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ATHENS 2013

SPORTS LAW

Structures, Practice, Justice
Sports Science and Studies

SPORTS LAW

Structures, Practice, Justice
Sports Science and Studies

Editors
Dimitrios P. Panagiotopoulos - Wang Xiaoping

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PREFACE

By President of IASL
Professor **Dimitrios P. Panagiotopoulos**

Firstly, I would like to congratulate my dear friend Professor Wang Xiaoping and his colleagues on their excellent work they have done for the organization of 18th Sports Law congress, in Beijing 2012. In addition, I would like to thank the Political Science and Law University of Beijing for the valuable assistance on the organization and the success for the 17th IASL Congress.

IASL members and its friends know that in Athens, in the year 1992, we began the attempt to highlight Sports Law as one of the scientific subjects of science of law and sports.

Today, Sports Law has become a special area of science, teaching and research worldwide, as well as a special area of professional employment of many lawyers and people active in the sports field, who come face to face with many issues relevant with law and sports rules.

The IASL 18th congress's theme was:

"*Sports Law Structures, Sports Law Practice, Sports Law Justice and Sports Science and Studies*"

In this Congress all the participants had the chance to attend in many important sessions.

In the 18th IASL Congress had participated distinguished lectures, Professors in Sports Law area of various Universities, Researchers of high prestige and people involved in international Sports and the Olympic Games.

Certainly, the 18th Congress was a challenge for a new horizon in research and development of Sports Law internationally. The excellent preparation of the Congress by the members both of the Scientific Committee in Beijing and Political Science and Law University provided the success of the Congress, which soul was the President of the Organizing Committee, my friend Professor Wang Xiaoping.

I would like to congratulate all of those who successfully organised the congress. As IASL president, I would like to extend a great "Thank you" to our Chinese colleagues for the excellent organization as well as for their hospitality, friendship and warm host in Beijing.

This Congress was of fundamental importance for sports law. A great op-

portunity was provided to discuss different subjects in several fields of sport law topics such as, the role of Lex Sportiva. *Lex Sportiva / Olympica, is another kind of law resulting from the synthesis of characteristics of international law (subject, object and content regulations) and internal characteristics of domestic legal orders.*

In this congress, it has been provided to us the opportunity to discuss different subjects in several fields of sport law topics such as the role of Lex Sportiva and its relations in international Sports institutions, as well as the legal relation with the international organization, the legal fields of the European Union law and the institution for sports Jurisdiction.

Also, we had the opportunity to discuss some new aspects of sport law in practice. It is helpful to fully realize the sport activity, such as the cases with ethical and legal aspects in modern Olympic and world games, which characterises the future sport in the world.

Furthermore, we discussed problems relevant with Betting and gambling in sports activities such as the problem of doping in sports.

I am sure that we all got some new, useful ideas that will help to develop our aim – science and practice of sport law. I hope you agree that in the IASL Congresses we don't only discuss problems from sports practice area, but also scientific problems of Sports Law development, in order to offer to the world of sports and to involve in sports activities.

In Beijing 2012, the IASL Congress was an excellent scientific congress, which gave us a new perspective. Finally, I would like to thank the Organizers for their valuable assistance, as well as all of the authors and contributors for their submission in order to publish this book.

Furthermore, I would like to thank the partners of Hellenic Center of Research on Sports law for their assistance as well as the publisher editor George Skoufos for his excellent impression of this Book.

On behalf of IASL, I am very glad for the fact that all the papers of 18th IASL Congress are going to see the light of publicity.

April 2013, Athens

By President of Organizing Committee of 18th IASL Congress
Professor **Wang Xiaoping**

I am very pleased indeed to write the preface to this Book, especially as the great success and excitement generated by the18th IASL congress in Beijing, China is still fresh in all our minds!

It's our great honour that this mega event is jointly organized by Research Centre of Sports Law of China University of Political Science and Law and International Association of Sports Law. Our centre was founded in 2002, has been dedicating into researching various sports related issues and pushing forward the development of sports culture. It has successfully held many International seminars on sports law so far, which had an extensive influence. With the experience of successfully hosting the 29th Olympic Games, we are convinced that 18th IASL congress can be unique and influential. We believe that this congress will make significant contributions to sports law study, Lex Sportiva and Olympic movement.

First of all, I would like to thank all distinguished participants for honouring us with your presence, which brought us the essence of your study on sport law from all over the world.

