1995) 128 (§174).
36 Nielsen (n 19) 113 (§426).
37 Herbots (n 19) 184 (§355).
38 (n 19) 185 (§356).
39 See also Hartkamp and Tillema (n 19) 63 (§51) See further Stathopoulos (n 36) 117 *et seq* (§154 *et seq*) on the position in Greece.
40 *Finlay v Eastern Racing Association* 30 NE 2d 859 861; *Bain v Gillespie* 357 NW 2d 47 49; *Shapiro v Queens County Jockey Club* 53 NYS 135 139.
41 Brussels Labour Court (Interim Relief Division) 20 April 2000.
42 *Thompson v Pullinger* 1 OR 301; *Farmer's Co-op Society (Reg) v Berry* 1912 AD 343.
43 *Shakinovski v Lawson and Smulowitz* 1904 TS 326; *Rissik v Pretoria Municipal Council* 1907 TS 1024; *Wheeldon v Moldenhauer* 1910 EDL 97.
44 Christie (n 18) 617.
45 Christie (n 18) 608.
46 Christie (n 18) 615.
47 Christie (n 18) 624.
48 Christie (n 18) 625 *et seq*.

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would not expect a team or individual to sever all ties with the various governing bodies in a particular sport. But it is not inconceivable that a team may withdraw from a league in protest of a decision by an official which amounts to breach of contract. Similarly, it may occur that a participant in an individual sport may withdraw from an event in the case of such a breach. Provided that the incorrect decision is clearly a case of breach, the team or individual concerned may be fully justified in terminating the contract relating to participation in the league or event concerned, while keeping the other contracts, such as membership of the relevant club, regional, national and international associations, intact.

However, this remedy is fraught with difficulty. The team or individual concerned should be absolutely certain that an actual breach of contract had occurred and that the breach would entitle them to invoke the remedy of cancellation. This may be very difficult to determine, since, as I have already indicated above, mistakes that are made honestly and in the absence of fraud or bad faith, would not constitute breach of contract on the part of the official. If a team or individual should withdraw from a tournament or event as a result of such a mistake, the team or individual concerned may be guilty of breach in the form of repudiation.[50] This would be the case, even if the team or individual concerned honestly believed that a breach had occurred that entitled them to cancellation.[51]

It should also be kept in mind that an official who maliciously makes a wrong decision, stands not only in a contractual relationship with the participants, but also with the relevant club or association. Breach of contract, therefore, does not only concern the participant who is directly affected by the decision, but also the club or association. As a result, the club or association may be justified in terminating its contractual relationship with the official concerned, thereby terminating the official's authority to adjudicate competitions in that particular sport. In professional sport, where officials are also paid for their services, it may not be as simple as merely cancelling the contract in terms of which a person is entitled to act as official in a particular sport. In such a case, the rules of labour law will invariably apply, so that the relevant procedures for dismissal on the grounds of misconduct, should be complied with.

In South Africa, dismissal on the grounds of misconduct calls for substantive fairness, as well as procedural fairness. In the case of substantive fairness, the main question is whether or not dismissal is an appropriate penalty for the misconduct concerned. The Code of Good Conduct in Schedule 8 to the Labour Relations Act[52] advocates a system of progressive discipline. Item 2(5) of the Code provides that when an employer has to decide whether or not to impose dismissal as penalty, the employer should, in addition to the gravity of the misconduct, consider factors such as the employee's circumstances, the nature of the job and the circumstances of the infringement itself. Item 7 (b) (iv) of the Code also states that an employer should consider whether or not dismissal is an appropriate sanction for the contravention of the rule or standard concerned. Another issue that should be taken into consideration, is the so-called parity principle. The courts require the equal treatment of similarly situated employees. However, it is recognised that an employer may justify a differentiation due to the personal circumstances of the employees (e.g. their length of service and disciplinary records)[53] and the merits (e.g. the role played in the commission of the misconduct).[54] In *SACCAWU v Irvin & Johnson*[55] the Labour Appeal Court held that discipline should not be capricious and that consistency is, therefore, simply an element of disciplinary fairness, but not a rule in itself.[56]

In the Belgian case of *Ancion v ASBL Union Royale Belge des Sociétés de Football Association*,[57] a football referee who had been dismissed by the Central Refereeing Committee of the Belgian football authorities, challenged the decision before the Interim Relief Division of the Brussels Labour Court. The judge decided that there was some doubt as to the actual legality of the disciplinary sanction. However, since the disciplinary measure implied the termination of a contractual relationship, the interim relief judge was powerless to order reinstatement on the list of referees. The termination of the contract, even if it was unlawful, could be resolved only as a matter of damages. The application was therefore rejected. The parties eventually resolved the matter amicably and the referee was reinstated.

Another contractual remedy that is generally available to a party who may have suffered prejudice as a result of a malicious decision by an official, is a claim for damages. Bad decisions by officials could have varied effects on participants, ranging from cases where no patrimonial loss may occur, to extreme cases where the entire career of an individual participant may be ruined, with resulting losses running into millions of dollars. Bad decisions by officials can also have various effects on the patrimonial position of clubs and associations, ranging from loss of income due to reduced spectator attendance and diminished sale of branded merchandise, to losses due to the forfeiture of an event, such as a cup final, that may have been staged by the team had it not been for the bad decision.

In the Belgian case of *Lyra v Marchand and others*[58] a referee was ordered to pay damages in the amount of 100,000 Belgian Francs to Lyra Football Club resulting from an incorrect decision during a match between Lyra and Rita Berlaar Football Club, which led to the eventual elimination of Lyra from the Belgian Cup. The two third division clubs played against each other and, after the regulation 90 minutes of play, the score was drawn at one all. In such a case, the rules provided for two 15-minute periods of extra time to be played. If the score was still tied after extra time, a penalty shootout would decide the result. The referee made a mistake and decided to move straight to a penalty shootout, which was won by Lyra. Rita Berlaar filed a complaint and the competent Sports Committee decided, pursuant to article 21.1 of the Belgian Cup Regulations, to draw lots. Rita Berlaar won the draw, and was thus able to go into the next round of the Belgian Cup. The court found that the referee was guilty of negligence in the meaning of article 1382 of the Belgian Civil Code. As a professional, he should have known that extra time should have been played first and then, if necessary, a penalty shootout should have been held to determine the winner.

Where damages are claimed on the grounds that a bad decision amounted to breach of contract on the part of an official, the main issue to determine would be whether the injured party would be entitled to claim the particular kind of damages. In general, any patrimonial loss which is suffered as a result of breach, can be claimed from the guilty party, provided that the damages are of a nature that would usually be expected as a result of a particular kind of breach or the nature of the damages would have been foreseeable at the time when the contract was concluded. Damages for breach is normally awarded based on the positive interest of the injured party. This means that the loss suffered is calculated, based on the hypothetical position the party would have been in, had the contract been properly complied with, in so far as this can be done by the payment of an amount of money, without causing undue prejudice to the party in breach.[59] A party may claim damages for loss which he or she may already have suffered, as well as damages which may be expected in future. On this basis, one could conclude that losses, such as prise money that may have been forfeited and loss of future earnings can be recovered in the case of breach. Similarly, loss of income due to reduced spectator attendance can also be claimed. On the other hand, in *Bain v Gillespie*[60] the court indicated[61] that

'[r]eferees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others.'

49 Christie (n 18) 628 - 629.
50 Christie (n 18) 600 *et seq*.
51 Christie (n 18) 602.
52 66 of 1995.
53 *Early Bird Farms (Pty) Ltd v Mlambo* 1997 5 *BLLR* 541 (LAC).
54 *NUM v Council for Mineral Technology* 1999 3 *BLLR* 209 (LAC) and *Mabinan & others v Baldwins Steel* 1999 5 *BLLR* 453 (LAC).
55 1999 20 *ILJ* 2302 (LAC).
56 See also Smith "Labour Law and Sport" paper presented at a conference on Sport and the Law hosted by the Centre for Sport Law and the Faculty of Law at the Rand Afrikaans University on 7 and 8 September 2000.
57 Brussels Labour Court (Interim Relief Division) 20 April 2000.
58 Malines Court of First Instance, 8 February 2001.
59 *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22.
60 357 NW 2d 47.
61 49.

This proposition, which seems sound, could be interpreted to mean that losses which result from diminished sale of branded merchandise, may be too remote to claim. On the other hand, modern professional sport has become a complex business so that one could indeed argue that diminished sale of branded merchandise would have been a foreseeable consequence of breach on the part of an official. This is even more so if one takes into consideration that an official will only be liable for breach of contract in the case of wrong decisions that are made in a malicious way. Although this could potentially open the door to limitless liability for damages resulting from breach of contract, the nature and extent of damages that will be awarded by court, will be restricted by two factors. Firstly, the principle of privity of contract applies, so that only those persons who stand in a contractual relationship with the errant official will be entitled to institute a claim for damages due to breach of contract.[62] Secondly, the party who claims damages bears the burden, not only to prove the nature and extent of the loss, but also the causal connection between the breach of contract and the loss suffered or anticipated. An injured party who claims damages may find it very difficult to prove the extent to which the bad decision may have contributed to his or her loss. This will particularly be the case where the damages claimed relate to loss of sales or loss of future earnings.

In South Africa, the contractual remedy of damages is limited further, in that it does not cover the awarding of compensation for non-patrimonial loss, such as physical injury, injured feelings or injury to reputation. A participant who suffers physical injury or impairment of personality as a result of breach, may have a claim in delict or tort if all the requirements in that regard are met, but the law of contract generally does not provide for compensation in such cases.

3.5 Conclusion

Apart from claiming damages as a result of breach of contract, it is clear that the remedies for breach of contract are mostly inappropriate to redress the situation where an official commits breach of contract by maliciously making wrong decisions during a sport event. Even in the case of damages, the impugned decision is not overturned, which means that it, and the result achieved as a consequence of that decision, stands.

4. Intervention based on administrative law

4.1 General

Although participation in sport and membership of sport clubs and associations are generally voluntary private relationships, courts in various countries have for some time recognised that members of private organisations, such as sport clubs and associations, often have little choice over the terms of their agreement with the clubs or associations and even less control over the management of the club or association. As a result, the courts in those countries have been prepared to apply the rules of administrative law to such clubs or associations.

In South Africa, the courts have in a number of cases been willing to apply principles of administrative law to the private relationships which exist in the sport environment.[63] According to Barrie,[64] the relationships within private bodies, such as sport clubs and associations, may be founded on contract, but since these bodies are in a position to act just as coercively as public authorities, the common law principles of administrative law apply to these private bodies just as they do to organs of state. In principle, therefore, if the common law requirements for judicial intervention are met, South African courts may be willing to intervene in matters that relate to the playing of a game.

Not surprisingly, most of the cases in which South African courts have been willing to intervene, have involved the sport of horse-racing, which has until the last decade or so been one of the few professional sports in South Africa and the only one in which gambling has been lawfully permitted. All these cases related to decisions taken by disciplinary tribunals. There are no reported cases in which matters that relate to the playing of a game, have been brought before the courts.

German courts have also applied various articles of the German Civil Code to justify judicial intervention in the affairs of sport associations. According to Wise and Meyer,[65] German courts will even review matters that relate to the playing of a game, such as manipulation of a result.

In the United States as well, courts have been willing to accept that

'the principle of judicial noninterference set forth in the law of voluntary associations was not strictly applicable, noting that NASCAR was a for-profit company that completely dominated the field of stock car racing and that its members have no rights whatsoever with respect to the internal governance of the organisation.'[66]

English law is a notable exception in this regard, as the courts have repeatedly refused to apply principles of administrative law to the private relationships which exist in the sport environment.[67] In *Law v National Greyhound Racing Club Ltd*,[68] the court held that judicial review procedures were not applicable to private sport bodies.[69] Lord Denning MR explained in *Enderby Town Football Club v The Football Association*[70] that

'[j]ustice can often be done in domestic tribunals better by a good layman than by a bad lawyer. This is essentially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game.'

This statement, coming from one of the most highly regarded and respected of the English law lords, is surprisingly unconvincing and, in fact, inaccurate. In the first instance Lord Denning MR errs since, in English law, proper interpretation of a document is regarded as a question of law.[71] Whenever a sport body has to apply its own rules, it does not do so in a legal vacuum. It inevitably has to interpret its own rules and apply it to the facts of the matter concerned. Consequently, decisions of sport bodies will always include points of law and fact that will have to be decided. Secondly, even a bad lawyer will make better decisions than a bad layman. By simply focussing on the comparison between a bad lawyer and a good layman, he seems to be clouding the issue. What his lordship is probably trying to convey, is the idea that a lay person with extensive experience in the administration of a particular sport, is usually in a better position to decide an issue emanating from that sport, than a lawyer who is ignorant of the intricacies involved in that sport. With this proposition, there can be little fault, but it should be kept in mind that lay people are sometimes prone to making grave mistakes in law. If this happens, the injured party should be entitled to some form of redress. English courts seem to have held the view that disputes concerning decisions taken by sport bodies, are contractual in nature and the ordinary remedies for breach of contract should be applied where appropriate.[72] However, as I have indicated above, the contractual remedies may not provide satisfactory results in these circumstances.

An important requirement that must generally be met before a court will intervene on the basis of administrative law, is that internal

62 *Bain v Gillespie* 357 NW 2d 47; *Sinclair v Cleary* 1946 StR Qd 74.

63 *Marlin v Durban Turf Club* 1942 AD 112; *Jockey Club of South Africa v Transvaal Racing Club* 1959 1 SA 441 A; *Balomenos v Jockey Club of South Africa* 1959 4 SA 381 W; *Elsworth v Jockey Club of South Africa* 1961 4 SA 142 W; *Bekker v Western Province Sports Club* 1972 3 SA 803 C; *Turner v Jockey Club of South Africa* 1974 3 SA 633 A; *Carr v Jockey Club of South Africa* 1976 2 SA 717 W; *Middelburg Rugby Klub v Suid-Oos Transvaalse Rugby Unie* 1978 1 SA 847 T; *Barnard v Jockey Club of South Africa* 1984 2 SA 35 W; *Natal Rugby Union v Gould* 1998 4 All SA 258 A.

64 "Disciplinary Tribunals and Administrative Law" paper presented at a conference on Sport and the Law hosted by the Centre for Sport Law and the Faculty of Law at RAU on 7 and 8 September 2000.

65 *International Sports Law and Business Volume 2* (1997) 1186.

66 *Crouch v National Association for Stock Car Auto Racing* 845 F 2d 397 400.

67 Grayson and Hill *Sport and the Law* (2000) 386 *et seq*.

68 [1983] 3 All ER 300 CA.

69 See also *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853 AC.

70 [1971] 1 All ER 215 CA.

71 *Halsbury's Laws of England Volume 9* 4ed (1974) 357 (§516 note 1); Lewison *The Interpretation of Contracts* (1989) 52 (§3.01); Cross and Tapper *Cross on Evidence* 7ed (1990) 161. See also *Neilson v Harford* 151 ER 1266; *Berwick v Horsfall* (1885) 4 CBNS 450; *Hill v Evans* [1862] De GF&J 288; *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1892] 1 QB 79; *Brutus v Cozens* [1973] AC 854; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1958] 2 All ER 368.

72 Grayson and Hill (n 66) 387.

remedies should first be exhausted before recourse is taken to the courts. This means that a party who feels aggrieved as a result of a bad decision made by an official or a tribunal, should first make use of those dispute resolution procedures that are set out in the rules of the sport concerned. Courts will, as a general rule, not entertain a matter in the first instance if the injured party could have resolved the matter by other means, unless it is patently clear that the internal remedies would be ineffective or would cause undue delay in resolving the matter.

4.2 Intervention in decisions of officials

There are no cases reported in South Africa in which a decision by an official had been challenged. However, an interesting analogy was drawn in *Beit v Frank Thorold (Pty) Ltd*,[73] a case in which the court had to adjudicate a dispute which had arisen at an auction. Blieden J concurred[74] with the view expressed by counsel, which described the function of the auctioneer

'as being similar to that of an umpire in a cricket match.'

He described an auction as a form of competitive bargaining, aimed at creating, in accordance with certain rules, a contract of sale. The rules are the conditions of sale that are framed by the seller and represent the terms upon which he or she is prepared to submit the property to competition. His Lordship referred to these rules as the rules of the game that bind all the players.[75] The players are the auctioneer and all those who bid at the auction.[76] Blieden J explained,[77] much as Lord Bingham LCJ had done in *Smoldon v Whitworth*,[78] that

'the auctioneer ... had to come to an instant decision. He had to decide whether there was an overlooked bid or there was not. He thereafter had to decide what he would do with the bid if he accepted that he had overlooked a bid. There was no time to lodge a full investigation of what had occurred. A decision had to be made instantaneously.'

According to the conditions of sale that applied in respect of the auction concerned, the auctioneer had an absolute discretion to resolve disputes. However, it was contended that an absolute discretion should not be absolute in the sense that there can be no appeal from it.[79] Blieden J drew[80] a distinction between 'absolute discretion' and merely 'discretion' as such. The former entails the exclusion from interference of anything but the exercise of such discretion in bad faith, while the latter implies the exercise of a reasonable discretion.

The issue has also received attention in the United States. Although the matter was brought before the courts after an internal enquiry had been conducted, the Second Circuit of the United States Court of Appeals, in *Crouch v National Association for Stock Car Auto Racing*[81] faulted the court *a quo* for delving into the rulebook and deciding *de novo* whether a disqualification had been appropriate in the circumstances. The court indicated[82] that sport associations possess considerable expertise in the conduct of their particular sport on which they may rely in the interpretation and application of their rules. Courts are generally unfamiliar with the standards that are applied in any particular sport and should decline attempts to have them act as officials for sport. The court saw the solution to improper officiating in pressure brought on officials by participants, rather than individual challenges in court which seek to undo bad decisions.[83] However, the court made it clear that these principles would only apply in the absence of bad faith.[84]

Both the *Beit* and *Crouch* cases[85] left the possibility that a court may be willing to intervene in the case of bad decisions that are made maliciously and in bad faith. In fact, in *Wellington v Monroe Trotting Park Co*,[86] the court was willing to intervene where a horse had won a race, but one of the judges had separately told each of the other two judges that he and the third judge had concluded that another horse had won. As each of the other judges believed that the majority of them had concluded that the other horse had won, they agreed that the other horse would be declared the winner. The court held that a decision which had been induced by fraud, should not be allowed to stand.[87]

Even if courts may be willing to intervene in cases of bad decisions that are made maliciously and in bad faith, it should be a rare occurrence for such disputes to end up in court. In most instances, I expect that such disputes will be dealt with and resolved internally by the sport association concerned.

4.3 Intervention in contractual dispute resolution procedures

As I have indicated earlier, sport clubs and associations are generally at liberty to provide their own procedures in terms of which decisions by officials can be challenged. These procedures range from protests directed to individual adjudicators, to appeals before appeal tribunals. While judicial intervention based on administrative law, in decisions of officials at a sport event is still uncertain and controversial, courts in various jurisdictions have been willing to entertain actions brought in response to decisions made in the course of dispute resolution procedures for which the rules of a particular sport provide. In most countries, it has been accepted that private tribunals, even if constituted only of one adjudicator,[88] such as those often found in the context of sport, are to some extent subject to the rules of administrative law. In *Jockey Club of South Africa v Feldman*,[89] the court held[90] that

'no statutory provisions come into play; it is a case of agreement to be bound by certain rules, namely the rules of the Jockey Club. Though these rules do not state expressly that the decision of race-meeting stewards in regard to the conduct of a jockey in riding a horse shall be final, in my view they imply that, subject to the right of appeal to the local executive stewards and the Head Executive Stewards, such decision shall be final as regards the merits of questions enquired into, and that as regards such merits the jurisdiction of Courts of law to interfere with action taken in accordance with such decision shall be excluded. The exclusion of the Courts of law on the merits is not contrary to public policy and our Courts have recognised that the decisions of such tribunals on the merits are final; but if the tribunal has disregarded its own rules or the fundamental principles of fairness, the Courts can interfere.'

Similarly, in *Carr v Jockey Club of South Africa*,[91] the court held[92] that

'[t]he Court will not interfere on review merely because the decision was unwise or one which the Court itself would not have come to. Interference is in essence only justified if there was a failure to properly exercise the conferred ... discretion.'

Consequently, the courts generally do not see themselves as appellate bodies that would adjudicate on the substantive fairness of decisions taken by domestic tribunals. They have rather seen their role as that of review, in which the court will determine whether principles of procedural fairness have been complied with. However, the distinction between process and substance is not watertight and an awareness of procedural unfairness is often triggered by an awareness of substantive unfairness.[93]

In the first instance, courts will generally look towards the terms of the contractual relationship to determine whether a discretion has been properly exercised. The terms of such a contract are generally constituted by the rules of the club or association concerned. As long as the rules of the club or association had been complied with, courts have generally refused to intervene in decisions taken by tribunals established in terms of such rules.[94]

In the past, courts have tended to dismiss applications where the

73 1994 4 SA 457 W.
74 468A.
75 *Estate Francis v Land Sales (Pty) Ltd and others* 1940 NPD 441 457.
76 462F - G.
77 470G.
78 [1997] ELR 249 CA 256E.
79 470D.
80 470F.
81 845 F 2d 397 402 - 403.
82 402.
83 403. See also *Koszela v National Association for Stock Car Auto Racing* 646 F 2d 749 756.
84 403.
85 *Supra*.
86 90 Me 495.
87 Weistart and Lowell (n 12) 155 - 156.
88 *Carr v Jockey Club of South Africa* 1976 2 SA 717 W 723F.
89 1942 AD 340. Cited with approval in *Turner v Jockey Club of South Africa* 1974 3 SA 633 A.
90 350 - 351.
91 1976 2 SA 717 W.
92 720G.
93 Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 59.
94 *Carr v Jockey Club of South Africa* 1976 2 SA 717 W 720G.

rules have been complied with, even if the courts had found the rules to be unjust or unfair.[95] Principles of fairness and justice with which public tribunals would normally have had to comply, were found not to apply to private tribunals if their rules contained provisions that were contrary to these principles of justice. In this regard, courts have refused to intervene where prior notice and further particulars concerning charges of misconduct had not been given,[96] all the relevant evidence had not been considered,[97] members of a tribunal had personally observed the incident at issue before the tribunals[98] and one person acted as member of a tribunal while also testifying before the same tribunal.[99] In all these cases, the seemingly irregular conduct was tolerated as the rules in terms of which the tribunal functioned, allowed for such eventualities.

4.4 Conclusion

In most jurisdictions, the principles of administrative law have been made applicable to sport. As more and more money is spent in and on sport, the pressure on courts to hold sport administrators bound to the rules of administrative law, will increase.

5. Liability in tort or delict

5.1 General

Another question which arises, is whether and to what extent a referee who makes an incorrect decision in a sport event, can be held liable for loss, damage or injury which result from such a decision.

5.2 Liability for injury to participants

In most legal systems today, it is accepted that the officials at a sport event have a certain duty of care towards the participants in that sport. This means that an official may be liable for injuries sustained by participants if the official is found to have neglected this duty of care.

In the English case of *Smoldon v Whitworth*,[100] a rugby referee was held liable for inadequate control of an under 19 rugby match. The referee constantly allowed the scrums during the match to collapse and, in so doing, failed to apply the laws of rugby in so far as they applied safety in scrums for under 19 players. In particular, he failed to apply the crouch-touch-pause-engage procedure which had been recommended by the Staffordshire Rugby Union Society of Referees, which had also warned that referees would face liability for injuries if those procedures were not followed. The referee also ignored warnings from one of the touch judges and some of the spectators, as well as complaints by players that the situation was getting dangerous and out of hand. One of the front row forwards were eventually injured and paralysed as a result of a collapsed scrummage. He instituted a claim based on personal injury against the referee and succeeded. According to Griffith-Jones,[101] the court correctly held that a referee owed a duty of care to the players, but the facts of this case were extreme, so that referees will not be liable for every injury sustained on the playing field.

The courts were again faced with a similar question in the case of *Vowles v Evans and another*.[102] The claimant was injured while playing as hooker for Llanharan Rugby Football Club in a rugby match refereed by the first defendant. There had been a lot of rain before the match and the field was boggy. Approximately 30 minutes into the match, one of the Llanharan front row forwards dislocated his shoulder and left the field as a result. There was, however, no front row forward on the reserve bench to replace the injured player and the referee was informed accordingly. The referee then informed the captain of Llanharan that they could opt for uncontested scrums,[103] in which case they would forfeit the points in the league competition in respect of that match. Rather than opt for uncontested scrums, one of the Llanharan flankers, who had years earlier at a lower level occasionally played a few matches at front row, offered to scrum at front row. The referee agreed to this course of action without any further enquiry or consultation and the game continued. After that replacement, the scrums were plagued with collapses and disruptions as the front rows struggled to engage properly. Towards the end of the match, Llanharan held a 3-0 lead over rivals Tondu. However, Tondu launched an attack which culminated in a scrum being awarded 5 metres from the Llanharan try line. The Tondu forwards aimed for a push-over try to clinch the match in the last seconds. The two packs of forwards did not engage properly for the scrum and the referee blew the whistle for them to break up. At that point, the claimant collapsed with what was clearly a serious injury. The referee ended the match and an ambulance was called. It transpired that, because of incorrect binding in the final scrum, the claimant's head had been thrust against the shoulder of one of the Tondu forwards. As a result, the claimant sustained an injury to his neck which left him with permanent incomplete tetraplegia. The court held that a referee owes a duty of care towards players and found that the referee in this case had abrogated his responsibility on two counts. Firstly, the referee should have conferred with the captain of Llanharan to determine whether another player was suitably trained or experienced to play at front row as directed under law 3 (12) of the Laws of Rugby. Secondly, the referee should not have allowed the Llanharan players to decide whether or not they would opt for uncontested scrums. In this regard, it is significant that law 6 (5) of the Laws of Rugby provide that

'[d]uring the match, the referee is the sole judge of fact and of law. All his decisions are binding on the players...'

As a result, the court held that the referee was negligent in his handling of the match and in breach of his duty of care.

5.3 Liability towards third parties

The next question to consider with regard to incorrect decisions taken by sport officials, concerns the official's liability toward third parties who may suffer loss as a result of such an incorrect decision. Such losses may result from various causes and could be manifested in various ways. Traders who sell branded merchandise may experience a reduction in sales or punters may loose not only the amount they wagered on an event, but also the lucrative pay-outs which result from an accurate prediction of the final result.

In *Bain v Gillespie*,[104] the Iowa Court of Appeals held[105] that, in the absence of corruption or bad faith, an official who makes a decision at a sport event, does not generally foresee that third parties may suffer loss if he or she should make an incorrect decision. Consequently, an official will not generally be liable to third parties for loss or damage which they may suffer as a result of an incorrect decision. While it could well be imagined that third parties may suffer loss as a result of a bad decision by an official, loss to third parties does not generally comply with the requirement of foreseeability of harm or probability of injury.[106]

5.4 Vicarious liability

Another question which arises, is whether and to what extent the relevant club or association may be liable for decisions taken by event officials. Is there, arising from the contract between the club or association and the participants or on any other grounds, an obligation concerning the competency of an official on the club or association? In the Australian case of *Sinclair v Cleary and others*,[107] the court refused to impart vicarious liability for wrong decisions of an official on the club which appointed the official. It would seem as if the court

95 *Bekker v Western Province Sports Club (Inc)* 1972 3 SA 803 C; *Carr v Jockey Club of South Africa* 1976 2 SA 717 W; *Barnard v Jockey Club of South Africa* 1984 2 SA 35 W.

96 *Bekker v Western Province Sports Club (Inc)* 1972 3 SA 803 C.

97 *Bekker v Western Province Sports Club (Inc)* 1972 3 SA 803 C.

98 *Marlin v Durban Turf Club and others* 1942 AD 112.

99 *Marlin v Durban Turf Club and others* 1942 AD 112.

100 1997 ELR 115. Upheld on appeal: 1997 ELR 249.

101 *Law and the Business of Sport* (1997) 23.

102 [2003] 1 WLR 1607 (CA).

103 Law 3 (12) of the Laws of the Game, as issued by the Council of the International Rugby Football Board provides, *inter alia*, that "[w]hen there is no other front row forward available due to a sequence of players ordered off or injured or both, then the game will continue with non-contestable scrummages which are the same as normal scrummages except that: there is no contest for the ball; the team putting in the ball must win it; neither team is permitted to push...".

104 357 NW 2d 47.

105 49.

106 *Bain v Gillespie* 357 NW 2d 47 49.

107 1946 StR Qd 74.

viewed the official as an independent contractor,[108] rather than an employee of the club. Similarly, in the case of *Lyra v Marchand and others*[109] a Belgian court refused to hold the Belgian football authorities liable where the court found that a referee was guilty of negligence when, in a match drawn after regulation time, the referee had failed to allow the prescribed extra time but moved directly to a penalty shootout to determine the result of a football match. However, in *Vowles v Evans and another*[110] it was accepted that the Welsh Rugby Football Board was vicariously liable for an injury sustained by a player as a result of negligence on the part of a referee.

In South Africa, the English law principle of vicarious liability has been adopted, which means that a sport club or association will be liable for delicts committed by officials if certain requirements are met. Firstly, there should have been an employer-employee relationship between the club or association and the official at the time when the delict was committed and, secondly, the official should have been acting in the course of his or her duties when the delict was committed.[111] As sports people become more professional, officials are also being appointed and remunerated in a way that seems to create employer-employee relationships between the club or association and the officials of the sport. As a result, the club or association could be liable for injuries sustained by participants when the officials do not perform their functions properly.

5.5 Conclusion

As long as an official makes an honest attempt at enforcing the rules and looking after the safety of participants, such an official should not be liable if participants do get injured or even killed. An official will only be liable to a participant in the event of gross negligence on his or her part, when the action or inaction by the official is so unsatisfactory that no reasonable official would tolerate such action or inaction. However, it seems that loss suffered by third parties is too remote and that officials will not generally be liable for such loss.

6. Criminal liability

6.1 General

If it is accepted that a referee has a legal duty to ensure the safety of participants within reasonable limits, one has to question whether a referee could be held criminally liable if he or she should fail to comply with that duty. While most legal systems rarely provide for criminally liability in respect of injuries to others that are caused negligently, people who negligently cause the death of others are generally held liable on the basis of culpable homicide or involuntary manslaughter.

While there are, as far as I could establish, no reported case in which a referee had been held criminally liable where failure to enforce the rules of the sport had resulted in the death of a participant, the approach of the courts in *Smoldon v Whitworth*[112] and *Vowles v Evans and another*[113] gives a clear indication that those courts would in a criminal case, in all likelihood, have found the referee guilty of culpable homicide if the injuries to the player concerned had been fatal. One can also imagine that a boxing referee, who allows a grossly one-sided contest to continue round after round, could be charged with and found guilty of culpable homicide if a boxer should die as a result of injuries sustained in the ring.

6.2 Conclusion

It is very rare indeed for officials to be held criminally liable for making incorrect decisions at a sport event. As in the case of delictual liability, an official who makes an honest attempt at enforcing the rules and looking after the safety of participants, should not be liable if participants do get killed in the course of an event.

7. Summary

As I have indicated above, the question whether judicial or other intervention in decisions taken by an official at a sport event is possible, is more complex than a simple "yes" or "no" would permit. In all instances, it seems clear that honest mistakes by officials are both expected and accepted. Officials who act reasonably, honestly and in good faith, should not have to fear legal action. However, it is equally clear that officials who act in bad faith or in a way that is grossly unreasonable, may have to answer to the courts.

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108 77, 78.
109 Malines Court of First Instance, 8 February 2001.
110 [2003] 1 WLR 1607 (CA).
111 Neethling, Potgieter and Visser *Deliktereg* 3 ed (1996) 362 *et seq*.
112 1997 ELR 115. Upheld on appeal: 1997 ELR 249.
113 [2003] 1 WLR 1607 (CA).

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Team Sport and the Collective Selling of TV rights: The Netherlands and European Law Aspects

by **Marjan Olfers***

"The upshot is that when the integration is essential if the activity is to be carried out at all,
the integration and restraints that make it efficient should be completely lawful."[1]

1. Introduction

In the Netherlands, tempers regularly flare in connection with the issue of TV rights in sport. The launch and subsequent illustrious demise of the sports channel "Sport 7" have, for example, not gone unnoticed.[2] After the sports channel's defeat, premier league club Feyenoord, as the flag bearer and spokesman of the clubs, trained its arrow on the Dutch football federation (*KNVB*). The outcome of a drawn-out trial had to provide a definitive answer to the question who may lawfully exploit the TV rights. This was done recently (May 2003) by the Dutch Supreme Court (*Hoge Raad*).[3] Weaving in and out of the issue is the Dutch Competition Authority (*NMa*) with its view of the competition law component of the problem. Under the headline "*NMa* prohibits the joint exploitation of broadcasting rights of live matches in the football premier league" it goes into battle against the collective selling of TV rights.[4]

This *NMa* decision has meanwhile also reached politicians in The Hague and has not left them indifferent. "Anyone who wants football clubs to go into liquidation soon, or local authorities to have to come to the rescue again or endanger public order, should let the *NMa* proceed unchecked" said an MP for the parliamentary party *Groen Links*. The fear this Dutch MP voiced is probably caused by the fact that income from TV rights was until recently exploited by the clubs and the *KNVB* jointly (termed "collective selling"). The sum was subsequently divided according to a certain distribution code among both premier league clubs and first division clubs. It is expected that the individual selling of TV rights will cause the gap between major and minor clubs in the national competition to widen.[5] The *NMa* was subsequently urged in its decision on the objections lodged by *Eredivisie NV* to review the prohibition of the joint exploitation of live matches in premier league football, especially now that the European Commission has decided to allow an exception to the prohibition on cartels in the UEFA case based on Article 81(3) EC.[6]

For it is a fact that TV rights in sport are now quite definitively on the European agenda and have been for a while.[7] The item: "Commission approves new UEFA policy concerning the sale of TV rights to champion's league matches"[8] made the front pages of European newspapers. The Dutch Competition Authority did not regard the European decision as sufficient reason to reconsider its decision. "Due to factual differences", the UEFA regulations are no basis for comparison, the *NMa* claimed.[9]

In addition to the decision concerning the UEFA, the European Commission announced through a press release that it intends to exempt the marketing system for broadcasting rights to *Bundesliga* football from the prohibition on cartels.[10] All the more reason for a further examination of both the European law issues and the Dutch issues in correlation.

2. Prohibition on cartels

Prohibition on cartels in general

Competition law generally aims to ensure conditions under which the game of supply and demand in the market can function optimally. Competition law starts from the principle that in order to optimise the functioning of the free market, undertakings should be able to make decisions freely and in mutual competition.

The prohibition on cartels is laid down in Article 81 EC and in Article 6 of the Dutch Competition Act (*Mededingingswet* or *Mw*). All "agreements between undertakings" or "decisions by associations of undertakings" or "concerted practices" which have as their object or effect "the prevention, restriction or distortion of competition" are legally prohibited when they "affect trade between Member States", according to Article 81 EC and where the Dutch market (or a part thereof) is concerned, according to Article 6 *Mw*. Article 6 *Mw* is nearly identical to Article 81 EC.

Collective selling

Collective selling, by the clubs and the federation together, is presumed to restrict market forces, as no competition exists between the clubs mutually and fewer matches are broadcast than would be the case in free market conditions. In short: output is limited, prices are forced up (known as horizontal effects) and the market position of the main broadcasting undertaking(s) is reinforced (known as the vertical effect).

Exclusive selling

In addition to collectivity, competition law problems are compounded by what is known as exclusivity. The supplier grants one single broadcaster the right to broadcast the game or games. In respect of exclusivity, the European Commission in its Competition Policy Newsletter of 1998 said: "Exclusivity is an accepted commercial practice in the broadcasting sector. It guarantees the value of a programme, and is particularly important in the case of sports, as a broadcast of a sports event is valuable for only a very short time. Exclusivity for limited periods should not in itself raise competition concerns. (...)"[11] Only exclusivity agreed to for a longer period of time is on a tense footing with the prohibition on cartels, as this practice can lead to "market foreclosure".[12]

Prohibition of collective exclusive selling?

Collective selling and exclusivity entered into for a longer period of time in relation to the abovementioned competition-restricting effects

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1 RobertH. Bork, *The antitrust paradox: a policy at war with itself*, The Free Press, 1978, new introduction and Epilogue 1993, p. 279.

2 The KNVB sold the exclusive broadcasting rights for the national competition over a period of seven years to the newly established channel "Sport 7". The channel ceased its activities.

3 *HOGE RAAD* 23 May 2003, Koninklijke Nederlandse Voetbalbond v Feyenoord, Case AF4607 no. C01/255 *HOGE RAAD*.

4 *NMa* press release of 19 November 2002, Case no. 18 1162 further to the decision concerning the *Eredivisie NV*, Case no. 18/105 and 1162/14.

5 That this prognosis is close to the truth is made evident by a similar situation in the Spanish competition. There, "only" twelve clubs were individually able to conclude a television contract. The remaining eight clubs in the Primera Division and 22 clubs from the second division were less fortunate and demanded a "guaranteed minimum price" for the TV rights. The minor Spanish football clubs were already threatening to go on strike if the negotiations with the "rich" clubs would not lead to a satisfactory outcome. NRC-Handelsblad, *Kleine Spaanse voetbalclubs gaan staken*, 23 August 2003.

6 30 July 2003, *NMa* press release, Explanation of the decision on the objection in case 18/1162 *Eredivisie*.

7 Karel van Miert, Mijn jaren in Europa, p. 165.

8 IP/03/1105, 24 July 2003

9 30 July 2003, *NMa* press release, Explanation of the decision on the objection in case 18/1162 *Eredivisie*

10 European Commission, New marketing system for Bundesliga broadcasting rights, IP/03/1106, 24 July 2003.

11 European Commission, Broadcasting of sports events and competition law. Competition policy newsletter 1998, no. 2, June, III.2.

12 Concerning exclusive rights cf. Hazel Flemming, Exclusive Rights to Broadcast Sporting Events in Europe, E.C.L.R 1999, p. 143-148.

seem to be headed straight for the automatic voidness of the agreement under Article 82(2) EC or Article 6(2) Mw.[13] For in addition to the alleged competition-restricting acts referred to above, clubs and federations as undertakings or associations of undertakings fall within the scope of both the European and the Dutch competition rules.[14]

And so it happened that the European Commission objected to the *original* collective marketing system of the UEFA and the Dutch Competition Authority in 2002 prohibited the joint exploitation of broadcasting rights to *live matches* in premier league football.[15]

3. Special characteristics of the sports sector

Community level and the recognition of special characteristics

At the Community level "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" are recognised.[16] All these worthy aims mostly concern the *non-economic* side of sport, while competition law by contrast is concerned with the distribution of material wealth. Or, in the words of the European Commission: "... there must be a clear separation between sports regulation and the commercialisation of sports".[17] Within the European Community, attention is further paid to the special character of sport, more in particular, the interdependence between competitors and the need to ensure the unpredictability of competition results. For, as opposed to other undertakings in commerce, the match and the competition cannot be realised without the preparedness of other horizontal competitors (in team sports these are the clubs, in individual sports, the athletes) to compete with each other. [18] This necessary interdependence of the clubs is a direct result of the trial of strength under equal conditions between the parties in the game of competing, as an essential characteristic of organised competitive sport.[19] In competition law terms: horizontal restraints on competition are essential if the product is to be available at all.

It is also important to note that the number of spectators on the demand side of the game is partly determined by the excitement contained in the uncertainty as to the outcome of the match or competition. This excitement among other things depends on the equal chances of teams (competitive balance), the ranking of the teams or individuals within a competition and the mutual national or local rivalry between teams or individuals (principle of locality or nationality).[20]

At first glance, these characteristics appear to justify that the production and sale of sports deserve a special approach within competition law. However, the European Commission has held that these special characteristics do not at all justify that the economic activities brought about by sport should *ex officio* be exempted from the application of the competition rules of the Treaty, given the increasing economic importance of these activities. The institutions of the European Community, among which the European Commission and the Court of Justice of the EC, must, however, take the special characteristics referred to into account.