Furthermore, I want to offer my thanks to the Academic Committee, who has set broad objectives for this conference, to allow all of participants to explore each of the thematic elements, building upon concrete success from last 17 IASL congresses, this meeting continues to advance these activities, and actively explore the role of virtualization of sports law, and the role of advanced visualization in every aspect of our activities, through diverse, cutting edge and crucial sports law issues.

And, I feel so grateful to thank a most important person, the great conductor, my friend, the President of IASL, Mr. Dimitrios Panagiotopoulos, who crowns this congress with a great success.

Last but not least, I want to express my gratitude to all staffs working for the organizing committee of 18th IASL, frankly, the congress could not be successful without your great efforts.

April, 2013 Beijing

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ABBREVIATIONS

ANOC	Association of National Olympic Committees
ANOCA	Association of National Olympic Committees of Africa
AIWF	Association of Winter Olympic Games International Federations
ASOIF	Association of Summer Olympics International Federations
CAS	Court of arbitration for Sport
CIAF	International Chamber for Football Arbitration
CoE	Council of Europe
CPS	Committee on Professional Sports
CUPL	China University Political Science and Law
ECJ	European Court of Justice
EOK	Hellenic Basketball Federation
EOC	European Olympic Committees
EPO	Hellenic Football Federation
EU	European Union
FINA	International Swimming Federation
GFF	Greek Football Federation
GSS	General Secretary for Sports
HCRSL	Hellenic Centre for Research on Sports Law
HEPA	Health Enhancing Physical Activity
HFF	Hellenic Football Federation
IASL	International Association for Sports Law
ICAS	International Council of Arbitration for Sport
IF	International Federation
IFS	International Sports Federations
IJPE	International Journal of Physical Education
IOA	International Olympic Academy
IOC	International Olympic Committee
I.C.S.S.P.E.	International Council of Sports Science and Physical Education
IPC	International Paralympics Committee
ISLR	International Sports Law Review Pandektis
ISSF	International Shooting Sports Federation
IWBF	International Wheelchair Basketball Federation
JSAA	Japanese Sports Arbitration Agency
NOC	National Olympic Committee
NJW	Neue Juristische Wochenschrift
NOC	National Olympic Committee
OCA	Olympic Council of Asia
OJ	Official Journal
Ol. Ch.	Olympic Charter
OCOG	Organizing Committee of the Olympic Games
OGKS	Olympic Games Knowledge Services
ONOC	Oceania National Olympic Committees

PASO	Pan American Sports Organization
PSC	Professional Sports Committee
RAD	Remunerated Athletes Departments
R.D.D.S	Rivista Di Dirito Sprtivo
SCC	Sports Controlling Council
SIRC	Sports Information Research Center
SPC	Sports Public Company
TAF	Arbitral Tribunal for Football
TAS	Tribunal Arbitral du Sport
UEFA	Union of European Football Associations
UIT	International Shooting Federation
UNESCO	United Nations Educational, Scientific and Cultural Organization
UOC	Union of Olympic Committees
WADA	World Anti Doping Agency
W.L.R.	Willamette Law Review

I. LEX SPORTIVA - LEX OLYMPICA AND INTERNATIONAL SPORTS LAW

- The Structure of International Sports Law
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- Legislature of International Sports Federations and Lex Sportiva

LEX SPORTIVA - LEX OLYMPICA AND INTERNATIONAL SPORTS LAW

Dimitrios P. Panagiotopoulos
Assoc. Prof, University of Athens, Attorney-at-Law[*]

Abstract: *This paper is a continuation of the opinion-thesis of the special nature of Lex Sportiva It examines the nature of Lex Sportiva and Lex Olympica and the quality of the rules of law, with their special features. In the context of international law, is indicated that International Sports Law is a species of International Law, a different species of law, regarding Lex Sportiva and Lex Olympica.*

In the theory of international law, it is common that: "Law is a coercive order. It creates socially organized sanctions and can be clearly distinguished from a religious order on the one hand and a merely moral order on the other hand. As a coercive order, the law is that specific social technique which consists in the attempt to bring about the desired social conduct of men through the threat of a measure of coercion which is to be taken in case of legally wrong conduct". Kelsen in the same work (The Principles of International Law, Rinehart 1952) affirms the nature of international law as true law. However, until the present moment, the lack of enforcement of international law remains the main difference of international law, which makes it a different species of law, different from domestic laws, also having in mind Lex Sportiva and Lex Olympica. Lex Sportiva and Lex Olympica are new species of law, a synthesis of features of international law (subjects, jurisdiction and content of regulations) and features of domestic national law (effective enforcement mechanism, vertical effect of its laws, and immediate incorporation in the national law systems and compulsory and exclusive jurisdiction of its judicial organs).