The product "sport"

The peculiar thing about the economic exploitation of the sports performance further is that the "rivalry" or "match" is exploited between competing clubs themselves. As under the influence of public interest, the sports performance economically speaking becomes a product "when transferred to another whom it will serve as a use-value, by means of exchange."[21] Neither the law in the EC, nor that in the Netherlands can be seamlessly applied to this economic "product sport", but regards the creation of the match or competition as a series of performances.[22] In organised competitive sport, a series of activities is involved, which can only be carried out "jointly" and "interdependently". The Court of Justice of the EC in the Deliège case, which concerned the sport of judo, clarifies this factual statement as follows:

"For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself."[23]

In the legal sense the problem first arises who, given the series of services performed by different parties, may lawfully exploit the sports performance to third parties. The answer to this preliminary question, according to *national* law, is crucial for further competition law analysis.[24]

4. Who is entitled to broadcasting rights?

Answer according to national (Dutch) law

The 1988 judgment in *NOS* v *KNVB* centred round the question whether, and if so, to what extent, the exploitation of matches organised by the football federation (*KNVB*) is legally protected against the radio and television broadcasts of reports of (parts of) matches in professional and amateur football of clubs associated with the *KNVB*, if the payment of reasonable compensation for such broadcasts is refused by the broadcasting association (*NOS*).[25] It is important to realise that the emphasis was on the protection of the sport performance in relation to the right to free gathering of news in this judgment.[26]

The *Hoge Raad* in this case therefore examined whether the *KNVB*

13 Generally speaking, the European Commission is competent in the case of the selling of TV rights of international competitions and of national competitions with a European dimension. Such a dimension is present when e.g. a national competition is also broadcast in other countries.

14 Art. 81 EC and Art. 6 *Mw* only concern *undertakings.* As of *Höfner and Elser v. Macrotron*, case C-41/90, ECR 1991, I-1979 it is established that an undertaking "comprises every entity engaged in an economic activity regardless of its legal status and the way it is financed". Both the Commission and the Court of First Instance have regarded the FIFA as an *undertaking* in previous decisions. E.g. Decision of the Commission, 27 October 1992, OJ L 326, p. 31. *Scottish Football Association,* ECR 9 November 1994, case T-46/92 ECR 1994, p. II-1039. Decision of the European Commission of 20/7/1999, in case IV/36.888-1998 Football world championship in France, Abl.L0005/55, 8 January 2000. Analogously, the *NMa* argues that the *ENV* (see below) and the clubs engage in an economic activity and can be regarded as undertakings. To establish this, it is not relevant whether the clubs are actually making a profit. If the collective selling has been laid down in the regulations of the umbrella federation, this may be regarded as a "*decision of an association of undertakings*". It can, however, also be argued that what is involved is an *agreement between undertakings* as the regulations only express the intention of the members. This distinction makes no difference for the application of Art. 81 or Art. 6 *Mw*. If the competition-restricting agreements (potentially) affect trade between the Member States, the European Commission is competent. If this is not the case, the national competition authority is competent to hear such cases and possibly start an investigation. Generally speaking, the European Commission is competent to hear cases concerning the selling of TV rights of international competitions and of national competitions with a European dimension. Such a dimension is present when e.g. a national competition is also broadcast in other countries.

15 European Commission press release, IP/01/1043, 20 July 2001, Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League and *NMa* decision 18/105 and 1162/14 in *Eredivisie NV*.

16 Annex IV to the Conclusions of the Presidency, Nice 7-9 December 2000.

17 Helsinki report, Brussels, 1 December 1999, Com (1999) 644.

18 J. Quirk & R. D. Fort, *Pay dirt: the business of professional team sports*, Princeton, New Jersey: Princeton University Press, 1992, p. 243.

19 See also H.T. van Staveren, *Het Voetbalcontract, op de grens van sportregel en rechtsregel*, Kluwer: Deventer, 1981

20 In individual sports where one athlete dominates the game for a long time the sports organisation can do little to ensure the unpredictability of the results; this is different for team sports. See Sloane, 1976, p. 3.

21 Commodity dictionary of Marxist thought, ed. Tom Bottomore et al., Cambridge, Mass., 1983, p. 86.

22 Cf. the Opinions of K.J.M. Mortelmans and H.A.G. Temmink, *De coupe van de KNVB, wie zendt de finale van de KNVB-coupe uit?*, NJB 12 April 1996, no. 15, p. 559-560.

23 ECJ 11 April 2000, NJ 2000, 542, Deliège, ground 57.

24 In this sense the use of the term "ownership" when referring to non-tangible objects like, for example, TV rights, does not correspond to the system used in the Dutch Code. The European Commission also takes the position that the question of ownership has to be decided in accordance with national law. European Commission: Broadcasting of Sports Events and Competition Law, Competition Policy Newsletter 1998, no. 2, June, III.2.

25 *Hoge Raad* 23 October 1987, NJ 1988, 310 (NOS/KNVB).

26 Under Art. 5:1 of the Dutch Civil Code only "goods" may be subject to ownership.

is entitled to certain protection as regards the broadcasting of TV rights under the absolute rights of intellectual property. Intellectual property rights offer protection against the illegal exploitation by third parties of certain achievements brought about by human effort.

The party entitled to the performance, as the performance of those who enable the match to take place, could, based on intellectual property law, prohibit another party (*NOS*) to exploit the match without prior consent and could make such consent conditional upon the payment of a fee.

However, the *Hoge Raad* held that there is no ground for any protection that is comparable to the protection offered by the law in the case of absolute intellectual property rights.[27] The *Hoge Raad* in *NOS* v *KNVB* further examined the possibility whether the sports performance is on a par with a performance that is protected under intellectual property law (parity performance). The *Hoge Raad* mentioned this possibility in *Decca* v *Holland Nautic*, but it was assumed only once, namely in the *Elvis Presley* case.[28] It should moreover be remarked that *Elvis Presley* concerned a performance which was brought under the protection of the Neighbouring Rights Act (1993) quite soon after.[29] Still, parity performance remains a possibility. The *Hoge Raad*, albeit cautiously, held that advantage-taking acts in respect of a certain performance could result in an infringement of due care rules and established the following criterion: "in case there is no legal protection under an intellectual property right, protection under unwritten law in every actual instance at least requires that the advantage is taken of a performance of a nature that allows it to be put on a par with one justifying the granting of such a right." According to the *Hoge Raad*, "where the exploitation of matches as organised by the *KNVB* is concerned, this requirement is not fulfilled."[30] Fifteen years later in its judgment in *KNVB* v *Feyenoord* the *Hoge Raad*, despite an attempt by the *KNVB*, saw no reason to reconsider its position.[31]

Considering the above, the conclusion is justified that in the Netherlands the sport performance is *not* protected under intellectual property law, *nor* by the criterion of the parity performance under Article 6:162 *BW* (Civil Code).

This does not mean, however, that *NOS* was at the time allowed to broadcast matches without permission. The *Hoge Raad* came up with another arrangement which justifies a fee from *NOS* in return for broadcasting the matches just as much. In ground 5.2 the *Hoge Raad* held: "It must nevertheless be assumed that the *KNVB* and its clubs are entitled to a certain protection in respect of the broadcasting of matches." Summarised in brief, the *Hoge Raad* held that the matches which the *KNVB* organises are held in a stadium or enclosed space which is structured in such a way that the matches are accessible to the public, but only against payment. They are allowed to restrict access to the stadium or match venue "*using the powers which they derive from the right of ownership or use of that stadium or venue*."[32] From this right, which has become known as the at home right, stadium right or arena right, the *Hoge Raad* infers that *NOS* has acted *unlawfully* now that neither the *KNVB*, nor the clubs granted their permission to broadcast. The length or duration of the broadcast (an integral game or only flashes of a game) makes no difference to this finding, according to the *Hoge Raad*.

Although it has now been established that a legal basis has been found in the at home right, it remains unclear whether the federation (*KNVB*), the federation and the clubs together or individual clubs are entitled to this right. In brief, the *KNVB* takes the position that the *KNVB* and the clubs are together entitled to the radio and TV rights, both for summaries and integral matches.[33]

In the *KNVB* v *Feyenoord* case the "at home right" needed further interpretation, as this time the conflict was between the *KNVB* and one of its clubs.[34] The Court of Appeal held that clubs associated with the *KNVB* are, pursuant to their right of ownership or use of the stadium or venue, in principle free to impose restrictions on access to the stadium or venue, also with a view to creating radio and/or television broadcasts. The club playing at home (hence at home right, stadium right or arena right) is entitled to the "broadcasting rights" in respect of ("flashes" of) football matches in the premier league and first division, which are both organised by the *KNVB*. According to the *KNVB*, however, the Court of Appeal has failed to appreciate that in its judgment in *NOS* v *KNVB* the *Hoge Raad* has allowed the *KNVB* some form of protection concerning the broadcasting rights. The *Hoge Raad* dismisses this by pointing out that it cannot be inferred from this that the *KNVB* would be jointly entitled to the broadcasting rights.

The *KNVB* subsequently argued that the *KNVB's* organisation of the competition and the playing of matches in it, can be regarded as a performance on a par with the granting of an absolute right of intellectual property. In the *KNVB* v *NOS* case previously referred to, however, this right was expressly not recognised. The *Hoge Raad* did *not* reconsider this position. Taking account of the above, it can be concluded that the *individual clubs playing at home* are entitled to the radio and TV rights in the Netherlands. This criterion is generally accepted in individual sports, albeit that ever more often individual athletes or players' unions claim income from TV rights.

Answer according to European law

At the European level, the Court of First Instance in October 2002 held that television rights are normally held by the organiser of a sporting event, who controls access to the premises where the event is staged.[35] This is without doubt true for individual sports. In the same ground the Court adds that: "Organisers of widely popular sporting events are often rather powerful national or international associations which are in an extremely strong situation with regard to television rights to certain events or certain types of sports, as there is usually a single national or international association for each sport."[36]

However, after the European Commission's decision concerning UEFA, the Court's approach needs some differentiation. Although the question of who is entitled to broadcast a certain event (or series of events) cannot be answered by the provisions of competition law, the European Commission still felt compelled, especially due to a lack of unequivocal national rules in the Member States and for the purpose of a sound competition law analysis, to give an opinion in this

27 After all, it may be deduced from the law and the literature that the protection of a sporting performance does not fall within the object of the law of patents, models and designs, plant breeders' rights, trademarks or trade names, nor does copyright protection apply. This latter possibility is probably dismissed, not because the sporting performance lacks the characteristics of a "work of an original nature bearing the stamp of the author's personality" as protected by Art. 1 of the Copyright Act, but rather because according to common opinion sporting performances fall outside the scope of copyright law. From the perspective of copyright law, however, an important sporting aspect has been largely ignored, until Van Staveren acknowledged it. In sport, it is simply not desirable to protect an athlete's sporting performances under intellectual property law, as this would imply that the athlete in question can exercise this right as against anyone and as a result, opponents would not be permitted to display a similar sporting performance. This would undermine the balance of equal opportunities.

28 *Hoge Raad*, 27 June 1986 (Decca/Holland Nautic), NJ 1987, 191 and *HOGE RAAD* 24 February 1989, NJ 1989, 701.

29 The sporting performance, which is considered to include the sporting performance of the athlete, is on the contrary and as appears from legal history, expressly excluded from the scope of application of the Neighbouring Rights Act, Verkade, D.W.F. and Visser, D.J.G., Parlementaire geschiedenis van de Wet naburige rechten, Delftse Academische Pers, Delft, 1993, p. 49. This is therefore the result of a conscious choice of the legislator and does *not* automatically follow from the law or case-law. As after all, is a beautiful shot on the turn not a work of art with an original character of its own bearing the stamp of the athlete's personality?

30 *Hoge Raad* 23 October 1987, NJ 1988, 310 (NOS/KNVB), ground 5.1.

31 *Hoge Raad* 23 May 2003, Koninklijke Nederlandse Voetbalbond v Feyenoord, Case AF4607, Case no.: C01/255 *Hoge Raad*.

32 NOS v KNVB ground 5.2

33 *Hoge Raad*, KNVB v Feyenoord, 23 May 2003, LJN-no.: AF4607 Case no.: C01/255 *Hoge Raad*

34 *Hoge Raad* 23 May 2003, Koninklijke Nederlandse Voetbalbond v Feyenoord, Case AF4607, Case no.: C01/255 *Hoge Raad*.

35 Judgment of the Court of 8 October 2002, in joint cases T-185/00, T-216/00, T-299/00 and T-300/00, Métropole télévision SA (M6) et alia v European Commission, ground 61.

36 OJ L 151 of 24 June 2000 p. 0018-0041 ground 52. Decision of the Commission of 10 May 2000 Case no. IV/32.150-Eurovision.

matter.[37] The European Commission did, however, add that: "the Commission's appreciation of the issue in this case is without prejudice to any determination by national courts."[38]

The European Commission takes the position that in the case of a *match* played by competing teams both participating clubs are able to claim certain rights.[39] The individual club playing at home is, of course, entitled to an "at home right", [comparable with the at home right under Dutch law] but according to the European Commission it "would be difficult to deny that the visiting club, as a necessary participant in the football match, should have some influence as to whether the match should be recorded and, if so, how and by whom."[40] In other words, and further to the explanation above: because the match cannot be created without an opponent, the visiting club also has certain rights. In its decision the Commission, as opposed to the *Hoge Raad*, also recognises the co-ownership of the federation. In ground 122, the Commission determines that: "(...) UEFA can at best be considered as a co-owner of the rights but never the sole owner."

And finally in ground 123 the Commission concludes that: "The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament."[41]

In conclusion

Briefly summarised, it is provided in the Netherlands that the club playing at home is in principle the owner of the rights as a result of the right of ownership or use of the stadium. The European Commission continues its analysis from the point of view that both the participating clubs and the federation may claim certain rights in respect of the match. This latter approach in my opinion does better justice to the special character of the "product" sport.

Variations are also possible whereby the perspective of the *Hoge Raad* is one extreme, while it can also be argued that the federation is entitled to the ownership of *all* matches played within the competition. This gives rise to the special situation that in that case there is no act restricting competition under Article 81 EC, as this ownership eliminates the need for clubs to conclude horizontal agreements concerning the collective exploitation of the rights. By means of their membership of the federation, the clubs act like a "single firm" in the market, not as horizontal[42] competitors. From this perspective it is assumed that clubs are completely controlled by the federation in the selling of TV rights and are unable to operate in the market independently.[43] This "single entity" theory is regularly applied in the United States. However, this does not change the fact that there can still be a possible abuse of a dominant position (Article 82 EC) when applying the single entity theory.

5. Collective selling outside the scope of the prohibition on cartels?

Although this kind of approach has not (yet) gained a firm foothold within the European Community, it has been attempted to keep certain horizontal agreements outside the scope of competition law by other means. At the Community level, a connection has previously been made with the concept of inherent restrictions, while at the national level a connection was sought with the Commission's guidelines for horizontal cooperation.[44]

The Netherlands: Collective selling of summaries of matches outside the scope of Article 6 Mw

According to the *NMa*, in the Netherlands summaries of football matches can only be offered when the professional football organisations combine their individual broadcasting rights of the summaries and offer them jointly.[45] An independent product, or a "cooperation between competitors that cannot independently carry out the project or activity covered by cooperation." is the result.[46] And for this reason, the *NMa* claims, no infringement of the prohibition on cartels takes place. Not because ownership in respect of all matches played in the competition lies with the federation, as in the case of the single entity theory, but because the agreement is *necessary* for the broadcasting of the summaries.

The NMa follows on the guidelines of the European Commission on horizontal cooperation agreements.[47] After all, *one single individual club* as the entitled party in the Netherlands is unable to create a summary of the match.

It becomes a different matter where live matches are concerned, more in particular, the *competition* as a series of live matches within a certain time-frame (the season) which are sold collectively. In the Netherlands, every separate match is deemed to be offered by the individual club playing at home, while in Europe it is deemed to be offered by three interdependent parties (the at home club, the visiting club and the federation). Nevertheless, it cannot be denied that a live match is part of the competition and derives its market value from this. "No revenue is generated by a single team operating independently, but it derives solely from the team's membership in the wholly integrated operation of the league."[48] It can likewise be argued that this is another instance of horizontal cooperation whereby the clubs are only partners in the creation of the activity (competition), which integrated product they cannot possibly create individually. Now that the parties create the competition together, the logical result is that they also coordinate their behaviour in the market, as the competition at the same times constitutes the exploitable product.

It must be taken into consideration here that in sport a distinction can be made between national markets and local markets. The division of markets is a special feature of the sport sector which is even maintained by the European Community.[49] As regards economic activities which can be attributed to the *local market*, being the location of the club, one could think of the renting out of skyboxes, club sponsoring, etc. In the case of economic activities which are attributable to the national market, or in the case of international competitions, to the European or world market, (like the selling of broadcasting rights) greater importance should be attached to the *necessity* of horizontal cooperation. The reason for this is that clubs have trans-

37 European Commission: broadcasting of sports events and competition law. Competition policy newsletter 1998, no. 2, June, III.2.

38 Ground 122.

38 In Germany, for example, the clubs are considered as the owners and the federation as the co-owner; England remains silent on the question of ownership; in Northern Ireland and the Irish Republic it is assumed that ownership lies with the national federation; in Italy the clubs are entitled to ownership, etc.

39 The European Commission has provided an opinion on the question of ownership as it is primarily up to the Commission to take a position on this and national law, given the European dimension, fails to provide a solution. Cf. OJ L 151 of 24 June 2000 p. 0018-0041 ground 52. Decision of the Commission of 10 May 2000 Case no. IV/32.150-Eurovision. "TV rights normally belong to the organiser of the sports event, who decides whom to grant access to areas or spaces where the event takes place."

40 Commission Decision, C (2003) 2627 final, Brussels, 23/7/2003, p. 33 ground 118.

41 Commission Decision, C (2003) 2627 final, Brussels, 23/7/2003, p. 35.

42 Agreements between undertakings at the same level.

43 *ICI-Dyestuffs* ECJ July 14, 1972, 1972 ECR 619, 661-663; 1972 CMLR 557, 628-629 (grounds 125-141). "Several business can only form an 'economic entity' if a control relationship exists between them".

44 Case C-250/92, Danish cooperation, ECR 1994, p. I-5641, ground 31-34. AG Lenz in his detailed Opinion to the Bosman case [*Koninklijke Belgische Voetbalbond* v. *J.-M. Bosman*, Case C-415/93, 15 December 1995, ECR 1995, I-4921] gave his views on the transfer rules applying at the time in relation to the concept of inherent limitations within European competition law. He referred to *Danish cooperation* where the Court had held that a prohibition of double membership as laid down in the articles of a buyers' cooperation did not necessarily constitute a restriction of competition under Art. 85 (now Art. 81) EC and could even have positive consequences for competition. Only those restrictions that were *necessary* to ensure the proper functioning of the cooperation and to maintain its contractual bargaining position could escape the application of (now) Art. 81(1).

45 Decision in *Eredivisie NV*, Case no. 18/105 and 1162/14, ground 48.

46 Communication of the Commission 2001 C3/02. Guidelines on the applicability of Article 81 EC to horizontal cooperation agreements.

47 Communication of the Commission 2001 C3/02. Guidelines on the applicability of Article 81 EC to horizontal cooperation agreements.

48 Roberts, 1986, p. 572.

49 H.T. van Staveren, *Arbeidsverhoudingen in de (beroeps)voetbalsport*, NJB 1999, p. 810-811. Cf. M. Olfers *Overheidssteun aan betaald voetbalclubs*, NJB 2003, p. 726; also in The International Sports Law Journal (ISLJ) 1/2003 pp. 2-9: *State Aid to Professional Football Clubs: Legitimate Support of a Public Cause?*

ferred a major part of their autonomy to the federations especially for supra-local activities. This approach, however, is not taken by the European Commission or the Dutch Competition Authority.

6. Collective selling within the scope of the prohibition on cartels?

Although for a long time it was *customary* for live matches to be sold by the clubs and the federation together, it must be assumed in the light of their recent statements that *neither* the European Commission, *nor* the *NMa* considered collective selling to be *necessary*. From this it must be concluded that the collective selling of television rights comes within the scope of the prohibition of cartels. In the Netherlands, this only concerns live matches.

Speaking on behalf of the European Commission, Herbert Ungerer at a conference in Spain on 2 October 2003 stated: "... A cartel remains a cartel even if it works on the commercialisation of sport rights and it remains subject to scrutiny under the Competition Rules".

Relevant market

This statement, however, only applies when the cooperation between clubs actually affects or is able to affect competition. In order to be able to draw this conclusion, the relevant market has to be determined.[50] The more narrowly the market is defined, the greater the chances are that an agreement restricts competition. Because not only is it possible to differentiate between sports broadcasts and other broadcasts, within the market for sports broadcasts separate markets again exist. The European Commission will not consider that the broadcasting rights for football matches can be substituted by other sports broadcasting rights.[51] The European Commission takes the position that there is a separate market for football matches in the framework of an (annual) competition. It assumes that if the price of the rights were to increase by a certain percentage (5-10%), an *interested broadcaster* would not (readily) settle for the purchase of other entertainment or the rights of other sports matches.

It is my opinion that the role of advertisers is paid too little attention in this analysis. It is important to broadcasters that they can sell enough advertisement broadcasting time to *advertisers* who target a certain audience. From this point of view, it is quite possible that the interested broadcaster will in fact settle for the purchase of another sport broadcasting right or, more probably, alternative entertainment (e.g. a film) in the case of a price increase.

Apart from that, it is doubtful indeed whether the same reasoning that the European Commission applies can be used for any other sport. In Europe, football is the most popular team sport and many other team sports are not as fortunate where the selling of TV rights is concerned. In my opinion, it is probable that if the rights of volleyball matches would rise by 5-10%, broadcasters would opt for basketball or other entertainment. In that case, the relevant market would be wider than the market for live football matches during the season. For many team sports, a considerable restraint on competition through the collective selling of TV rights is therefore unlikely. In fact, it will be necessary for many sports to join forces in order to conquer part of the market. This fact is too easily discounted by both the European Commission and the Dutch Competition Authority. While, the "battlefield for market positions, and sometimes survival" with respect to sports broadcasting rights in the television and media markets does form part of the general principles which are taken into account in a competition law analysis,[52] the "battlefield for market positions and sometimes survival" of sport clubs is hardly discussed.

In my opinion, the general rule should apply that, if it is assumed that clubs are capable of operating independently in the market, they are allowed to enter into agreements that restrict competition when according to rational competition standards they *jointly* take up a *small percentage* of the relevant market. In determining the relevant market, the focus should not be the *will* of the broadcaster, but the eventual consumers, those who eventually pay the price of the broadcasting rights and in this respect, these are the advertisers.

In my view, it therefore follows from this reasoning that *minor football clubs* in the national competition may also join forces and operate together in the market for broadcasting rights, as individually they are almost incapable of exploiting broadcasting rights and they only make up a small percentage of the relevant market. This is an important consideration when the collective selling of TV rights is prohibited, as is the case now in the Netherlands.

7. Assessment of the decision of the *NMa* and the rejection of the petition

After these general considerations concerning the prohibition on cartels under Article 81 EC, the following cases will be discussed below: *Eredivisie NV* by the *NMa* in the Netherlands, the *UEFA* decision of the European Commission and the *expected* exemption in the case of the *DFB* by the European Commission.[53] In all cases it has been concluded that the agreements concerned (apart from the summaries of matches in the Netherlands) come under Article 81(1) EC. An exemption from this prohibition may be obtained both under European competition law and under national law, based on Article 81(3) EC or Article 17 *Mw*, where such agreements benefit the consumer and the competition cannot be produced and distributed in any other, equally efficient, way.[54] If this requirement is not fulfilled, the agreement or decision is automatically void (Article 81(2) EC, Article 6(2) *Mw*).

NMa decision in Eredividie NV Netherlands[55]

In 1998, the *NMa* received two applications from *Eredivisie NV* (*ENV*) for an exemption from the prohibition on cartels pursuant to Article 6 in conjunction with Article 17 of the Competition Act.[56] One application concerned the rights to live broadcasts of football matches played in the Dutch premier league, the other the summaries of football matches played in the Dutch premier league. When it became clear that the broadcasting rights of summaries and broadcasting rights of live matches were exploited in the same way, the *NMa* decided to join the applications. The exploitation was coordinated by the *ENV*. The offers (from *Canal+* for live matches and from *NOS* for summaries) were subsequently put to the eighteen professional football undertakings, after which the distribution of the income from the selling of the rights was put to the vote in a general meeting and decided by a two-thirds majority. As has been explained above, summaries fall outside the prohibition on cartels in the Netherlands.

Where the live matches are concerned, the *NMa* tested the arrangements that had been notified against the prohibition of cartels in Article 6 *Mw* and concluded that the arrangements restricted competition between the eighteen premier league clubs and that, moreover, the rights are sold to only one broadcaster and that the number of live matches is limited.

In other words, the *NMa's* approach to collective selling is to stress the restriction of competition without paying attention to the nature of the cooperation in relation to the special character of the integrated activity as a chain of separate performances.

The *NMa* subsequently assessed whether an exemption was allowed under Article 17 *Mw*. There has to be an improvement of pro-

50 The relevant market is of course also important in determining whether a dominant economic position exists.

51 C (2003) 2627 final Commission Decision of 23 July 2003, Brussels, point 62. Cf. Commission Decision COMP/M.2483-Canal+/RTL/GJCD?JV, (IP 01/1579).

52 Herbert Ungerer, European Commission, Comp/C/2/HU/rdu Commercialising Sport: Understanding the TV rights debate, Barcelona, 2 October 2003.

53 Decision in *Eredivisie NV*, Case no. 18/105 and 1162/14, and Commission Decision, 23 July 2003, C (2003) 2627 Final UEFA Champions League, and European Commission press release, New marketing system for Bundesliga broadcasting rights, IP/03/1106, 24 July 2003.

54 In accordance with Art. 81(3), the European Commission can give permission for competition-restricting agreements 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." For horizontal cooperation agreements see Communication of the Commission 2001 C3/02 Guidelines on the applicability of Article 81 EC to horizontal cooperation agreements.

55 Decision in *Eredivisie NV*, Case no. 18/105 and 1162/14

56 *Eredivisie NV* is a public limited company under Dutch law. *Eredivisie NV* was established by the professional football organisations.

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duction and distribution and technical progress for the *NMa* to grant an exemption. The criteria are broad and give the *NMa* wide discretion to further define them.

The *ENV*, among other things, contended that collective and exclusive selling enabled a proper distribution of the income, that the arrangement contributed to the sporting balance between the clubs and that more income was generated so that talent and top footballers could be retained for the Netherlands and the international position of the Dutch clubs was strengthened. The *ENV* further argued that there is no market for TV rights for non-top clubs.

According to the *NMa*, briefly put, no improvement of production, or technological progress took place, now that among other things the distribution of income could also have been managed in the case of individual selling by relinquishing part of the earnings. The *NMa* further considered that only the equal division of the income would contribute to a sporting and financial balance and thereby lead to an improvement of production. Now that the distribution was variable, this argument did not apply.

The *NMa* also observed that it could be concluded from information supplied by broadcasters that a demand for matches of non-top clubs did exist. In ground 55 the *NMa* considered:

"It can be assumed that the individual exploitation of broadcasting rights by the clubs themselves will lead to an increase in the supply of matches on television and to more TV attention for non-top clubs" and in ground 57: "It is furthermore highly probably that possible forms of cooperation of a number of non-top clubs in the exploitation of their individual broadcasting rights would result in interesting packages of broadcasting rights for broadcasters and would thus enable non-top clubs to exploit their broadcasting rights commercially."

The test whether the users were entitled to a fair share and whether the condition of necessity had been fulfilled could be omitted, now that there had been no improved production or technological progress. Given that the eighteen professional football undertakings had a dominant position, there is insufficient remaining competition, so that the requirements of Article 17 *Mw* were not met and no exemption from the prohibition in Article 6 *Mw* could be granted. The decision entered into force on 1 August 2003.

Eredivisie NV subsequently lodged an objection against the decision of the *NMa*.

Eredivisie NV referred to the decision in *UEFA*, but according to the *NMa* "factual differences" stood in the way of justification of a possible different conclusion: in the UEFA situation, several packages were being offered and individual clubs still had a (limited) right to offer matches, and there were differences in the nature of the competition. Comparisons with other national competitions would not necessarily hold either, as, according to the *NMa*: "the precise factual and legal circumstances are relevant to assess any improvements in efficiency that are to be achieved through the joint exploitation of broadcasting rights." Despite this warning of the *NMa*, it is, in my view, quite possible to make comparisons with respect to certain aspects, apart from the factual differences. In doing so, the expected exemption concerning the German football competition will also be considered.

8. Assessment of the decision of the European Commission in the case of the UEFA Champions League[57]

Background UEFA

UEFA sells all TV rights to the final rounds of the UEFA Champions League on behalf of the participating clubs. This involves exclusive rights which are sold as a package for periods of up to four years to one broadcaster per Member State. At the beginning of 1999, the UEFA notified this collective selling arrangement of media rights to the European Commission. The European Commission considered that the negative aspects of the competition-restricting acts outweighed the alleged positive aspects. In July 2001, the European Commission, in brief, voiced the following objections (among others):

- UEFA prevents individual clubs from offering the rights to interested buyers of their own accord. This restricts competition between the clubs.
- nterested buyers can only get involved with *one* supplier.

The Commission continued its summing up of its objections by stating that possible efficiencies and advantages were eliminated by the far-reaching exclusivity , whereby all rights, both for TV which may be received free of charge and for pay TV, were sold per area to one broadcaster.

New joint selling arrangement

As a result of the objections, UEFA modified its joint selling arrangement. This, however, no longer covers television rights alone, but also all other media rights (radio, television, internet, UMTS, etc.). The new joint selling arrangement, in short, comprises the following aspects (among others):

- "UEFA will continue to market centrally the rights to live TV transmission of the Tuesday and Wednesday night matches. The main rights will be split into two separate rights packages (the Gold and Silver packages) giving the winning broadcasters the right to pick the two best matches.
- UEFA will initially have the exclusive right to sell the remaining live rights of the Champions League.[58] However, if it does not manage to sell this so-called Bronze package within a certain cut-off date, the individual clubs will be able to market the matches themselves.
- The new joint selling system also affords opportunities to new media operators as both UEFA and the football clubs will be able to offer Champions League content to Internet and operators seeking to launch or boost the new generation of mobile phone services using the UMTS technology.
- Individual football clubs will also, for the first time, have the right to exploit TV rights on a deferred basis and to use archive content, e.g. for the production of videos, therefore provide their fans with a better and more varied offer.
- UEFA will not sell the rights for a period longer than three years and will do so through a public tender procedure allowing all broadcasters to put in bids."[59]

Exemption

The European Commission approved the new draft rules of UEFA and granted an exemption under Article 81(3) EC, now that the rules contributed 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.

The Commission decided to grant the exemption because UEFA's arrangement results in:

- a broader and more varied offer of football in the European Union;
- the fact that clubs may exploit some of the rights individually;
- an impulse for the emerging new media markets such as internet and UMTS services;
- the fact that UEFA, through the central selling of part of the rights, will still be able to exploit the successful Champions League brand which it created;
- the financial solidarity within sport continuing to be guaranteed.

Conclusion of the Commission on UEFA Champions League

"The Commission accepts that the decision of the football clubs and the UEFA regarding the joint selling arrangement improves production and distribution of the UEFA Champions League within the meaning of article 81 (3) of the Treaty and Article 53(3) of the EEA Agreement by enabling the creation of a quality branded content

57 Decision, 23 July 2003, C (2003) 2627 Final UEFA Champions League

58 The Champions League is an annual tournament between the top-ranking European football clubs - 72 clubs from the European Union and from third countries participate in it. The main tournament, which starts in September, comprises the 32 clubs that managed to qualify. The Champions League season ends in May of the following year.

59 European Commission press release IP/03/1105, Brussels 24 July 2003.

product and by providing an advantage for media operators, football clubs and viewers, since it leads to the creation of a single point of sale for the acquisition of a packaged league product. However, since no such benefits arise from the restriction of football clubs' freedom to sell live TV rights under package 5 to other broadcasters than pay TV/pay per view broadcasters this decision should be subject to a condition, which will enable football clubs to sell their live TV rights to free TV broadcasters, where there is no reasonable offer from pay-TV broadcasters."[60]

9. European Commission: expected decision in the *Bundesliga* case

Background

In Germany, despite criticism from the European Commission, a statutory exemption applies in respect of collective selling.

Section 31 Anti-Cartel Act: "Section 1 shall not apply to the centralised marketing of rights to the TV broadcasting of sports contests performed in accordance with the articles of association by sports associations which 'as a way of discharging their socio-political responsibility' help promote youth and amateur sports and are rewarded for this by an appropriate participation in the revenues resulting from the centralised marketing of those TV broadcasting rights."

Given the fact that Article 81 EC has priority over national legislation the provision will rapidly turn into a dead letter as soon as national cartel law clashes with EC law.

Overview of the draft arrangement derived from the European Commission's press release

- The *DFB* or an independent selling body will offer packages in a transparent and non-discriminatory procedure. Applicants may resolve disputes through arbitration. No contract may cover more than three seasons.
- Two television packages contain live broadcasting rights. They can be acquired by both free TV and PPV providers. One package contains Saturday's first division matches and Sunday's second division games (the main match day package). The second package contains Sunday's first division games and Friday's second division matches (the secondary match day package). Both packages will also contain other rights, including conference-call coverage of the other match day.
- The third package consists of free TV rights for the first highlights programme and the right to broadcast at least two *Bundesliga* first division games live per season. The fourth package entitles the provider to broadcast the second division matches live on free TV. Other packages cover secondary and tertiary exploitation rights for free TV. These packages may be shared out among free TV broadcasters.
- Centrally marketed Internet and mobile phone packages: various packages offering live and deferred broadcasting.
- Clubs' television rights: every club can sell its home games 24 hours after the match on free TV once.
- Clubs' mobile phone, Internet and audio rights: every club may offer the latest clips through mobile phones and put extensive match highlights on its website. Furthermore, every club can market live excerpts of its matches on the radio and mobile phones and offer live audiostreaming on the Internet.
- Rights that the League is unable to market may be offered at the same time by the home club, etc.

10. Comparison of the decision of the *NMa* with the decision in UEFA and the possible exemption for the collective selling arrangement of the *Bundesliga*

Main differences?

The collective selling arrangement in the UEFA case is factually different from the Dutch situation in respect of the following points:

- The package approach: rights are divided over a number of packages, while in the Netherlands "only" two "packages" exist, namely one for summaries and one for live matches.
- The right to exclusive selling expires the minute the UEFA is unable to sell the rights.
- After the live broadcast the clubs become entitled to sell the match in question.
- Selling of the rights by means of a tendering procedure.

Main points in common?

In all the cases that have been discussed, it is assumed that the joint selling arrangement for live matches comes under the prohibition of cartels of Article 81 EC or Article 6 *Mw*.

- A central selling point as efficiency?

In the UEFA case, the emphasis lies on the fact that there is a central selling point. This is of course important in the Champions League, as an international competition, given the uncertainty as to participation and the diversity of clubs from various countries. However, some parallels with the Dutch situation can still be drawn:

A collective selling arrangement gives the media undertakings an opportunity to offer the entire competition during a whole season. With a single selling point, it is easy for broadcasters to determine a schedule and approach advertisers. It moreover offers advertisers the possibility to conduct a specific campaign over a longer period of time and offers broadcasters the chance of binding advertisers to them for a longer period of time. The broadcaster's financial risk is minimised, because, other than in the case of individual selling, he does not run the risk of betting on the "wrong" club, i.e. a club which ends up in the lower regions of the competition and loses the public's attention. Minor clubs benefit from a central selling point, as, generally speaking, they are less well able through lack of experience and commercial opportunities, to sell the rights themselves. Finally, the consumer also benefits, as the consumer wants to be able to watch the match live, preferably without first having to find out by whom, where and when the match is offered.

- The brand is protected, efficiency?

The brand name of the UEFA Champions League event is protected by collective selling, as, among other things, the product is presented uniformly. This is also to the advantage of the broadcasters as they can broadcast a recognisable product and it benefits the consumer who is indeed able quickly to recognise the product. In addition, it benefits objectivity, because in individual selling the club will sooner promote itself than place itself in the service of another club or the federation. It has to be noted, though, in reference to the principle of locality and nationality, that the identity of the club is different from the identity of the national competition. The national championship is only a means by which the individual club can establish its own identity. By analogy, it can be assumed that the brand "*Eredivisie NV Nederland*" is also protected by collective selling.

- Financial solidarity between clubs

At the European level, a certain balance is recognised between the clubs, justifying a flow of funds from the major to the minor clubs. However, the European Commission considers this argument less important than the previous arguments.

- Collectivity only fails when there is no market demand for the joint product

If the federation is unsuccessful in exploiting (part of) the rights, the clubs have to exploit these rights individually. This will ensure a better response to market demand.

There is nothing to prevent giving clubs the right to exploit the rights individually either, if this is done some time after the live broadcast.

11. New opportunities?

From the above, it emerges that collective selling does in fact lead to market efficiency. The European Commission is mainly concerned

60 Decision, 23 July 2003, C (2003) 2627 Final UEFA Champions League, ground 168.

about the restriction of output and the undesirable effects of far-reaching exclusivity.

The following requirements must be fulfilled before a collective selling arrangement of a national football competition can be considered for an exemption:

- The distribution of media rights in packages;
- The rights have to be sold by means of a transparent, non-discriminatory procedure;
- The duration of the contracts should not be too long;
- Clubs are allowed to exploit the rights after the live broadcast of the match;
- If the federation does not manage to sell the rights collectively, the exclusive right of the federation expires.

In my opinion, complete individual selling is not desirable, as this would affect the efficiencies mentioned above. It would be better to offer a limited number of packages in accordance with the requirements set out above. This would result in a central selling point, a recognisable brand and an increased supply that better connects with market demand.

Where less popular sports are concerned, an exemption would in my opinion seem indicated, if it can be demonstrated that collective selling is necessary in order to provide a strong counterbalance to broadcasters.[61]

12. Conclusion

Again the special character of the product?

As regards ownership, the *Hoge Raad* in my opinion fails to take into account an important comment: it is not the separate performances or the economic risk of every individual party that is at stake, but a *joint, integrated* product. The product in organised sport consists of a *series of matches* within a limited time-frame (the duration of the competition) at the end of which a winner is elected, for example, by means of a points or knock-out system. In order to create this series of matches, the performances of the clubs have to be considered jointly and in their mutual cohesion and interdependence, as an *integrated* event. After all, the clubs are only partners in the creation of the product, which they could *not possibly* create individually. At the very least, the *Hoge Raad* should have recognised that both the club playing at home and the visiting club, as well as the federation, are entitled to a certain "right" in respect of the match, similarly to the situation at the European level.

If it is assumed that the production of a series of matches (the national competition) within a national competition leads to *efficiency*, i.e. a high-quality national championship, and that:

- the national competition is offered by all clubs together;
- the clubs are organised in an umbrella federation;
- this organisational structure causes the market value of the product to increase;
- this product is offered in the national market;

this in my view can warrant no other conclusion but that the clubs and the federation *jointly*, *interdependently*, and *necessarily* create the product.[62]

If the above is applied consistently, there is *no* agreement on the part of the clubs which can restrict competition, irrespective of whether summaries are offered or live matches. There is simply no need for an arrangement for the collective selling of TV rights. Collectivity in this scenario is inherent in the creation of the product, not in an agreement between competitors. In my opinion, this approach best suits the special character of the product sport.

The situation that has arisen

If it is accepted that the club playing at home is entitled to the TV rights (*Hoge Raad*), or both UEFA and the clubs (European Commission) and an agreement is concluded between these separate parties for the collective and exclusive exploitation of the TV rights, a competition law problem will arise. In the assessment of the agreement affecting competition, the impact on the market, the agreement's objective, its duration, the indispensability of the agreement and the extent to which the parties retain their economic independence all have to be considered.

By completely prohibiting all collectivity, like the *NMa* has done, the monopoly position in the field of TV rights is actually fragmented and falls into the hands of *a few* "major" clubs within the competition. The individual clubs will use the federations' monopoly power as a vehicle for their own gain. These clubs are free riders, as they can never create the product on their own and just profit from the competition's success. The method followed ignores the manner of creation of a high-quality product, affects the competitive balance between teams, affects the competition's trademark, and the unity of the product and is also contrary to the associational structure which is based on solidarity.[63] I would say that sooner or later the clubs (in hindsight?) will return to togetherness and decide to eliminate this flaw, possibly after facing a boycott by the minor clubs, through (again) joint agreements.