This new species of international law necessarily puts long accepted practices and organizational structures established under another light that reveals the inadequacy of international law practices in a legal system, which is another kind of international law. It has an impressive feature of coercion, similar with this of domestic jurisdictions. However, fundamental changes in its organization should be done, in accordance with the principle of legality, in order to create an international field of legitimacy in sports, like in that area that may be considered as an international sports law and on international conventions, on the international sports acts and in WADA Code.

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Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

Introduction

By the present paper, it is examined whether international law relates to sports law and the particular nature of Lex Sportiva[1]. Lex Sportiva and the special features of the last one are being compared to the ones of International Sports Law. It is also researched whether Lex Sportiva/Olympica may be a subcategory of international law, or on the other hand it creates a different kind of rules of law in the international practice field of sports, as an independent one, which has as sources private international sports institutions[2].

In the theory of international law has prevailed that: "*The law is a mandatory class. It establishes socially organized penalties and it is clearly distinguished both from the religious classes and the moral ones* […]»[3].

On the basis of the abovementioned theory it is examined whether the international sports institutions: International Sports Federations and the International Olympic Committee are according to international law, international entities, i.e. bodies whose rules can be content of international sports law.

1. Subjects of International Law

What is international law? It is a body of rules and principles embodied in the legal instruments of agreements between states, in international customs binding for the subjects of international law, i.e. the states, international organizations, and, more recently, individuals. States are the primary subjects of international law[4]. Despite the fact that another category of subjects of international law has been emerging, namely international organizations, individuals, groups of people

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[1]Claim had been supported by Dimitrios P. Panagiotopoulos (1999) "Sports Law, a special branch of Sports Science" [in Gr."Αθλητικό Δίκαιο ειδικός κλάδος της επιστήμης» in: Professional Sports Activities, 1st Sports Law Congress EKEAD Ellin: Athens, pp. 38-52, see also Dimitrios P. Panagiotopoulos (2002), "Sports Legal Order in National and International Sport Life", 8th IASL Congress Uruguay, Modevideo Nov. 28-30, 2001, in: *Revista Brasileira De Direito Sportivo* (Instituto Brasileiro De Direito Desportivo), no: 2, Pp. 7-17 and in: *International Sports Law Review Pandektis*, Vol. 4:3, pp. 227-242.See also Dimitrios P. Panagiotopoulos (2003) *Sports Law A European Dimension*, Ant. N. Sakkoulas: Athens, pp.16-27, and ibid (2004), *Sports Law (Lex Sportiva) in the world, Regulations and implementation*, Sakkoulas: Athens, pp 22-32.

[2]For Lex Sportiva theory See Dimitrios P. Panagiotopoulos (2011) Sports Law: Lex Sportiva - Lex Olympica Theory & Praxis, Ant. N. Sakkoulas: Athens, pp.102-149 and Lex Olympica pp. 375-439.

[3]Kelsen in the same book affirms that international law is true law, βλ. Kelsen, The *Principles of International Law*, Rinehart 1952, σελ. 45-50.

[4]Part of this chapter (in the form of a paper) was announced in 11th IASL Congress in Johannesburg 28-30 Nov. 2005, South Africa. See D. Panagiotopoulos, Tina Xristofilli (2006) "International Law and Lex Sportiva", In: *International Sports Law Review/Pandektis* (ISLR/Pand), Vol. 6:1/2, pp.11-13.

and liberation movements, the states remain the traditional category of international legal subjects which hold the authority in the international legal community[5].

When states are interested in realizing and carrying out tasks of mutual interest, they establish international machinery. The International Court of Justice in its advisory opinion on Legality on the Use by a State of Nuclear Weapons in Armed Conflict[6], stated that the object of the Charter of the international organizations "is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals."