Collective selling, i.e. the joint offering of a complete package of broadcasting rights, should in my view be eligible for exemption. It has become clear from the decision of the *NMa* that it has particularly strong feelings about collective selling as a restriction of competition, while the European Commission seems rather to focus on the negative effects for competition of exclusive selling than that it worries about the collective selling of TV rights. Indeed, as has appeared from the decision in the UEFA case and the expected exemption for *Bundesliga* football, collective selling is still the rule rather than the exception. Clubs cannot exploit the rights until after the live broadcast. If the federation fails to exploit certain rights collectively, the clubs can sell the rights individually.

The European Commission has discovered efficiencies where the *NMa* has failed to spot them, and a significant part of the analysis is not invalidated by the different factual situations. Collective selling allows the broadcasters to bind themselves to the competition for the entire season. They can organise their programming accordingly and approach advertisers. It allows advertisers to bind themselves to the competition for a longer period of time. The broadcasters' financial risk can be spread, as they do not run the risk of betting on the wrong horse. The minor clubs benefit from a single selling point, as they are generally less well equipped, through a lack of experience and commercial opportunity, to sell their own rights. Consumers benefit from collective selling because they want to see the match live, preferably without first having to find out by whom and when it is being offered.

The brand name of the national competition is protected by collective selling, because, among other things, the product is presented uniformly. This is also agreeable for the consumer, as he is able to recognise the product instantly. It moreover contributes to objectivity, because in individual selling the club will more likely promote itself than place itself in the service of the visiting club and the federation. It has to be noted here that the identity of the club is different from that of the national competition. The national championship is only a means by which the individual club can determine its identity.

How to proceed?

In accordance with Community practice. By introducing a new collective selling arrangement in which *all* media rights are divided into packages. It should be provided in the regulations of the federation that, if the federation fails to exploit (part of) the rights, the clubs may exploit these individually. This would enable a better response to market demand. There is further nothing to prevent giving clubs the right to the individual exploitation of the rights some time after the live broadcast.

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61 Decision of the European Commission, 4 December 1981, (GEMA), 1982 OJ L94/12, ground 37.

62 The European Commission expressly does not follow this reasoning. Commission Decision, C (2003) 2627 final, Brussels, 23/7/2003, p. 33, ground 119, "Looking at a whole football tournament, it would seem that each football club should have a stake in the rights in the different constellations in which they play but their ownership could not be considered to extend beyond that. (...)"

63 There must be a certain balance between the clubs ensuring the unpredictability of the outcome of the game. Generally speaking, individual selling widens the gap between the richest teams at the top of the competition and the poorest teams in the lower regions of the competition.

Where exclusivity is concerned, the possibilities for this are already limited by the number of packages on offer, for which public, non-discriminatory bidding can take place. If the period of exclusivity remains limited, three years as a rule, I do not expect any problems. If a new market is involved, a longer period of exclusivity will be possible.

I would like to conclude by voicing the wish that a little more creativity will be injected if a new joint selling arrangement is concluded in the future.

I also point out that quite a number of sports are not so fortunate that they can bask in the public's attention. These sports stand to benefit from collective selling, as collective selling would be the only way that they could offer an interesting product to broadcasters. I assume that the European Commission will be prepared to grant an exemption in that case, if it can be shown that collective action is necessary in order to provide a strong counterbalance against broadcasters. And I expect the *NMa* will take the same approach.[64]

64 Decision of the Commission, 4 December 1981, (GEMA), 1982 OJ L94/12, ground 37.

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The Battle over Broadcasting Rights in Israeli Football

by **Joseph Eshed***

1. Introduction

Last year, the subject of broadcasting rights became a major issue in Israeli football. This happened as part of a process where Israeli football is becoming overly dependent on broadcasting rights revenues. In this article, I will describe the legal background of this process in the light of the legal structure of sport in Israel and sum up the current legal position.

2. The clubs' subordination to the FA's judicial system

Sport in Israel is highly centralized for historical reasons, as sport traditionally functioned as a branch of the political movements and parties. Only 15 years ago, some clubs began to function as profit-making companies. According to the FA rules concerning the transfer of ownership rights in football clubs, a prerequisite for FA membership is being a non-profit company.

A profit-making company (also a company quoted on the stock exchange) can acquire ownership rights in FA member clubs subject to certain terms and conditions, including having a minimum share capital of no less than 10% of the annual budget with a minimum of $0.5 m. Each member club of the FA has to commit to the articles of association of the FA (hereinafter "the articles"). Courts have historically recognized the priority competence of the FA's judicial bodies, and its exclusiveness, based on the articles of the sports organization. The argument for this has been that the members voluntarily subscribed to the articles and the national courts should avoid interfering in adjudication by "internal tribunals".

Since the adoption of the Israeli Sports Act in 1988, the jurisdiction of the judicial bodies of the sports organizations is regulated by, in particular, sections 10-11 of the Sports Act:

10. A sport union or association will enact articles/regulations which will regulate the "proper management" of the particular sport controlled by them, including regulations in the fields of discipline, internal jurisdiction, transfers (subject to restrictions imposed by general law) and remuneration of players, coaches and officials. The articles/regulations will bind all clubs, players and officials in that particular sport.
11. The exclusive jurisdiction to judge and decide in matters relating to the activities of the aforementioned union or association will be held by the internal judicial institutions designated in the articles/regulations. The decisions of the highest instance of the internal tribunal in matters of discipline will be final and cannot be appealed against in the national courts.

Despite the considerable power granted to the internal judicial institutions of the sports organizations, the articles/regulations of the sports organizations were not recognized as subsidiary legislation. For this reason, these articles/regulations, which govern such a wide range of activities and people, are not subject to parliamentary supervision. According to case-law, all activities of sports associations/unions are considered "matters relating to the activities of the union or association", including decisions which raise basic issues, such as equal rights for women. However, when a sports tribunal's decision covers more than "disciplinary matters", there is a right to petition a 'regular' court, albeit only after the legal remedies offered by the sports union have been fully exhausted.

Only when a decision of the highest instance within a sport association/union violates fundamental rights, such as the right of equality, freedom of occupation, the right of ownership, etc., or in cases when the internal tribunal failed to apply the principles of sound administration, will a "regular" court be prepared to review the internal tribunal's decision. To sum up: before being able to bring legal action before the national courts, the party concerned must first exhaust the legal remedies of the sports association/union and the case in question must not be one involving a "disciplinary matter".

According to section 3(f) of the articles, all FA members have to comply with the decisions of the administrative and judicial institutions of the FA. According to section 3(g) of the articles, all FA members have to accept the judgments of the FA's highest judicial instance as the highest authority in all matters related to the FA. According to section 3(I) of the articles, judgments of the FA's highest instance are final and binding upon the parties involved. Also according to this section, when a matter exceeds the jurisdiction of the FA's internal tribunals, the parties in question are entitled to bring the matter before the competent court in Tel-Aviv.

The FA judicial system is organized as follows:

The FA supreme court - This includes 7 to 11 members, conducts hearings in 3 to 5 different compositions, is presided over by a three-member presidium and is appointed by a 2/3 majority of the FA general assembly. It has jurisdiction to hear all petitions or appeals involving decisions of all the FA institutions (except for decisions of arbitrators appointed by the FA arbitration tribunal) and appeals against decisions of the disciplinary tribunal and is competent to interpret the FA articles.

The FA disciplinary tribunal - This is the competent body in all disciplinary matters concerning clubs, players and referees (with some

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exceptions) following the submission of a charge sheet by the FA legal adviser.

The FA arbitration tribunal - Its jurisdiction is compulsory and applies to all members, players, coaches and officials. The arbitrators are appointed by the presidium of the FA supreme court and their jurisdiction extends to all contractual disputes arising between clubs, players, coaches or commercial companies involving the transfer of ownership rights.

3. The issue of broadcasting rights over the past ten years

On 27 September 1993, before the first broadcasting rights agreement for live matches in Israel was concluded, the FA amended its articles by incorporating a section which granted FA directors full and exclusive authority to enter into agreements with the media as regards the filming, recording and broadcasting of football matches in the various leagues.

The FA subsequently invited tenders and accepted the bid of the then newly-launched commercial TV channel "Channel 2". The contract required the broadcasting of one live match in each weekly programme and no less than 20 matches per season. The price was $7.5 m per season. The anti-trust commissioner (hereinafter "the Commissioner") had opposed the co-ordination among the Channel 2 concession holders and claimed that the arrangement restricted trade. After some modifications to the concession agreement the Commissioner exempted the concession holders from the court approval usually required for such an agreement. In 1997, the Channel 2 agreement was extended to the 1997/1998 and 1998/1999 seasons on similar terms.

In 1999, the FA again invited tenders for two successive periods of 3 years each. JCS, a company which is owned by the concession holders for cable broadcasting, won the tender for the sum of $13.5 m per season.

Due to the Commissioner's objections that the agreement covered such a long period of time (6 years), no written contract was concluded. JCS failed to fulfil its obligations and on the eve of the 2001/2002 season withdrew from the unwritten contract still owing money to the FA. This was the background against which in August 2002 an agreement between Charlton Ltd. (hereinafter "Charlton") and the FA was concluded for the sum of nearly $22 m.

Charlton sold the broadcasting rights in packages: $11 m. per season for the first match (Channel 2), $5 m. per season for the second match and an additional $2 m. per season for advertising time granted to the FA (Channel 10, which has now gone into liquidation), $2,5 m. per season for the highlights (Channel 1) and $1 m. for the third match for part of the season (JCS). These financial terms were unprecedented and the result of once-in-a-decade circumstances created by the fierce competition among the various channels.

4. A challenge to the FA's ability to maximize its monopoly power

Surprisingly, in the past year the greatest challenge to the FA's ability to optimize the exploitation of the broadcasting rights was not posed by the Commissioner, but by the district court in Tel-Aviv. A private company named "Aviv Gil'adi productions Ltd.", involved in the marketing of broadcasting rights of football matches brought an action claiming that the agreement concluded by the FA and Charlton for a period of 3 times 3 years was contrary to the law.

The claimant argued that the FA was obliged to invite tenders for this kind of contract as a result of its status as a "dual status", i.e.semi-public body, both in the field of private law and in the field of public law. As the FA had not initiated a tendering procedure, the claimant requested the court to declare the agreement between the FA and Charlton null and void. According to the agreement, Charlton had to pay to the FA an annual fixed sum of $21 m. and in addition 42% of all extra income above this sum.

The FA defended the agreement by asserting that profits could only be maximized by selling the rights in packages. It also argued that after the previous agreement between the FA and a consortium of 3 broadcasting companies which control the second commercial channel of Israel (Channel 2) had terminated after Channel 2 had breached its terms on the eve of the 2001/2002 season, there had been no other option but to conclude an agreement with Charlton which had offered the best terms.

The court examined the case and decided that the agreement between the FA and Charlton would be considered void as from the 2002/2003 season (making it a one-season agreement only) for the following reasons:

1. The right to market broadcasting rights is exclusive and constitutes a major source of income for the FA.
2. The agreed duration of the contract (9 seasons in all) was too long to be permitted. Where the facts were concerned, Charlton failed to prove that it had relied on the accumulated duration of the contract with the FA upon its conclusion.
3. There is cause for concern that Charlton could gain a monopoly position.
4. The FA had conducted tendering procedures in the past where the marketing rights were concerned. The court saw no reason why this regime should be abandoned.
5. The general exemption from the obligation to invite tenders as laid down in the FA articles cannot set aside the basic rule that a public body must invite tenders for contracts it wishes to conclude.
6. There was no evidence that the income from the sale of the rights would have been reduced by inviting tenders.
7. Even if reduced earnings would be the result of a tendering procedure, this alone is insufficient justification for evading the rules on tendering.
8. The position of Charlton as a mediator is incompatible with the concept of tendering and cannot be justified.

An appeal against this judgment to the Israeli Supreme Court was dismissed, so the FA was forced to follow the tendering procedure.

5. The 2002/2003 season tender

Following this decision, the FA invited tenders for the broadcasting rights, subject to the following terms and conditions:

1. Bidders must hold a broadcasting license or concession.
2. The contract would be valid for 1-3 years.

The broadcasting rights were offered in 9 packages, the most prominent of which were: first match, live broadcasting on a national channel; second match, live broadcasting on any channel the concession holder sees fit; third match, live broadcasting on any channel the concession holder sees fit; the remaining 3 premier league matches on any channel the concession holder sees fit; second division matches (at least one match) and the FA cup matches (with the concession holder obliged to broadcast semi-final and final matches) on a national channel, plus highlights; women's league and cup matches; overseas broadcasting rights; Internet broadcasting rights; cellular phone broadcasting rights.

In the competition between Charlton and JCS, Charlton came out the winner and was awarded the contract for the sum of $13.5 m per year with a right to withdraw after one year. In addition it was agreed that if Charlton could access a pay channel the sum would be increased by $2 m. for 200,000 subscribers and an additional $2 m. for a further 200,000 subscribers (i.e. 400,000 subscribers overall).

After winning the contract, however, Charlton made its signature of the binding agreement with the FA conditional upon the establishment of a pay channel. The FA took the position that the question of the pay channel had not been a prerequisite in Charlton's bid. No contract was consequently concluded, nor did Charlton pay the FA the money it owed for winning it. As a result, the clubs are in a very bad state. Yet Charlton has already sold the broadcasting rights for the first matches in the premier league for the sum of about $150,000 per match and also uses existing pay-per-view channels (channels that broadcast films) to broadcast live matches.

6. The major clubs want ownership of the broadcasting rights

In Israel there are only 2 professional football leagues, the premier league (first division) and the national league (second division). Each

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league includes 12 clubs. The other 4 divisions (with some sub-divisions in each division) are amateur, even though players receive some remuneration.

In the "golden years" of the JCS contract (1999-2001) and the first Charlton contract (2002/2003) income from the broadcasting rights was distributed among the three top leagues, but not evenly, as nearly 85% of the revenues went to the premier league clubs. Each premier league club received a basic fee of about $900,000 and there were bonuses for excellence: $850,000 for the champion, and smaller fees for the runners up, down to $100,000 for reaching 8th place.

Second league clubs received about $500,000 per season, and during the 2000/2001 and 2001/2002 seasons even the third league clubs received small fees. The FA received $1 m. for its role as organizer. This arrangement was criticized almost from its inception by the major clubs which believed that they could have made more for their broadcasting rights if they would have sold them individually rather than collectively.

Maccabi Haifa took upon itself the role of spokesman for the major clubs, which were Maccabi Tel-Aviv, Ha'poel Tel-Aviv, Beitar Yerushalayim and Ha'poel Be'er Sheva. Already in 1999, Maccabi Haifa had attempted to sign a contract with Charlton (which was not then a concession holder) on the exclusive-sale basis of Maccabi Haifa's home matches for the sum of $2.4 m per season.

As a consequence, the FA had threatened to expel Maccabi Haifa from the premier league and the then Israeli champion capitulated for a time. The next round in the battle over the broadcasting rights took place in 2002.

7. Maccabi Haifa's arguments before the FA Supreme Court

In 2002, Maccabi Haifa played in the champion's league. The club had launched a special channel in which it broadcast edited clips. The FA again threatened Maccabi Haifa with expulsion, whereupon the club brought a claim before the FA Supreme Court. In its statement of claim Maccabi Haifa contended the following:

1. The collective selling arrangement prejudiced its rights as a major club in Israel.
2. It had already objected to the previous collective selling arrangement, but had been forced to comply under threat of being prosecuted by the FA.
3. The FA acts as the clubs' agent. However, permission for this can be unilaterally revoked and was indeed revoked when Maccabi Haifi refused to comply with the collective selling arrangement.
4. The Sports Act recognizes the right of ownership of clubs as is evidenced by the clubs' ownership of their logo.
5. The section in the FA articles of association which conveys upon the FA the full authority to sell the broadcasting rights is invalid, because:
   a. the FA is only authorized to regulate "the proper management" of football and this does not include "broadcasting rights".
   b. since the inclusion in the articles of the section granting the FA the exclusive authority to sell broadcasting rights collectively, the price of these rights have increased dramatically, which renders any previous arrangement of the broadcasting rights irrelevant.
6. The FA discriminates against the major clubs as compared to the minor clubs. There is no justification for compelling Maccabi Haifa to share with the minor clubs which lack a solid fan base, as its revenue potential is the result of its significant fan support.
7. The FA cannot rely on Article 47 of the UEFA regulations which gives the broadcasting rights to the national federations that are members of UEFA, as the purpose of this provision is to prevent a decline in the number of viewers, not to grant full ownership to the national federations.
8. The UEFA regulations governing the implementation of Article 47 refer to UEFA's authority to transfer broadcasting rights rather than to the ownership of those rights. This made it possible for the issue to be resolved in countries like Spain, Italy, Germany and the Netherlands by recognizing club ownership of these rights.
9. The club is financially damaged by the distorted distribution of the revenues, now that it has been deprived of ownership of the broadcasting rights, as it received only $1.3 m as compared to the sum of $2.4 m. which it could have earned if it would have sold its rights individually. The result of the distorted distribution is the unjustified enrichment of other clubs at the expense of Maccabi Haifa.

8. The FA's response

The FA naturally opposed Maccabi Haifa's claim and defended its ownership of the rights by the following arguments:

1. Maccabi Haifa is bound by the provision in the articles granting the FA the exclusive and full authority to sell the rights. The articles cannot be nullified for other reasons than being illegal, immoral or contrary to the public interest, none of which is presently the case. The FA concluded contracts on the basis of this authority.
2. According to the Sports Act, the FA is fully competent in all matters relating to its activities and not only in regard to regulating "proper management" as argued by the club. The collective selling arrangement results in the highest possible revenues by using the goodwill of the league.
3. Maccabi Haifa owes it goodwill to its membership of the league. This is the only leverage it has to generate income.
4. The rules concerning standard contracts (which in certain circumstances justify intervention in contractual relations) does not apply in respect of the FA articles, because Maccabi Haifa agreed to the provision granting the FA the authority to sell the broadcasting rights. Amending the provision in question is the exclusive responsibility of the general assembly of the FA.

9. The judgment of the FA Supreme Court

On 12 May 2003, the FA supreme court, as expected, found in favour of the FA.

It held that the broadcasting rights belonged exclusively to the FA. This judgment was based, inter alia, upon the status of the articles as a multilateral agreement binding all of the FA's members, including Maccabi Haifa. The articles' validity is based on the Sports Act which recognizes the FA's authority in respect of its members.

The supreme court further held that under the Sports Act, the FA is the representative body in the football sector and is thereby exclusively competent to manage football activities in Israel. This also implies, however, that the FA is subject to the principles of sound administration.

The supreme court also found that the rules concerning the right to sell broadcasting rights, including collective selling, fall within the framework of the "proper management" of the football sector and therefore also fall within the FA's competence. The supreme court reached this conclusion even though the Sports Act does not expressly refer to this competence when listing the FA's areas of authority. The conclusion is based on the fact that the Sports Act does not provide an exhaustive list of sectors regulated by it.

The supreme court further considered that the collective selling of broadcasting rights is inevitable due to the way the league is structured and due to the risk that minor clubs will lose their bargaining position in case of individual selling. In addition, incompatibilities could arise insofar as the times at which matches are played or broadcast are concerned, which might damage the league as a whole. The supreme court held that only the FA is capable of ensuring the fair distribution between the clubs of revenues from the sale of broadcasting rights, based on rational calculations, as only the FA has a duty in respect of the general interest of the league as a whole, rather than in respect of one or other particular club alone.

The supreme court rejected the claim that the FA articles prejudiced Maccabi Haifa's rights and concluded that the articles represent the overall consent given by all the clubs, including the claimant, as opposed to being a dictate forced upon it. The supreme court further rejected the club's basic assumption that it is the owner of the broadcasting rights, now that these rights are the outcome of a common effort in which all participating clubs invested together, with the FA as the organizing body. It is not possible to separate an individual match from the league and even the match's rating depends mostly

upon the timing of its broadcast (which is the result of the FA's control of the league), the rival club's position in the league and other factors following from the league context. For this reason, clubs do not have ownership of broadcasting rights (contrary to the rights of a non-league tournament) and cannot claim a violation of their fundamental rights as regards property and/or free trade.