In the famous Reparation case[7], the ICJ observed that the performance by the organization of the tasks entrusted to it would be impossible, if the organization did not possess international personality. The judges took great care to link the attribution of such personality to the will of the member states, which is necessarily implied in the case. The court acknowledged in its 1949 advisory opinion that the concept of legal personality has no uniform content in international law[8].

International organizations[9] are governed by the principle of specialty. A two-fold test verifies the possession of legal personality by the international organizations[10]. First, it must be shown that the member states intended to confer upon the international organizations the competence required to enable them to discharge effectively these functions[11]. Second, it is necessary for the organization to enjoy real autonomy from member states and the effective capacity necessary for it to act as an international subject. In the words of the ICJ it is necessary to show that the organization "*is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane*"[12] .

What are the international rights and duties conferred upon international organizations? We mention the most important ones:

1. The right to enter into international agreements with non-member states[13].

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[5]A. Cassese (2001)*, International Law*, Oxford University Press, pp 7- 27, J. Dugard, *International Law, A South African perspective,* 2000, Juta & Co, Ltd, pp5-10, 26, 133-145. 376, Ian Brownlie, *Principles of Public International Law,* 1998, Oxford University Press, pp 31-45.

[6]Βλ. advisory opinion on *Legality on the Use by a State of Nuclear Weapons in Armed Conflict*,Legality of the Threat or Use of Nuclear Weapons Case I.C.J. Rep. 1966

[7]Reparation for Injuries Suffered in the Service of the United Nations Case, I.C.J.Rep. 1949.

[8]Βλ. advisory opinion of The Court from 1949, Ph. Sands, P. Klein, *Bowett΄s Law of International Institutions*, 2001, London, Sweet and Maxwell, pp 285, 292, 472, 474.

[9]Sands, Klein, 508,509.

[10]Cassese, pp 71-72.

[11]Ibid, 78.

[12]Expression of the International Court

[13]Ibid, 78.

2. The right to immunity from jurisdiction of state courts for acts[14] and activities performed by the organization[15].

3. The right to protection for all of the organization's agents[16].

4. The right to bring an international claim with a view to obtaining reparation for any damage caused by a member States or by third states to the assets of the organization or to its officials acting on behalf of the organization[17].

Another subject of international law emerges timidly yet decisively: the individuals. More and more treaties confer rights directly on individuals and impose obligations on them, especially in the area of International Criminal Law[18]. The right of individual petition to the ICC and other judicial organs are indications of the slow but marked trend of making individuals subjects of international law. The right of individuals to petition international or quasi international judicial bodies is considered exceptional since it lacks any substantive right, or the power to enforce a possible decision of the international body that might be favorable to the individual. Rather, it is the states that are in a position to advance such a claim and pursue enforcement bringing a claim before a national or international court those allegedly responsible for breaches of their international obligations[19].

2. International law vs. domestic-national law

The status of the international law versus the national law has given rise to three distinct positions.

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[14]Due to the judicial activity within the limits of the mandate received from the Member States and which are specified in their charter, βλ. Cassese, Op. cit., pp. 80- 81.

[15]In 1931 the Italian Court of Cassation delivered a seminal decision in *Istituto Internazionale di Agricoltura v. Profili.* Mr. Profili, an employee of the International Institute for Agriculture, the organization that was the predecessor of the FAO and headquartered in Rome, was dismissed by the organization. He sued the IIA before a court of Rome. The IIA challenged the jurisdiction of the Italian courts, and the case was brought before the Court of Cassation. The Court held that the Organization had international legal personality, as the states establishing the organization had intended to be ¨absolutely autonomous vis-à-vis each and every member state." Consequently it was empowered to organize its own structure and legal order autonomously and without any interference from sovereign states. Therefore the Italian courts lacked jurisdiction over employment relations with the organization.

[16]Ibid 81.

[17]The ICJ upheld this right in the Advisory Opinion on *Reparation for Injuries,* On September 1948, the UN mediator, Count Folke Bernadotte, and the UN observer, Colonel André Serot, were assassinated while on official mission in Israel. Israel declared itself to be ready to make reparation for its failure to protect the two UN agents and to punish their killers.

[18]Sh. Bassiouni, *International Criminal Law,* 1999, New York, Transnational Publishers pp 456, 678.

[19]Cassese, pp. 90- 93.

1) The monistic doctrine[20], according to which international law is not a separate legal order but a set of provisional guidelines to be advanced to the status of law, if this is in the interest of the sovereign state and according to its unchecked will.