The supreme court added that even if it would have concluded that the rights belonged to the club, the FA's control of the rights would still be justified under the Sports Act (which grants the FA the power to regulate the football sector) by a legitimate purpose (the current centralized mechanism recognizes that the clubs' income from the broadcasting rights has to be differentiated based on the clubs' different positions within the league) and that there is no other established method for distributing revenues from broadcasting rights which is fairer than the present method.

The supreme court also concluded that if the club (and 3 other major clubs, which also have an interest in selling their broadcasting rights individually) would receive the lion share of broadcasting rights revenues, there would be no alternative source of income for the minor clubs, which would jeopardize the fate of the entire league.

For these reasons and with due regard for the principle of the accepted limits to ownership (which considers the concept of private property in the light of the owner's obligations to society) the court concluded that the FA is still justified in infringing the ownership rights of Maccabi Haifa.

10. Afterword

After a stormy summer that caused several weeks' delay in the opening of the season, the picture is still in flux. Charlton launched a pay-per-view system in which matches are played during four different days so that all six premier league matches can be broadcast. Two of the matches are broadcast on free channels, while the remaining four are broadcast on pay channels for the price of around $4.5 for each pair of matches.

So far the average number of viewers has been around 50,000 for each programme, which is too few to even offer a chance of making a profit. The economic break-even point would be somewhere between 100,000 to 150,000 subscribers, so the whole business has only resulted in substantial losses.

In view of this, the concession holder, Charlton, is trying everything in its power to improve its position. One of the ideas it toyed with was to prevent cable and satellite subscribers from being able to receive live broadcasts of matches in the European leagues, as Israeli league matches are broadcast using Article 48 of the UEFA regulations which allows national football federations to protect its clubs' exposure rate by avoiding live broadcasts of matches from other leagues during a time-frame of 2.5 hours, subject to certain conditions, such as that at least half of the matches would have been played at the same time and that out of these only one will be broadcast live. This idea met with a lot of opposition and was therefore abandoned.

Another negative result of the new system is the dragging out of each weekly programme to cover four different days (Friday - Monday). This has already led to the termination of a very popular radio programme which used to cover the matches, because there is no longer one particular day on which matches are played.

The ongoing battle over broadcasting rights is beginning to arouse widespread criticism because of the restrictions on the general and public access to live broadcasts of matches and the financial losses suffered as a result. It is expected that the matter will soon become subject to public and parliamentary intervention, leading to necessary changes.

❖

Is there a Legal Claim to Free Radio Broadcasts of German *Bundesliga* Matches?

by **Michael Siebold and Joachim Wichert***

1. Radio Hamburg v. Deutsche Fußball Liga GmbH, Hamburger SV and FC St. Pauli Hamburg

As of the season 2001/2002, the organizers (*Veranstalter*) of the matches in the German professional football league (*Bundesliga* and *2. Bundesliga*) requested a fee from the private radio stations for radio broadcasts of these matches. Today, the fee varies between Euro 2,500.00 and Euro 35,000.00 per season, but until the 2001-2002 season the private radio stations could produce these radio broadcasts free of charge.

The private radio stations do not accept that there is an entitlement to a fee as claimed by the league and/or the clubs. Consequently, they started legal action as a test case. Formally, Radio Hamburg, a private radio station, acts as the claimant; however, the claimant is fully backed by the Association of Private Radio Stations (*VPRT - Verband Privater Rundfunk und Telekommunikation e.V.*). The Deutsche Fußball Liga GmbH (*DFL*), as well as the two Hamburg professional football clubs Hamburger Sportverein (*HSV*) and FC St. Pauli, are the defendants. The claimants argue that they have a right to broadcast matches of HSV and St. Pauli live on radio without having to pay any specific fee or compensation.

The issue at hand does not concern payment for the use of technical equipment provided by the stadium owners or operators, or for the lease of premises used by the broadcaster; the issue is the license fee for live broadcasting from the stadium.

The claim was dismissed in the first two instances. The District Court of Hamburg (Az. 308 O 415/01) as well as the Hamburg Court of Appeals (Az. 5 U 67/02) ruled that the organizers of football matches in the Bundesliga may request compensation for the live radio broadcasts of their matches. The dispute is currently before the Federal Supreme Court (*Bundesgerichtshof - BGH*; Az. XII 1517/03) on final appeal; a decision may be expected in 2005. Since both sides based their arguments primarily on constitutional civil rights (*Grundrechte*) it is more than likely that the dispute will finally be heard by the Federal Constitutional Court (*Bundesverfassungsgericht - BVerfG*).

Contrary to the private radio stations, the public radio stations did accept the League's request for a fee for the live broadcasting of matches in the German professional football league. Accordingly, in 2003, they concluded an agreement with the DFL, under which a seven-digit sum is to be paid for the opportunity to broadcast matches live on radio over a period of three seasons.

The authors of this article acted for the Deutsche Fußball Liga GmbH, the Hamburger SV and FC St. Pauli in the above-mentioned test case before the District Court and the Hamburg Court of Appeals.

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2. Legal position of the organizers

The marketing rights of the organizers vis-á-vis the radio stations are not governed by any specific laws. TV rights, however, have in fact been regulated: permission to broadcast live on TV against (steep) compensation or a fee is based on the Broadcasting Agreement (*Rundfunkstaatsvertrag*). Originally, the Agreement was also intended to include provisions on radio broadcasting. Due to a perceived lack of relevance at the time, the provisions in question were not included. Back in the 1980s and 1990s, radio broadcasting rights were not marketed separately and nobody could have foreseen the current developments.

The marketing rights of the organizer must therefore be inferred from other, general principles. However, the courts have declared that the Copyright Act (*Urheberrechtsgesetz - UrhG*) is not applicable, as DFL matches cannot be brought under its scope. The Competition Act *(Gesetz gegen Wettbewerbsbeschränkungen - UWG*) is likewise for the most part considered inapplicable. The applicability of the concept of profiting from the work of a third party was especially rejected, because, although radio reporters may depend on the event for their report, the report itself is still their own achievement.

The legal position of the organizer is based on the right of the owner of premises to the undisturbed possession of these premises, in other words: domestic authority (*Hausrecht*). Based on this domestic authority the organizers can decide who may enter the stadium and for which purpose. This right also extends to being able to request a special fee from radio reporters wishing to broadcast a match. This point of view was considered the focal point by the courts of first and second instance in the present case. They based their findings on decisions of the Federal Supreme Court and the Federal Constitutional Court regarding TV rights, as these had also been based on this same legal principle of domestic authority before TV rights were specifically regulated.

The defendants emphasized the position of the organizers and the independent value the organizers added by setting up and maintaining the match schedule, the match-ups, the whole league structure including marketing, the rules, the venues and fan support; in short, everything that makes the sport of league football or European football the most successful ongoing sports event in the world.

3. Legal position of the radio stations

The private radio stations on the other hand referred to Article 5(1)(2) of the Constitution (*Grundgesetz - GG*) which provides the freedom of broadcasting in a general sense. Summarized and simplified the arguments of the private radio stations were the following.

According to Article 5(1)(2) *GG* radio stations have to be guaranteed unrestricted access to all events of special public interest. Such interest is definitely present for matches of the DFL. If this freedom were not respected, influenced reporting and the monopolization of important information could be the consequence.

Radio broadcasting has to be differentiated from TV broadcasting. TV broadcasting mainly consists of images of the match and therefore depends much more on the event itself than radio reporting does. The radio reporter delivers a service uniquely his own by describing the event in his own words and thus provides an alternative for the moving images that are lacking. Radio broadcasting is considered comparable to a description of the match in the printed media. For the purposes of reporting in the printed media, no special fees or compensation are charged either.

4. Response of the organizers

In response to this reasoning, organizers could also argue a legal position based on the Constitution. Their right to market the event follows from Articles 12 and 14 *GG* which provide the freedom of profession (*Berufsfreiheit*) and the right of ownership (*Eigentumsrecht*). The organizers are responsible for organizing DFL matches and accept the corresponding economic risk. They deliver the product which the radio stations need in order to be able to put out a broadcast. According to the general terms of trading, it is fair to request a fee for such a product. This is even more true against the background that private radio stations use the specific live broadcast to make a higher profit, which is, of course, perfectly legitimate. But it is also legitimate to charge a special fee for the product that forms the basis of the broadcast.

By the same token, the comparison given between radio broadcasting and TV broadcasting is beside the point. It was not considered that the production of a TV broadcast requires the input of many own services in addition to the live images taken. It was further completely ignored that a major aspect of both radio and TV broadcasts is the live atmosphere. This is a key element for radio stations: without it, they could just as well broadcast from outside the stadium (e.g. based on information received via a TV broadcast) or report the match afterwards. This way, the facts could also be conveyed to the public, but this is not what is intended. In this context, radio broadcasting has to be distinguished from the printed media, which lack the live atmosphere and the background noises of the event and are instead a retrospective narrative or factual information rather than a programme.

The District Court and the Hamburg Court of Appeals gave priority to the constitutional rights of the organizers. The freedom of broadcasting, which is also protected by the Constitution, is not seriously affected when broadcasters are obliged to pay adequate compensation or a fee for the right to produce a live radio broadcast. By contrast, the freedom of profession and the right of ownership of the organizers provide sufficient basis for considering the event a disposable and marketable good. For this reason, the courts dismissed the claim of Radio Hamburg.

5. Conclusion

The District Court and the Hamburg Court of Appeals have delivered a sound judgment. The organizers are allowed to charge a fee for live radio broadcasting from inside the stadium. It is anticipated that the Federal Supreme Court and the Federal Constitutional Court will arrive at the same conclusion, whether based on the same legal principles or based more on the role of the organizers as outlined above. The freedom of broadcasting would not be endangered by such a decision.

The Avoidance of the International Double Taxation of Sportspersons

Netherlands Court of Appeal deals with the application of tax treaties to the allocation of a professional cyclist's income from activities undertaken abroad

by **Rijkele Betten***

1. Introduction

The role and function of OECD Model Tax Treaties and the OECD Commentaries thereto

Most countries have long since taxed resident individuals on their worldwide income, and non-resident individuals on their domestic source income. Hence, individuals enjoying income from outside their country of residence run the risk of being subject to income tax on the foreign income component in both the residence country and the source country. In order to avoid such international double income taxation, countries have since approximately 1895 concluded tax treaties between each other. Among the most important functions of these tax treaties are the allocation of a right to tax to the source country, and the application of a method for the avoidance of the double taxation (when the source country has a right to tax).

After World War I the League of Nations set up various commissions to draft models for the tax treaties. For this introduction it suffices to say that after World War II this work was taken over by the OECD (and first its predecessors). In 1963 a comprehensive Draft Model Convention was published, in 1977 an updated comprehensive Model Tax Convention was published and from 1992 a new "loose-leaf" Model has been published which is amended at irregular intervals. These model treaties are in practice indeed used by virtually all countries as the starting point for tax treaty negotiations.

Apart from the Models the OECD has also always prepared and published Commentaries to the Models. In the case at hand, the function of both the Models and the Commentaries becomes apparent: without deviating tax treaty provisions or deviating explanations the Model Conventions and the OECD Commentaries thereto may be used as authorative means of interpretation.

Treatment of employees versus treatment of athletes

An important category of income that is covered by tax treaties concerns income from the exercise of an employment in another country (different to the residence country). It would be impractical if on each occasion an employee works in another country that country would have to utilize a right to tax the income earned by the non-resident employee during that particular period of time. Therefore certain limits have been set, which need to be exceeded before the country in which the employment is exercised may tax an employee under a tax treaty. In order to avoid taxation in the source country there are three limits which all need to be fulfilled:

- the taxpayer should exercise his employment in the other country for a period or periods not exceeding 183 days in a calendar year (in recent treaties reference is often made to any 12-month period);
- the remuneration should not be paid by, or on behalf of, an employer who is not a resident of the source country; and
- the remuneration should not be borne by a permanent establishment which the employer has in the source country.

Another category of income, which is specifically dealt with in tax treaties, is income earned by artistes and athletes. The rights for the source state to tax income earned by entertainers or athletes from their personal activities as such that are exercised in the source country, is not restricted by the limits mentioned above for employees in general.

In the case at hand the main issue concerns the application of the tax treaty provisions regarding the activities undertaken by athletes and artists.

Methods for the avoidance of international double taxation

For a long time there have been two methods for the avoidance of international double taxation. Regarding passive income such as dividends and interest the source country's right to tax has typically been limited to amounts between 5 and 15%, while the residence country is allowed a deduction of the foreign tax paid.

For other income, e.g. salary or business profits, the right to tax under the tax treaty often does not limit the source country at all. For the residence countries there are two common methods for the avoidance of double taxation:

- ordinary credit method: the residence country applies its own legislation to the worldwide income of the taxpayer and allows a credit of foreign tax paid with as a maximum the proportionate share of the tax due in the residence country;
- exemption with progression method: the residence country does take the foreign income into account for determining the effective tax rate to the worldwide income of the taxpayer, but then applies the effective rate only to the non-exempt foreign income.

The above description of tax treaty issues is a simplification, which is only meant to assist the non-international tax specialist in understanding the issues dealt with by the Court.[1]

2. The facts

The professional cyclist Mr X was from 1 January 1998 an employee of a certain professional racing team, with a contract for 12 months. His basic yearly salary was determined at NLG 45,000 (Euro 20,420). As of 1 August 1998 the contract was extended to 31 December 1999 and the basic salary on a yearly basis was increased to NLG 125,000 (Euro 56,722). The basic salary for 1998 thus amounted to NLG 89,756 (Euro 40,729).

Apart from this basic salary the cyclist received starting money and prize money. The payment thereof was channelled though the Royal Netherlands Cycling Union (Koninklijke Nederlandse Wielren Unie, hereinafter KNWU). In 1998, starting and prize moneys amounted to NLG 53,530. The geographic sources of these payments were:

	Starting and prize money (in NLG)	Withheld tax (in NLG)
Netherlands	16,768.81	
France	34,552.15	5,182.86
Italy	271.25	55.28
Spain	1,938.67	169.88
Total	53,530.88	5,408.02

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1 **Court of Appeal of 's-Hertogenbosch, No. 02/04286, 13 November 2003.**

The 1998 gross income of the cyclist amounted to NLG 143,286. The deductible amounts for tax purposes amounted to NLG 22,291.

During 1998 the cyclist participated in cycling competitions on 117 days in the Netherlands, Belgium, Denmark, France, Ireland Italy, Spain and Switzerland. Of these days, 48 days concerned competitions in Belgium, Ireland and Spain. In these three countries the cyclist trained a further 52 days during 1998. In total he thus spent 100 days in the three last-mentioned countries.

Only the tax treaties concluded by the Netherlands with Belgium, Ireland and Spain are applicable regarding income from sporting activities for which avoidance of international double taxation is to be achieved through the exemption with progression method (for an explanation of this method see above in the Introduction). The tax treaties concluded between the Netherlands and France and Italy provide that only an ordinary credit is to be allowed.

The taxpayer argued that regarding the days worked in Belgium, Ireland and Spain the exemption with progression had to be applied to a proportionate share of his basic salary. The tax inspector on the other hand argued that the right to tax the basic salary was only to be attributed to the residence country, i.e. the Netherlands. The main arguments raised by the tax inspector appear to be that the cyclist would also have received his basic salary if he had not been active in the three countries, and that the activities in the three countries in question were of such short duration that attribution was not possible.

3. The Issue at hand

The issue is whether the taxpayer considers a proportionate part of his basic salary to be entitled to the application of an exemption with progression on the basis of the three mentioned tax treaties and, if so, how exactly should this exemption be calculated.

4. The law

The relevant provisions in the tax treaties concluded by the Netherlands with, respectively, Belgium, Ireland and Spain read as follows:

Belgium - Netherlands tax treaty[2]

Article 17
Artists and athletes
Notwithstanding the provisions of Articles 14 and 15, profits or income derived by public entertainers, such as theatre, motion picture, radio or television artists, and musicians, and by athletes, from their personal activities as such, may be taxed in the State in which these activities are exercised.

Ireland - Netherlands tax treaty[3]
Article 16
Artistes and athletes
Notwithstanding the provisions of Articles 13 and 14 of this Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes and musicians, and by athletes, from their personal activities as such may be taxed in the State in which these activities are exercised.

Spain - Netherlands tax treaty[4]
Article 18
Artistes and athletes
Notwithstanding the provisions of Articles 15 and 16, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the State in which these activities are exercised.

5. The decision of the Court of Appeal

The Court stipulated that it was not disputed that the taxpayer enjoyed income which for individual income tax purposes needed to be classified as employment income (Article 22(1)(a) of the Income Tax Act 1964). It was also not disputed that the starting and prize moneys earned in 1998 during the races in the three mentioned countries were covered by the three relevant tax treaty provisions regarding the taxation of artistes and athletes.

The Court repeated the three relevant tax treaty provisions (see under THE LAW), and then cited the provision from the 1963 OECD Model Convention, on which these provisions have been based. This provision reads:

"Notwithstanding the provisions of Articles 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised."

Then the Court repeated the first two paragraphs from the 1963 OECD Commentary to its Article 17:

"1. The provisions of Article 17 relate to public entertainers and athletes and stipulate that they may be taxed in the State in which the activities are performed, whether these are of an independent nature or of a dependent nature. This provision is an exception, in the first case, to the rules laid down in paragraph 2 of Article 15.

2. The provision makes it possible to avoid practical difficulties, which often arise in taxing public entertainers and athletes performing abroad. Certain Conventions, however, provide for certain exceptions such as those contained in paragraph 2 of Article 15. Moreover, too strict provisions might in certain cases impede cultural exchanges. In order to overcome this disadvantage, the States concerned may, by common agreement, limit the application of Article 17 to independent activities by adding its provisions to those of Article 14 relating to professional services and other independent activities of a similar character. In such case, public entertainers and athletes performing for a salary or wages would automatically come within Article 15 and thus are entitled to the exemptions provided for in paragraph 2 of that Article."

The Court then reasoned that in its opinion there is no support for the view of the tax inspector that provisions similar to Article 17 of the 1963 OECD Draft model do not cover basic salary. These provisions, according to the Court, provide a specific rule for artistes and athletes independent from the circumstance whether their personal activities are exercised as dependent or independent activities. If the Netherlands and one or more of the other three countries had wanted to deviate therefrom, they would have used the possibility to include a provision which deviated from Article 17 of the 1963 OECD Draft Model.

The Court also held that there is no indication in the text and context of Article 17 of any limitation to the duration of the activities. Also, the meaning of the Commentary contradicts the view of the tax inspector because the nature of activities of artistes and athletes can often be characterized by a short duration.

The Court then turned to the 1977 OECD Model Convention. Its Article 17, paragraph 1, in essence does not deviate from the similar provision of the 1963 Draft Convention. The Commentary to the 1977 Model Convention has, in comparison with the 1963 Commentary, been extended with the following paragraph 8:

"8. Paragraph 1 applies to income derived directly or indirectly by an individual artiste or sportsman. In some cases the income will not be paid directly to the individual or impresario or agent. For instance, a member of an orchestra may be paid a salary rather than receive payment for each separate performance: a Contracting State

2 Tax treaty concluded between the Netherlands and Belgium on 19 October 1970 (Trb 1970 No. 192). The text is from the unofficial English translation published in the Tax Treaty Database of the International Bureau of Fiscal Documentation, Amsterdam. As of 1 January 2003 this treaty was terminated and replaced by the tax treaty which was concluded between the Netherlands and Belgium on 5 June 2001 and which has since become effective.

3 Tax treaty concluded between the Netherlands and Ireland on 11 February 1969, Trb. 1969, 37.

4 Tax treaty concluded between the Netherlands and Spain on 16 June 1971, Trb. 1971, 144.

where a performance takes place is entitled, under paragraph 1, to tax the proportion of the musician's salary which corresponds to such a performance. Similarly, where an artiste or sportsman is employed by e.g. a one person company, the State where the performance takes place may tax an appropriate proportion of any remuneration paid to the individual [...]."

The above paragraph clarifies in the view of the Court that Article 17 does not only concern remuneration paid directly to the athlete but also the salary paid by the employer which in turn receives a remuneration for the sporting activities. It is the opinion of the Court that if the athlete receives remuneration in the form of a salary and only part of the employment is exercised abroad then an attribution of that salary needs to take place.[5] Since in this case the Court did not find any facts or circumstances which would require that an attribution should be made in a disproportionate manner, the Court held that a proportionate attribution would be suitable.