2) The dualistic doctrine, according to which the international legal order and the domestic national orders are two different sets of legal order quite distinct from each other. Their differences lie in:

a) Their subjects (individuals and groups of individuals for the domestic legal orders, states and international organizations in the case of international law),

b) Their sources (parliamentary statutes or judge made law in the national law systems, treaties and customs in the international law), and

c) the contents of the rules (national law regulating the internal functioning of the state and the relation between the State and the individual, while international law regulates the relations between states) [21].

This position allows for an equal, but different status of international law. However, it is obvious that it is upon the discretion of the states to enforce by implementation in their legal systems or to discard it[22].

3) A third view, formulated by Kelsen[23], argues for the supremacy of international law vis-à-vis the domestic legal systems. It appears to have gained ground more in theoretical debates than in reality.

In order to find out to which of the above positions any given state ascribes, we must examine the stipulations the state sets for the implementation of international law in its domestic law[24].

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[20]Fitzmaurice, "The general principles of International Law Considered from the standpoint of the Rule of Law" *in Hague Recueil* 5, 1957, pp 70-80, J. G. Starke, "Monism and Dualism in the Theory of International Law" In British Year Book (1936), p 74.

[21]As a counterbalance to these two contrasting opinions, there has been also the opinion put forward, that international law can additionally derive from various other sources; according to these theories even private bodies can set binding rules which extend to the international field of their activities. Typical example of that theory is the *lex mercatoria* as a foundation of international commercial practice. For the special nature of this autonomous legal order see also Ch. Pampoukis (1996), L*ex mercatoria* (in Greek), Ant. N. Sakkoulas, p. 17 ff.

[22]Cassese, pp 162-165.

[23]Kelsen, The *Principles of International Law*, Rinehart 1952, pp 45-50.

[24]States like Greece, the Netherlands, and Spain adopt an automatic incorporation system. In addition, in Greece, according to the Hellenic Constitution, customary international rules and treaties override national law. In Spain provision is made not only for the supremacy of the international treaties but also for the obligation of the national authorities to construe national legislation on human rights in the light of international instruments.

3. Enforcement of international law

In international law, neither central executive authority, nor effective mechanisms of enforcement exist. One would be justified to state that the UN has fallen short of its role to be the executive power of international order. The lack of an effective enforcement mechanism is coupled with a lack of a system of compulsory international adjudication. The International Court of Justice and other international courts such as the European Court of Human Rights only have jurisdiction when the parties to the dispute have consented to the Court's jurisdiction. On the whole, the history of the ICJ has been, with a few bright exceptions, one of an embarrassing succession of failures to establish its authority over the subjects of international law. It appears then that international law is still in a primitive state evident. Current political developments sadly confirm this. International law has not been much different from the contractual mercantile spirit which gave birth to it. It remains highly fragmented, contractual, and, as a result, basically ineffective in its enforcement[25].

4. International Sports Law, or "anethnic" Sports Law? Lex Sportiva-Olympica?

4.1. Features

The term international sports law appears to be a subcategory of international law. *Basically most of the international Sports organizations were the product of private initiative and belonged to the category of Private international organizations***.** However, it is commonplace that the most important ones, like the International Olympic Committee and the international sport federations, have acquired international legal personality through customary practice[26]. The compliance by the states and individuals with the rules created by these organizations leaves no other logical alternative[27]. The fact that these organizations are subject to the law of the country they are based, does not contradict with their international personality. It appears that the originally private international sports organizations by the implied will of states and individuals and as a result of custom have international legal personality and effective capacity in order to attain the spe-

[25]Brierly, p. 167, Dugard, 175, 178, Cassese, pp. 223- 224.

[26]D. J Harris, Cases and Materials on International Law, 2000, London, Sweet & Maxwell, pp 24- 43, 143-144; Asylum Case, Columbia v. Peru, I.C.J. Rep. 1950, p.226. See also Dimitrios Panagiotopoulos (1991*), Olympic Games Law*, [in Gr. *Δίκαιο Ολυμπιακών Αγώνων*, (Αρχαία και Σύγχρονη Εποχή), Ant. Sakoulas: Athens, pp, 249 next.