The Court concluded that the issue should be resolved in agreement with the opinion of the taxpayer. Regarding the basic salary, which is proportionate to the activities exercised abroad, the taxpayer was entitled to an exemption with progression.

The calculation of the proportionate share was made by using as the relevant factor the number of daily activities undertaken in the three countries concerned (100) divided by the total number of working days (261).

6. Comment

For international tax lawyers the outcome of the procedure does not really come as a surprise, and appears to be rather straightforward. Up until this case, there was no Dutch case-law in which this issue was explicitly clarified. Hence the desire of the tax authorities to test the case. The tax authorities are apparently not satisfied regarding the outcome of this case, as they have appealed against the decision.

The international tax situation for athletes is different to that of other employees. As indicated in the Introduction to this case note, a source country is in the case of "regular" employees only entitled to tax the income earned by the employee during the exercise of his employment in the source country if certain conditions are fulfilled. These conditions entail either an extensive presence of the employee in the source country (depending on the text of the relevant tax treaty, more than 183 days in a calendar year or in any 12-month period), or the presence of an employer in the source country or a taxable presence in the source country by the foreign employer.

As also becomes apparent from the above case, for athletes (and athletes) there is no such minimum presence requirement. The only limitation is that the pertinent income must be earned in connection with the exercise of sporting activities. Where an athlete receives a basic salary as a member of a sports team, it is submitted that it is clear that this connection exists. But since the Dutch tax authorities have decided to appeal, the final decision of the Supreme Court is eagerly awaited.

One final remark concerns the definition of an artiste or athlete. There is no precise definition available.[6] Moreover, an individual may perform more than one task in the country where the performance takes place (e.g. as a player and a coach).[7] According to paragraph 4 of the Commentary, if the activity in the country where the performance takes place is predominantly of a performing nature then Article 17 will apply to the entire income. If the performing element is a negligible part of what he/she does in that country then the whole of the income will fall outside the scope of Article 17. And then the Commentary continues: "In other cases an apportionment should be necessary."

The conclusion from the above is that regarding athletes (and artistes) the application of tax treaties to the income earned by them in relation to performances outside their country of residence needs to take place on a case by case basis.

5 The Court specifically mentioned that this interpretation is in agreement with HR 23 November1983, no. 21 818, BNB 1984/33). In that case the Supreme Court (Hoge Raad) basically held that the tax treaty article on artistes and athletes does not only apply to self-employed persons, but also to employees.

6 See para. 3 of the Commentary to Art. 17.

7 Trainers and coaches are not considered athletes for the application of Art. 17.

UEFA and Football Governance: A New Model

by **Pierre Ducrey, Carlos Ferreira, Gabriel Huerta and Kevin Marston***

1. Introcution

When in 1904, representatives of seven European countries gathered in Paris to found the Fédération Internationale de Football Association, they could not imagine that their newly-born association would a century later, evolve into the most international of world organisations. FIFA currently has more affiliated countries than the UN.

The main idea behind that meeting was to create a body with legitimacy to arbitrate over conflicts among national football associations and later to assure the presence of one national association per country and the development of football across all member nations. This legitimacy came with time, when an ever-growing number of associations pleaded their affiliation to FIFA, and with the monopolistic characteristic that the body impressed at all levels of football governance: Only one association per country would be officially recognized as sovereign responsible for the control and development of the sport within its boundaries.

This was the seed for what would prove to be the most successful model of organisation and diffusion of a sport discipline. With the passing years, that model was consolidated with the advent of other organisational layers, forming what is known today as the "Pyramid of Football".

However, although this model has remained stable over the last fifty years, which in fact contributed to the successful popularisation of the sport internationally, the context in which the model is inserted has changed drastically over the past decades.

One does not have to look far for the evidence of the changes and resulting conflicts on the European continent. The modern headlines of sport-news sections are filled with tension-riddled declarations from football club managers toward football's organisers on a host of topics covering the calendar, competition structures, revenue distribution and the relationship between national team and club football. This gives us a clear sign that the UEFA's governance model is in need for adjustments.

2. The root of the conflicts

If we were to summarise the utmost objective of the central stakeholders within the European Football Industry in one sentence, that would be - to increase demand for football. When asked about their objectives, UEFA, national associations, domestic leagues and clubs agree on that central point. The root of the conflicts lies on their views on how to do that.

The figure below illustrates that situation, depicting the areas of convergence and divergence of interests among UEFA, the clubs and the domestic leagues:

The Industry, at its highest level, offers three different classes of products: domestic club football, international club football and national team football. All of them are based on the same limited pool of resources, namely players and calendar, and with different appeals, address the same market. The task of optimising the supply model of modern football in Europe is indeed not an easy one.

By its place in the hierarchy of European football, UEFA would be best positioned to balance the conflicting interests of the main actors and find the optimal solution for the supply model. However UEFA have a handicap by birth: Its blood cells are the national associations alone. By its constitution, UEFA have to safeguard the interests of the member associations, and the member associations are the ones calling the shots at the continental level, through the voting at UEFA's congress or by appointing the governing body's Executive Committee and CEO.

Thus, in situations where a conflict of interests between the national association and the clubs or domestic leagues might emerge, UEFA would not be able to take on an impartial position to resolve the issue.

For example, the trespassing of the national boundaries in the domestic context would play against the sovereignty of national associations. UEFA reacted strongly against the idea of creation of an Atlantic League combining the largest clubs from Scotland, The Netherlands, Belgium, Portugal, Sweden, Norway and Denmark, giving them an opportunity to play in a more commercially viable league than their current domestic ones.

But the most frequent conflicts arising at the continental scenario are the ones between top clubs and UEFA.

3. Main conflicts between the clubs and UEFA

The cases of conflicts between UEFA and the clubs abound and fall mainly into three categories: international competition format, revenue distribution and representation. The analysis of the way in which these areas of conflicts are being managed by UEFA, suggests

* This is the synopsis of a Paper delivered for the International Master of Management, Law and Humanities of Sports - CIES (Centre International d'Etude du Sport), Switzerland, July 2003.

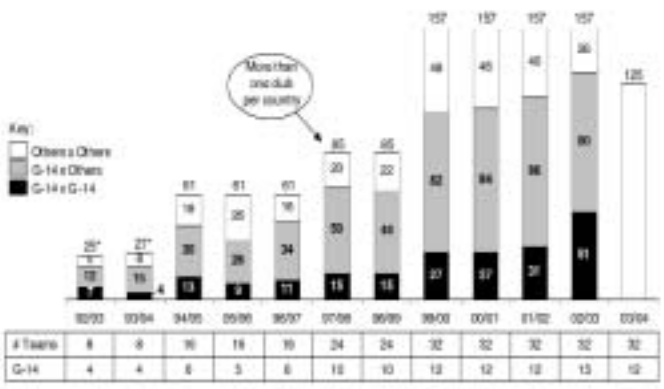
that the governing body has been losing ground in the arm wrest against the clubs in the first two areas.

This situation has been amplified especially after some of the most popular and successful clubs in Europe created the G-14 to channel their pressure.

4. International competition format

The fact that there have been five changes in the format of the UEFA Champions League over a little more than a decade shows the strength of the top clubs in getting their aspirations applied. In all those changes but the last, the big clubs have benefited with an increase in participation at the competition, as shown in the figure below:

Evolution of the total number of matches played at the UEFA Champions League



	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	00/11	01/12	02/03	03/04
# Teams	8	8	10	10	10	24	24	32	32	32	32	32
G-14	4	4	6	5	6	10	10	12	12	12	13	12

Notes: * Not considering the knock - out rounds preceding the group stage

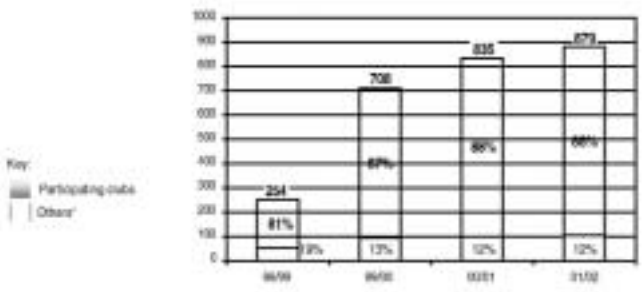
Source: The Rec.Sport.Soccer Statistics Foundation, analysis of the authors

It is clear that with an increase in the participation of popular teams the value of UEFA's premium product has skyrocketed, and this in turn should benefit the whole family of European football through revenue sharing and solidarity schemes. But this brings us to the second area of conflict.

5. Revenue sharing

Traditionally, UEFA have used the revenue from its main competitions, namely the European Footbal Championship (hereafter: EURO competition) and the UEFA Champions League, to fund its activities and to promote solidarity among its member associations. However, much like what occurs in the design of international competition, UEFA are proving unable to withstand the hunger of the clubs for an ever growing share in the revenues of the UEFA Champions League. Over the last years, virtually all marginal growth in the revenues of the UEFA's Champions League has been absorbed by the participating clubs, with the G-14 clubs accounting for a disproportional share in this money, as shown in the figure below.

Evolution of the distribution of UCL's income – CHF million
(Net of organisational costs)



# of G-14 clubs / Total Participating Clubs	42%	38%	38%	38%
Income share of G-14 clubs / Income Share of Participating Clubs	54%	54%	55%	53%

* Others include National Leagues, National Associations and 6th ranked teams in the qualifying rounds

Source: UEFA Financial Reports

In addition to that, there is also pressure from the clubs to participate in the revenue distribution scheme of national team competitions, such as the EURO competition, under the argument that the clubs are the providers of the tournaments main asset, the players.

Theoretically, one could argue that this is nothing but fair, since the clubs are the main drivers for the generation of those revenues. However, one of the well-known peculiarities of the economy of team sports is that there should be cooperation among clubs in order to guarantee competitive balance and increase long-term demand for the sport. The current trend of concentration in the revenue sharing systems would then be violating that principle.

6. Representation

The third area in which the clubs have concentrated their pressure - and this is probably the most fundamental one, since it has impacts over all other areas - is the lack of representation at the governance of European football. The clubs complain that there are a large number of decisions being made at UEFA that affect their daily business and over which they have little or no control.

To address that, UEFA have been adopting measures of bringing both the leagues and the clubs closer to the governance of European football. The creation of the UEFA Professional Football Committee and the European Club Forum, whose board participates in the UEFA Club Competitions Committee are examples of such measures. However those are nothing more than palliative solutions, since in its essence the participation of clubs and leagues through the committees is only consultative.

UEFA have still not taken the step to actually share the decision making power with the other main groups of interests. And, as a matter of fact, why should they do this?

Although there is little that the clubs can actually do to change that, the threat of a breakaway movement - even though its implementation is so complex that it becomes almost unviable - is certainly a tool of pressure. The clubs, after all, are the ones with the strongest link with the fans, and popular support is the lifeblood of spectator sports.

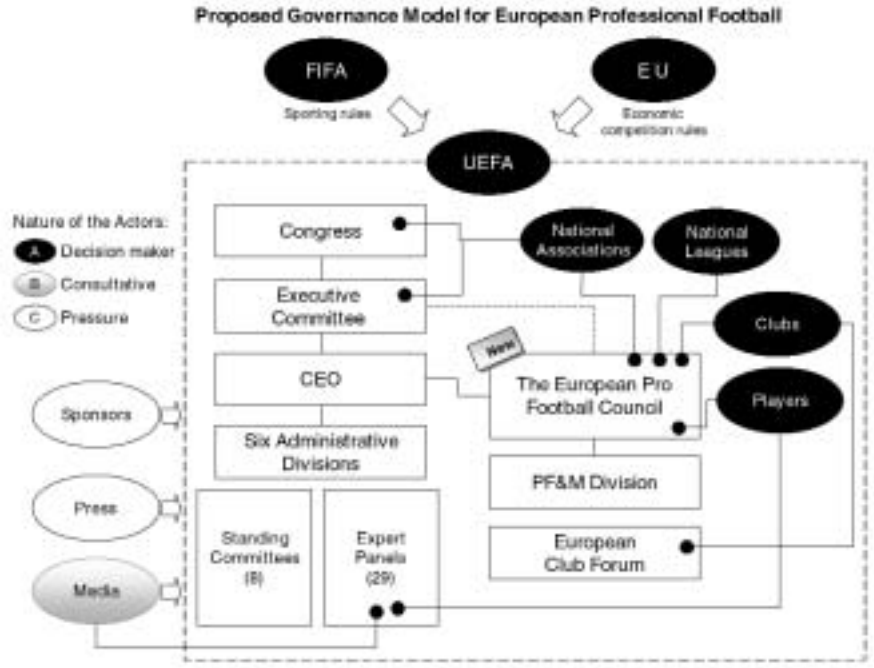
With these issues in mind and looking outside its bubble, European football can find some valuable lessons of conflict management in the wider world of sport.

7. Conflict management lessons from outside European football

We have studied four cases of conflict management in sports to draw some lessons that could help UEFA in deciding its way into the future.

The first two are cases of the breakaway movements appearing at Brazilian football and more recently at Formula One. Those cases show that the perception that the governance of the game is not being conducted at an optimal level will eventually lead to the appearance of breakaway movements. When the situation comes to this point, a reactive strong position from the Governing Body - usually the first instinctive reaction - does not intimidate the opposing party, but rather pushes it away. In the case of Brazilian football, the first reaction of the local national association was to threaten the clubs taking part in the breakaway movement, with their expulsion from the worldwide football pyramid. The clubs reacted making use of their popular support to withstand the threat and the national association eventually had to find a compromise.

The other two cases show situations in which the governing body adopted proactive measures to avoid potential damages in the future. Those are the cases of the UCI with professional cycling, and the IOC with the creation of the Athlete's commission. In both cases, the Governing body invited relevant stakeholders to participate in the decision making process. The hindsight analysis of those measures show an effective plunge in the number of conflicts within the sport. It also strengthened the credibility of the governing body as the principal regulator of their sports.



holders would be able to express and learn from others' perspectives.

Considering that, we recommend that the council be formed by ten voting members, the UEFA President and an additional observing member from FIFA. UEFA would have 5 voting seats in the council, 3 in the form of National Associations, 1 in the host of the EURO competition and 1 in the CEO and with the President attending all meetings. The other members would represent the other major actors in European football, the national leagues, the clubs and the players. In the case of a tie vote the UEFA President would hold the casting vote, thus representing the wider interests of European football. An additional power reserved to UEFA would be that the Executive Committee could retain a veto power in the case that the Council makes a decision falling outside its scope. The proposed voting structure for the European Professional Football Council is shown in the figure below.

8. Football's United Table: A new model for football governance in Europe

With these lessons learned, we strongly believe that sharing the decision making power is the only way to bring the actors of European football together at the same table, and effectively address the root causes of the conflicts plaguing modern football.

Based on the diagnostic of European football's current situation, and drawing from the lessons learned from the external cases, we believe that UEFA have a unique opportunity to lead a fundamental reform in its governance model, bringing benefits to the whole family of European football.

This reform must address three key points: (1) it should work within UEFA's current structures, (2) it should raise different stakeholders to professional football's decision-making level and (3) it should be able to anticipate future conflicts and provide the grounds to solve them.

Based on those points and after reviewing UEFA's current structure, we propose the creation of the European Professional Football Council, a body that would accumulate the functions of the current UEFA Club Competitions Committee, UEFA Professional Football Committee and the National Teams committee, with the novelty that this council would have decision making powers.

This body would make all decisions within the scope of professional club and national team football at the European level, such as, definition of format of European competitions, revenue sharing system, transfer windows and the commercialisation of rights of the competitions.

The Council would report functionally to the Executive Committee of UEFA and would have its decisions made operational by UEFA's Professional Football and Marketing Division.

The voting structure at the new council could be designed in a way to preserve UEFA's ascendancy over the game and at the same time satisfy the need of relevant groups for representation. In this way, stakeholders would be able to express and learn from others' perspectives.

9. Conclusion

The proposed solution brings many advantages to the current governance model of football, the most important of these being the representation of relevant stakeholders at decision-making level.

It is clear that such a change, although necessary, will face resistance. We believe that the main focus of resistance will come from the national associations, who at the end of the day are the ones that will have to approve it by the vote at UEFA's congress. However, once it is understood that without these adjustments, the level of conflicts at European football may reach a level where the sport becomes unmanageable with negative consequences to all involved; we believe that any initial resistance can be overcome.

Almost a hundred years ago, representatives of seven European countries gathered together to draw the first lines of what would become the ideal governance model for football in the twentieth century. The time has come to prove if Europe is still capable of producing visionary leaders with sufficient political will to adjust that model and guarantee the prominence of football for another hundred years.

Legal Opinion on a Hypothetical Case: State Prosecution of Sports Officials

Under national criminal law, governments may prosecute officials of national sports organisations for violations of national provisions of public law (domestic law).

If in such a case the international organisation of the sport in question suspends the national team of the state in question because of the prosecution, this would be unlawful under the statutes of the international organisation concerned. The national sports organisation cannot be blamed for any action taken by the state.

It is also true that the government can only take action against the decision of the international organisation if the national team is legally under official state control. This would imply that the national team (or rather, the national sports organisation) is a state organ. However, such national organisations should be refused membership of the international organisation due to the fact that their governments are able to interfere in the sport in question. Under the statutes of most international organisation only autonomous national organisations can become members. In practice, however, it is a well-known fact that in some countries sports ministers direct the national sports organisations. This could and should be a reason to suspend these organisations' membership of the international organisation. However, prosecution by the national criminal law authorities can never be a legal ground for taking action against the national sports organisation through the suspension of the national team: also from a public international law perspective, national public law must prevail over the "private" law of international sports organisations.

However, the state may only take legal action against the international organisation's decision to suspend the national team, if the national sports organisation is an official state organ. But as we have seen above, in that case the national sports organisation should have been refused the international organisation's membership. Generally and legally speaking, national teams are NOT the teams of the country concerned: they merely represent the "private" national sports organisation!

The national sports organisation as a member of the international organisation may of course take action against the international organisation's decision to suspend (if, that is, the national sports organisation is an autonomous organisation).

So, from a legal perspective, governments can prosecute and national sports organisations can subsequently start all proceedings available under the statutes of the international organisation concerned. Finally, if necessary, it can bring the matter before the national courts of the international organisation's seat if it wishes to challenge the decision to suspend the national team

In fact, from a sports-political perspective, the international organisation should support the government's decision to prosecute, as it would clean up the national sport in question. In fact, the international organisation itself should proceed to suspend the officials from the national sports organisation concerned before any state action is taken. Or, at the very least, the national sports organisation should suspend them. In that case, the international sports organisation could no longer threaten to suspend the national team because of state interference. If, however, the state is the first to take (criminal law) action, the national sports organisation should still and also suspend the officials in question, as then these officials would not be a stumbling block in the national sports organisation's action against the international organisation to challenge the suspension of the national team.

Robert Siekmann

The Interpretation of the FIFA Regulations for the 2006 FIFA World Cup on Eligibility of Players

Article 24 of the FIFA Regulations under XIV (Eligibility of players, list of players) reads as follows: "1. Each national association shall take the following provisions into account when selecting its national team: (a) all the players shall be citizens of its country and subject to *its* jurisdiction; (b) all the players shall be eligible for selection in accordance with the Regulations Governing the Application of the FIFA Statutes." (italics added).

A question concerning this provision has been put to the T.M.C. Asser Institute (ASSER International Sports Law Centre) by Mr R.D. Munro, the Vice-Chairman of the Board of Directors of Kenyan Football Group Ltd and Chairman of the MYSA Board of Trustees as well as of Mathare United FC in Nairobi (Kenya). The question is whether the (second) word "*its*" in the phrase "its jurisdiction" in Article 24 (1)(a) refers to the jurisdiction of the country or of the national association. One possible answer could be that "its" refers to the country for the following reason. When an FA issues an International Transfer Certificate (ITC) to another FA, the player in question is removed from the scope of jurisdiction of the transferring FA, to be included in the jurisdiction of the receiving FA. If "its" referred to FA jurisdiction, it would no longer be possible to select the transferred player for the national team, as he/she now comes under the jurisdiction of the foreign FA. In practice, however, selection for the national team is never blocked in this way. Following this interpretation, the term "its jurisdiction" accordingly means that the player must have the passport of the country he plays for.

This, however, is not the opinion of the ASSER International Sports Law Centre. First, "citizens" here means "nationals", and generally speaking nationals come under the jurisdiction of their country of residence, except when travelling abroad. If "its" referred to "country", players residing abroad would not be eligible for selection for their national team, which is evidently not the case. For example, the Dutch national team mainly consists of players who are under contract with foreign clubs. Conversely, players who play in their country of residence automatically fall under this country's jurisdiction, rendering the words "and subject to its jurisdiction" superfluous. Secondly, this being a legal text, it is illogical that "its" would refer to two different words in the sentence, instead of only to "national association", which is the sentence's grammatical subject. For this reason, we must conclude that "its" refers to the jurisdiction of the national association, which applies to all national players (national passport holders), even abroad for the purpose of selecting players for the national team. This is supported by the fact that players of a "breakaway league" (cf. the proposal of PSV Eindhoven Chairman Van Raaij some years ago to form a separate Atlantic or European League which was rejected by UEFA and thus in fact also by FIFA), who, although nationals, were - even at home - not subject to the jurisdiction of the national FA when it came to selection for the national team, since under FIFA rules a breakaway league is illegal and neither these leagues, their clubs, nor their players are considered to take part in FIFA, which recognizes only one (centralized) FA per country where this FA covers all the competitions in organized football. Only the official national FA is authorized by FIFA to be represented in the World Cup by "its" players, i.e., the players under "its jurisdiction", who are also nationals of the country in question. Therefore, even if

"its" were to refer to "country", 'breakaway players' would be barred from playing for their country. This would only be different if the breakaway league (or association) would be recognized by FIFA as the official league, instead of the "old" league.

This opinion is confirmed by the applicable Article 15 of the Regulations Governing the Application of the FIFA Statutes (under VII: Eligibility to play for association teams). Paragraph 1 of this provision stipulates that "any person holding the nationality of a country is eligible to play for the representative teams of the Association of his country." Paragraphs 3-5 of Article 15 concern the exceptions to the additional rule in paragraph 2 providing that once a player has played for association A, he is no longer allowed to play for association B, i.e., these paragraphs concern *the right to change associations* subject to certain conditions (acquisition of new nationality, double nationality). This illustrates the question of jurisdiction in the case of eligibility for the national team, which is a matter quite different from transfer issues (ITCs): a player is allowed to play for the country of his nationality, provided he comes under the jurisdiction of that country's association.

Robert Siekmann

Fat Fatter Fattest

After over indulging at Christmas, the New Year brings resolutions to eat less and lose weight. Obesity is an increasing curse of our consumer driven age. And is high on the agendas of the WHO, the European Commission, the US-based International Obesity Task Force and the UK Food Standards Agency. In the UK, one in five of the adult population and one in ten six-year olds are clinically obese. And, in the States, children are the biggest consumers per head of the population of junk food and soft drinks.

Obesity not only has important health and social implications; it also has marketing and advertising ones. Not least the promotion of food and drink products in connection with sporting events. Leading brands like McDonalds, Coca-Cola, Pepsi, and Walkers Crisps traditionally sponsor major sports events, such as the Olympics, the Football World Cup and the European Championships. Indeed, without their sponsorship dollars, many of these events could not be held. And sport, it is argued by sports marketers, would be the loser - always in need of private sector funding. This has already happened with the banning of tobacco advertising and sponsorship. For example, Formula One has had to find new venues where sponsorship by tobacco companies is still legally permitted.

In the UK, the Parliamentary Select Committee on Health is currently looking into the obesity problem - described as a 'time bomb' waiting to go off - and what to do about it. Indeed, the Medical Journal, 'The Lancet', has called for legislation banning sports stars - like David Beckham who promotes PEPSI and has just, incidentally, signed a new multi-million dollar deal with this Soft Drinks Company - endorsing fatty and sugary food and drink products, especially aimed at children and young people.

Such a ban on advertising aimed at children, similar to bans already in force in Sweden and Canada, for example, is gathering steam in the UK, as well as other parts of Europe and the rest of the world.

But does, ask the proponents of sports sponsorship, such as the UK Institute of Sports Sponsorship, banning advertising and promotion of such food and drink products really reduce obesity? And rather than an out right ban, could not the matter be dealt with - just as effectively - by a voluntary code of practice for sponsors to follow? Or indeed, by such guidelines being incorporated in the existing British Codes of Advertising and Sales Promotion, whose basic rule requires all advertisements to be "legal, decent, honest and truthful". Any infringements would be dealt with by the UK Advertising Standards Authority rather than by the courts. And this form of self-regulation is already working well in practice as far as the advertising industry and consumers are concerned.

In any case, it looks as though deciding how best to deal with this issue is going to involve a rerun of some of the arguments against banning tobacco advertising. The Tobacco companies have always maintained - and have done research and collected statistics to back them up - that such bans do not stop people from smoking, but merely affect brand loyalty. Any attempts to ban sports sponsorship by snack food and soft drinks companies are likely to be met with stiff opposition. And all legal means, including Human Rights and Constitutional arguments, not least freedom of expression and commercial speech (that is, product promotion and advertising), deployed in their defence.

So, if the sports marketers get their way, perhaps the new Olympic sporting motto should be: 'Fat Fatter Fattest'!

Ian Blackshaw

Corporate Hospitality - An Effective Tool for Motivating Employees if Handled Properly

Traditionally, providing hospitality at major sports events has been a marketing tool for promoting the sale of goods and services amongst existing and potential customers of the companies acquiring and exploiting these rights. So, over the years, corporate hospitality and entertaining have become a significant and well-established and integral part of the sports marketing and communications mix.

But, as holders of these rights - on both sides of the Atlantic - have realised, offering hospitality and entertainment in relation to sporting events, especially prestigious ones like Formula One Grand Prix Racing, is not only an effective marketing tool for customers, it is also proving to be a valuable corporate tool for motivating and rewarding employees, especially sales and marketing executives, who are at the sharp end of any consumer driven business. Such schemes have become an integral part of modern human resources policies. They also produce positive effects within business organisations by improving internal communications. All employees are made aware of their companies' corporate hospitality programmes - often combined with the sponsorship of the sports events concerned - and made to feel proud of their companies' involvement and support of such a worthy cause as sport.

I have experienced this phenomenon myself in my professional involvement with the corporate sponsorship of Formula One, which has a global following, and have seen the effects that giving VIP tickets to employees have had on their morale, motivation and dedication. The results have been quite remarkable and palpable.

As a result of such employee hospitality programmes, many employees have been willing to do anything for their company - including, in some instances, foregoing pay rises or other direct financial benefits - to secure such invitations.

Such schemes also help to preserve employees' loyalty to their companies. A good impression is also created among company clients and

(continued at page 87)

Case Digest

United States: IP Rights in Sports Databases - Morris Communications Corporation v. PGA, Tour, Inc., 235 F. Supp. 2d 1269 (M.D. Fla. 2002)
The dispute concerned the online publication of 'real-time' golf scores. The PGA Tour argued that it enjoys a property right in its real-time scoring system and that its regulations restricting the syndication of real-time golf scoring information gathered and generated by its real-time scoring system constituted a reasonable safeguard against would-be free riders seeking to unfairly capitalise on its product.
The court found that Morris wanted to commercially exploit golf scoring information that the PGA Tour had expended money in gathering and had not yet reaped the full benefit possible from its investment. As the near instantaneous scores are not in the public domain, and as the PGA Tour maintains an interest in the scores until they are in the public domain, the court held that the scores are not externalities until the PGA Tour has either reaped its reward or forgone that possibility.

Australia: End of Super League litigation - News Limited v South Sydney District Rugby League Football Club Limited [2003] HCA 45
On August 13, 2003, the High Court ruled in favour of News Limited and overturned the decision of the Full Federal Court. It was held that News Limited had not breached Trade Practices Act 1974 (Cth) s. 45, when it excluded South Sydney from the Super League competition in 2000.
The majority found that the '14-team term' did not have as a purpose the 'singing out' or targeting of South Sydney, or any particular club or clubs. There was not sufficient particularity as to make the persons who were to be excluded identifiable at the time the provision was agreed. An agreement between competitors which may have an unintended effect of restricting the supply to, or acquisition of, goods or services from a third party will not, in itself, result in there being an illegal exclusionary provision. This ends the long-running Super League saga that commenced with the 1997 agreement to merge ten News Limited Super League clubs with 12 Australian Rugby League clubs.

United Kingdom: Unfair Trading in Replica Football Shirts - Decision of The Office of Fair Trading No. CA98/06/2003
The OFT decided in early August 2003 that a number of sportswear retailers, Manchester United plc, the Football Association Ltd. and Umbro Holdings Ltd. have all entered into price-fixing agreements in relation to replica football kits, infringing the Chapter I prohibition contained in Section Two of the Competition Act 1998. This involved agreements or concerted practices which fixed the prices of the top-selling adult and junior short-sleeved replica football shirts manufactured by Umbro Holdings Ltd.
These were the replica football shirts of the England team and Manchester United, Chelsea, Glasgow Celtic and Nottingham Forest football clubs. The agreements or concerted practices took effect during key selling periods after the launch of a new replica football kit.
The Office of Fair Trading considers that agreements between undertakings that fix prices to be among the most serious infringements of the Competition Act 1998. Fines totalling (18.6 million ((27m/ $29.17m) have been made against the parties - see www.oft.gov.uk for a full transcript.

(Taken from SportBusiness International, October 2003, p. 41)

New Zealand: Sports Event Management - R. v. Andersen, District Court, Christchurch (29 August 2003)
The organiser of the Christchurch to Akaroa cycle race was successfully prosecuted for criminal nuisance following the death of a cyclist in the 2001 event. The cyclist was killed in a head-on collision with a car after crossing over the centre line of the road on a section of the course. Many competitors were under the impression that the particular section of the course was closed to traffic due to the terminology used in the pre-race instructions and briefing. The District Court held that the race organiser had failed to take reasonable care to avoid danger to human life. She had issued instructions that were ambiguous having failed to consult with her safety manager. The confusion arising from the ambiguous instructions led to the accident that caused the death of the competitor. The maximum fine of $NZ 10,000 ($5,700/(5,1120) was imposed. Although it was stressed that the conviction was due to the specific circumstances, the case reinforces the need for sports organisers to be fully aware of safety issues.

Australia: Thorpe wins naming rights - Torpedoes Sportswear Pty Limited v Thorpedo Enterprises Pty Limited [2003] FCA 901 (27 August 2003)
Australian sporting company Torpedoes Sportswear lost its bid to stop Thorpedo Enterprises, a company owned by Australian swimming star Ian Thorpe's parents, from using his nickname, THORPEDO, on a range of products. The Delegate of the Register of Trade Marks rejected Torpedoes Sportswear's appeal against Thorpedo Enterprises' application to register the trademark THORPEDO.
Where there is opposition to registration (and appeals from them), the question of onus on the applicant is important. Bennett J held that Torpedoes Sportswear had not established any of the grounds of opposition. It failed to establish that Enterprises was not the proprietor of the THORPEDO mark or that the THORPEDO mark was substantially identical to the mark 'Torpedoes'. It also failed to establish that 'Torpedoes' had acquired a reputation in Australia such that, because of its reputation, the use of the THORPEDO mark would be likely to deceive or confuse consumers.

United States: Specific Performance and Sports Contracts - Reier Broadcasting Company, Inc. v. Kramer, 316 Mont. 301 (2003)
Reier Broadcasting had exclusive broadcast rights, until 2002, to air Montana State University athletic events. Further, Reier Broadcasting had entered into an employment contract with MSU football coach, Michael Kramer, for exclusive broadcast rights with him. Afterwards, MSU awarded its broadcast rights to Clear Channel Communications and directed Kramer to provide broadcasting services to Clear Channel, not Reier.
The issue before the Montana Supreme Court was whether Reier could receive injunctive relief so as to prevent Kramer, while under contract, from performing services for Clear Channel. In ruling against Reier, the court held that the issuance of an injunction, preventing Kramer from working for Clear Channel during the period remaining on his contract with Reier, would result in the indirect specific enforcement of the Reier-Kramer employment agreement, which was illegal under Montana law. This case is another illustration of when a sports employer could not enforce a contract via specific performance.

(Taken from SportBusiness International, November 2003, p. 55)

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customers, who mix with the employees in a relaxed atmosphere and environment and experience - at first hand - their enthusiasm for their companies and their products and services. This has a knock-on effect by creating a favourable climate for increasing sales!

But all these internal and external corporate advantages and financial benefits can be so easily lost, if employee hospitality schemes are not handled properly, especially from a legal and contractual point of view.

In general, these schemes should be operated with total openness, transparency and fairness. Otherwise, disgruntled employees, who have not received invitations, will undermine the internal 'feel good factor' and endanger the corporate employee hospitality programme. In serious cases, claims to Employment Tribunals for unfair treatment may ensue, which could prove costly in financial and PR terms!

To ensure fairness, it is advisable to include clear and objective performance criteria in employment contracts - for example, defined sales targets to be reached by sales and marketing executives within a specified period of time - and these criteria should be consistently applied across the board.

Again, employees not selected for participation in hospitality programmes should be given reasons. And also, internal grievance procedures should be put in place and be followed to the letter and the spirit. For example, an appeal to the managing director, whose decision shall be final. Such grievance procedures must satisfy the 'rules of natural justice'. In particular, the process of internal appeal must be impartial and the employee given a fair hearing.

Employees at all levels should be included in the scheme - otherwise, there may be legal claims of discrimination. And, for employees at lower levels, because their activities do not usually directly and obviously affect the 'bottom line' of the company, their selection should be made in some other way. For example, through some form of lottery. Again, whatever method is used, it must be clearly defined and strictly followed to ensure that it is beyond reproach. On the European Continent, for example, such lotteries should be overseen by a Notary Public.

Like so many other good sports marketing ideas, employee corporate hospitality programmes, if not thought through and handled properly, can prove to be a legal minefield and totally counterproductive. You have been warned!

Ian Blackshaw

Maximising the Value of Hospitality

By Ardi Kolah

A Sportbusiness Report, London, January 2004, Price £ 495,-/$ 795,-/ € 700,-

The corporate hospitality market in the UK - the most developed in the world - is worth some £750m a year and is growing. Globally, the market is estimated to be worth between $6.6 and $13.5 billion a year. 75% of this expenditure is attributable to North America, Europe and Australia.

According to Ardi Kolah, the author of this latest SportBusiness Report and an acclaimed marketing guru: "increasing importance is being placed on hospitality as a component of sports sponsorship as well as the growth of customer relationship marketing generally; where face to face entertainment and hospitality has a vital role to play in developing and sustaining customer and employee relationships within business".

And customer relationship management, he points out, is more than a management theory. "It is" he says "a mindset and a methodology for brand owners by providing a route map in the way clients/customers need to be treated" adding that "within Europe and the US ... whilst brand owners have cut back on the amount of corporate hospitality ... they have at the same time increased the value of that hospitality."

So, corporate hospitality has become a significant component of the sports marketing and communications mix. And Kolah's Report could not be more timely as we look forward in 2004 to the Summer Olympics in Athens and the European Football Championships in Portugal.

The Report contains a wealth of the latest marketing information, statistics and research on the hospitality industry, including a list of major sports events favoured by invitees, the key success factors for corporate hospitality; and how to measure the return on investment from corporate hospitality expenditure. There are also some very helpful and original checklists, tables, charts and illuminating case histories.

Finally and of particular interest to sports lawyers is a very useful chapter on the

key legal issues that are crucial for the successful organisation and implementation of a corporate hospitality programme within a sponsorship context. These include:

- The capacity of the parties to grant the corporate hospitality envisaged
- The issue of trade marks and other intellectual property rights
- Exclusivity, termination and other essential contractual terms and conditions
- Payment structures
- Corruption and bribery.

The last point is of particular interest and concern in the case of an international sporting hospitality programme, where there may be clashes of culture and law in deciding whether the hospitality provided is so excessive as to constitute a bribe under any applicable rules, such the US Foreign Corrupt Practices Act. After all, an important part of the business rationale of providing corporate hospitality is to keep existing customers and gain new ones! Likewise, the new IOC Ethical Rules may also come into play.

This chapter also covers the important subjects of insurance, especially the position where the event is cancelled or partially interrupted and the costs of providing such cover; and also accounting and tax issues, especially the tax deductibility of the costs of the corporate hospitality provider and the potential income tax liability of employees who benefit from it.

All in all, this Report, which does not come cheap, is a veritable cornucopia of valuable insights and information for all those engaged in corporate hospitality in general and sport in particular.

Ian Blackshaw

Case Digest

EUROPE: Trademark Law - Adidas-Salomon AG and Others v Fitnessworld Trading Ltd, European Court of Justice Case C408/01 (23 October 2003)
Fitnessworld markets certain sports clothing bearing a motif similar to the famous Adidas trademark, but composed of two vertical stripes, not three, Adidas brought an action against Fitnessworld before the Netherlands courts, claiming a likelihood of confusion between the two motifs on the part of the public. Fitnessworld believed that the motif was viewed purely as an embellishment of the clothes by the relevant section of the public and not an infringement of the mark.
The ECJ, on a preliminary ruling, found that an infringement occurred 'if the relevant section of the public establishes a link between the sign and the mark with a reputation even though it does not confuse them'.
However, where, according to a finding of fact by the national court, the relevant section of the public views the sign purely as an embellishment, it does not necessarily establish any link with the mark with a reputation.

AUSTRALIA: Procedural Fairness in Doping Offences - Beaton and Scholes v the Equestrian Federation of Australia Limited, Court of Arbitration for Sport (20 October 2003)
An Australian court was asked whether Beaton and Scholes had been denied natural justice by the EFA after they received notice that they were not allowed legal representation in disciplinary hearings. A horse, owned by Beaton and Scholes, had been swabbed for the purposes of conducting a doping test after a competition organized by the EFA. A positive result had been returned.
It was held that such denial was not unknown in similar proceedings. It was also held that as a legal right of representation upon appeal existed, there was no denial of natural justice.
However, on an appeal to the CAS, it was argued that the EFA had tested the 'B' sample without Beaton's authority and without having him or his representative present contrary to clause 4.3 of the Anti-Doping By-Law. Where the EFA was seeking to impose strict liability on the applicants, lack of representation denied procedural fairness. The CAS upheld the appeal on the basis that the entire test ought to be disregarded.

UNITED STATES: Trademark Law - Pro-Football, Inc. v. Harjo, 2003 U.S. Dist. Lexis 17180 (2003)
A group of Native Americans initiated an action to cancel federal trademark registrations owned by the Washington Redskins football team. The Native Americans claimed that the Redskins' trademarks disparaged their people or brought them into contempt or disrepute, in violation of (2(a) of the Lanham Act.
Conversely, the Redskins argued that their trademarks honoured Native Americans and that the legal 'doctrine of laches' barred the requested trademark cancellation because this claim was delayed for en unreasonable amount of time - the first trademarks being registered in 1967.
The court held that the Redskins trademarks neither disparaged Native Americans nor placed them in contempt or disrepute and that the Redskins had made substantial financial investment in their marks over 25 years.
The court stressed that its 'opinion should not be read as making any statement on the appropriateness of the American imagery for teams'. Where a more complete factual record can be established, other future trademark cancellation cases may be successful regarding the ongoing Native American sports mascot and logo controversy.

(Taken from SportBusiness International, December 2003/January 2004, p. 55)

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4th ASSER / CLINGENDAEL INTERNATIONAL SPORTS LECTURE

Friday 19 November 2004
Venue: Instituut "Clingendael"
Opening: 16.00 hours

"Sport and Development Cooperation II"

Speaker: Mr Adolf Ogi, Special Advisor to the United Nations Secretary-General on Sport for Development and Peace, Geneva

In the second part of the meeting attention will be paid by a Dutch panel of experts - Humberto Tan, Diederik Samwel and Will van Rhee - to the Netherlands-Surinam "football relations" in the perspective of sport and development cooperation.

This event is a follow-up to the 2002 Lecture on "Sport and Development Cooperation" that was delivered by The Prince of Orange, Member of the IOC and its Solidarity Commission, and Johan Cruijff, Chairman of the Johan Cruyff Welfare Foundation.

Participation is by invitation only

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