[27]See Dimitrios Panagiotopoulos (1991*), Olympic Games Law*, supra note, and see also L. Silance (1977), "Sports Law", *IOA. 16th Congress*, Athens, p.76.

cific goal of creating and organizing the performance of international sports and international sporting events. Thus, international sports organizations meet the requirements of the twofold test, discussed above, e.g., the International Olympic Committee, which is vested with the authority to organize and supervise the Olympic Games.

We note here a clear departure from the international law reality described above. *In Sports Law as Lex Sportiva, law obligations and rights are imposed directly on the individual athletes***.** The direct effect of international sports law on individuals can be compared only with the vertical effect which exists in domestic national law systems and, in the case of regulations, in EU law. In addition, the integration rules of Lex Sportiva in the national jurisdictions are automatically through the National Sports Federations and National Olympic Committees, an issue that does not exist in international law, but only after the accession to it.

In terms of the creation of the rules, the main legislating function is performed by the international organizations of sports law, i.e. the International Olympic Committee and the international sports federations. However, there are many differences between Lex Sportiva and International Law. In case of noncompliance by the member states with the rules of Sports Law as Lex Sportiva, the exclusion of the disagreeing member, be it a national sports organization or sports federation or athlete, is immediate and is enforced through the sanction of permanent or temporary banishment from the games. Failure of the athlete to abide by the rules of Lex Sportiva activates a system of penalties which vary from fines and suspension to partial and life game exclusion. The system of penalties for the athletic existence of the individual athlete is the equivalent of detention, temporary incarceration, and life imprisonment in a "land" of non-athletic competition. This is a crucial difference between international law and Lex Sportiva: an effective enforcement mechanism[28] is definitely not one of the characteristics of international law while the sophistication of sports law international as Lex Sportiva has in terms of enforcement is impressive[29].

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[28]Dimitrios P. Panagiotopoulos (2008), "Lex Sportiva and sporting jurisdictional order", in: *International Sports law Review Pandektis*, Vol. 8:3-4, pp. 335-373.

[29]Considering all the above, the notion expressed by J. Nafziger in International Sports Law, 2nd edition, New York 2004, p 49, that "lex sportiva is the product of only a few hundred arbitral decisions within a limited range of disputes (…) It is still more of a lex ferenda than a mature lex specialis" seems unjustified. As much as we disagree regarding this opinion; Lex Sportiva exists with the already established rules and is not created by court decisions. These decisions only state in the present moment their devotion to the international sports system and less their interest to formulate case law, i.e. to subvert the rules of lex Sportiva, meaning to force the actors to change the rules in accordance with the operative part of the judgment. For the obvious existence of *lex sportiva* in the international sports domain compare Dimitrios Panagiotopoulos (2002), "Sports Legal Order …", op. cit pp. 7-17 anIn: International Sports Law Review Pandektis, Vol. IV: 3, Pp. 227-242, ibid

Another very important difference is the exclusive jurisdiction of the judicial organ of international system of sports law, as Lex Sportiva, that is the Court of Arbitration for Sport in Lausanne (CAS)[30] .

In the "Bliamou case"[31] the clash between national judicial organs and the CAS proved without doubt the superiority of the CAS jurisdiction in international sports law. *In international law there is no system of compulsory international adjudication.*

4.2. A new species of internationalized sports law

We observe differences between Lex Sportiva and international law on issues fundamental to the nature and the quality of the law itself. The position that Lex Sportiva[32] is merely a category or subspecies of international law does not appear to be true on closer examination. *We are faced with a system of law which, although it undoubtedly possesses characteristics from the General Principals of Law and it regulates relations in the international domain***.** The international sports system has succeeded to establish an impressive system of coercion, through sanctions and binding jurisdiction of the judicial institution, comparable only with national domestic law and Community law, in terms of efficiency and application.

We are before another species of international legal system which can not be a simple category or a diversification of international law. *Between the system*

(2003), Sports Law: A European Dimension…, op. cit, pp. 16-27, (2003), "Reglements Sportifs – Limites Juridiques et Lex Specialis Derogat Legi Generali", in: *Revue Juridique Et Economique Du Sport*, Dalloz: Paris, pp. 87-98, (2004), Sports law [Lex Sportiva] op.cit, pp. 39-50, also ibid (2004), "Lex Sportiva: Sport Institutions and Rules of Law", in: *International Sports law Review Pandektis* (ISLR/Pandektis), Vol. 5:3, , p 40 f., and in: (2005), *Sports Law – Implementation and the Olympic Games* [ed] , Sakkoulas: Athens pp. 40-44. For the Lex Sportiva Theory, generally see Dimitrios P. Panagiotopoulos (2011) *Lex Sportiva and Lex Olympica, Theory and Praxis,* Ant Sakkoulas: Athrens, pp.102-209 and for the "Lex Olympica", pp.375-439.

[30]For the international sports judicial system and the principle of exclusion of sports federations, βλ. Dimitrios P. Panagiotopoulos (2006), Sports Law II Sports Jurisdiction [in Gr. *Αθλητικό Δίκαιο ΙΙ, Αθλητική Δικαιοδοσία] Nom Bibliothiki, Athens, pp.*144-148. For the practice of CAS for the applicable law and the enforceability of its decisions , see ibid pp. 192-203. For the process of resolving disputes arbitral see also Pantelis Dedes Andreas Zagklis (2006) Court Arbitration for Sport, [in Gr. *Το Αθλητικό Διαιτητικό Δικαστήριο της Λωζάνης]*, Nom. Bibliothiki: Athens, pp. 25-46.

[31]See, Dimitrios P. Panagiotopoulos (2004), "International Sports Rules' Implementation – Decisions' Executability", in: *Marquette Sports Law Review*, Vol. 5:1, pp.1-12 and Comment in ISLR/Pand., Vol. 5:4, pp.304-307. For a detailed analysis of this case, see also Dimitrios P. Panagiotopoulos (2011) *Lex Sportiva and Lex Olympica…"* Op. p, Part V, pp. 502-523.

[32]*Analogous to the Lex Mercatoria,* see Dimitrios P. Panagiotopoulos (1999) and (2002), "Sports Legal Order in National and International Sport Life'', 8th IASL Congress Uruguay, Modevideo Nov. 28-30, 2001, in: Revista Brasileira De Direito Sportivo (Instituto Brasileiro De Direito Desportivo), no: 2, Pp. 7-17 and in: International Sports Law Review Pandektis, Vol. 4:3, pp. 227-242.

of Lex Sportiva and public international law there is no conflict because there is a law of private nature, internationally, which is the sports "anethnic», that regulates a field of relations that could regulate the public order[33] *to apply the provisions of this regulation***.** This is another kind of law on the international level, which is parallel with international law, shares common elements, such as the general principles of law generally, in a new composition[34], type in the international arena Lex Sportiva / Olympica. This is not an amalgam of law, but an independent system of anethnic sports law. *The rules of this new legal order are a new system of rules derived from the composition of rules in proportion to the Lex Mercatoria*[35]*, international law and domestic legal systems*. When a legal system has such a binding effect and effective enforcement of its rules, then we face the same ideological dilemmas that for centuries we are trying to solve at a domestic jurisdictions level. The theoretical debate remains for years and the results have crystallized into principles that are fair, clear and undeniable. In any organized structure when we have a concentration of power in a few hands the solution is given by the principle of legality and the separation of powers. Prerequisite is the complete separation of the institutions that exercise legislative, executive and judicial authority. Separation of instruments and separation of powers. The separation of powers and the implementation of democratic processes must be under the guarantee that will provide an independent judicial body and the existence of effective judicial protection[36], an international Court for Sports of special procedural rules of state standing, in a statutory framework of international legitimacy for sport and sports activity.

[33]This outside of nations sporting character of law is not identical with either a national, has a substantial similarity in the Community legal order, which is located midway between the legal systems of the Member States and the international legal order, borrowing elements from all, while remaining independent of them, "Supranationalität" and "supranationalité" German and French literature, respectively. But in this case the term more appropriate is anethnic law, or Lex Sportiva-Olympica.

[34]See Adnan A Wali (2010), "The theory of the Sports Law: Towards specific Legislation for sports Transaction", in: *International Sports Events and Law* [Jacek Foks Ed.], Warsaw, pp.183-192.

[35]*Lex Mercatoria:* A creation, of a set of customary rules and general principles, which constitute an autonomous legal system capable of governing in a meaningful way the international trade, although not referring to a particular state legal system, previously See Goldman (1987) *The applicable law: General Principles of law-lex mercatoria* in Contemporary problems in international arbitration, J.M Lew (ed), *Martinus Nijhof*, 116.

[36]Under the conditions imposed by the Article 6 of the ECHR.

4.3. Lex Sportiva - Lex Olympica: an anethnic Law of International Practice

Sports law in the international sporting field, as Lex Sportiva-Lex Olympica, is actually private, and means that it is a law, which is international as anethnic because, *it necessarily regulates an area with no geographic boundaries the relationships of persons involved in international and Olympic sports and action, which are coming from more countries that require coordination in their activity within their States*. That is, the Lex Sportiva-Olympica, a really "anethnic" law internationally, to which, however, the theory does not give special power[37]. Nevertheless, it constitutes a sui generis sports law legal order imposed in the sports world heteronomously, through these international sports organizations[38].

This new kind of law, Lex Sportiva & Lex Olympica as "anethnic" law of international practice, sets necessarily old accepted practices and organizational structures, established under another perspective that reveals the insufficiency of practices of international law, in a legal order which consists a different kind of law internationally, has an impressive feature of coercion similar to the domestic jurisdictions. Many of us claim, perhaps based on thoughts of CAS[39]that is, through the jurisprudence of the abovementioned Court that has been formed a not-called Lex Sportiva but a Lex Ludica. With this distinction probably erroneously they want to give a sporting dimension to this law, but they forget that if

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[37]Dimitrios P. Panagiotopoulos (2011) *Sports law: Lex Sportiva and Lex Olympica*…, Op. cit , pp.117-152, ibid (2004) "Sports Law [Lex Sportiva]…", op. cit, pp.34-49.

[38]Ibid, (1991), Olympic Law [in Gr *Δίκαιο των Ολυμπιακών...], Op .cit. p*. 249, see also D. Panagiotopoulos (1993) "The Olympic Games-an institutional dimension-perspective", in: *Proceedings of International Congress, (The Institution of the Olympic Games),* Hellenic Centre of Research on Sports Law: Athens, pp. 527-528.

[39]Bl. CAS decision no. 98/200 according to "[...] Sports law has developed and established through the years, mostly through the arbitration dispute resolution, a set of unwritten legal principles - rather like lex mercatoria for sport, or else a lex ludica - in which national and international federations have to obey. [...] ", see also k. Foster (2006)"Lex Sportiva –Lex Ludica: The court of Arbitration for sport Jurisprudence, in: *Entertainment and Sports Law Journal*, p.1-14. As well as same opinion by: J. Nafziger (1988) "International Sports Law" 2nd edition - Transnational Publishers Inc N. York (σελ. 57-61), Reeb "Digest of CAS Awards II-1998-2000" Kluwer Law International, p. xxx, McLaren (2001) "Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games"12 MARQ. SPORTS L. REV. 515 and Different as below, Dimitrios P. Panagiotopoulos (2009), "Sports Law Foundation: Lex Sportiva, a Fundamental Institutional Approach", in: *Sports Law: an Emerging Legal Order - Human Rights of Athletes*, Nomiki Vivliothiki: Athens, pp. 20-22 and in: *International Sports law Review Pandektis*, Vol.8, Issues 1-2, pp 6-14, ibid see also (2008), "Lex Sportiva and sporting jurisdictional order", in: *International Sports law Review Pandektis*, Vol. 8:3-4, pp. 335-373.

it is Ludica it can not be Lex and vice versa[40]. The Lundica concept comes from the theory of Homo Ludens of Hunginca, the game that finally has no need of rules of law[41] and can not be regulated by the law, while in the sporting action we have absolutely regulating laws - the Lex Sportiva, including technical rules of the particular character of the sport that do not constitute area of law bit they are non law rules[42].

As an international sports law, subcategory of international law, can finally be described only the rules of international conventions on sports, the international sports conditions, and the international acts for sport governed in their application by the rules and practice of the international law. In addition, the rules of the Code WADA, which has been adopted by UNESCO, UN organization bind the states who signed the agreement to make it a rule of their domestic law, after approval of their parliaments, and these rules are rules of international sports law[43]. International Sports law is therefore absolutely different from the law of rules of Lex Sportiva / Olympica.

Conclusion

The rules of Lex Sportiva and Lex Olympica and the quality of the content of these norms with their particular characteristics in the international context of practice, demonstrate that sports law, is not a subcategory of international law,

[40]See Dimitrios P. Panagiotopoulos (2009), "Sports Law Foundation: Lex Sportiva, a Fundamental Institutional Approach", in: *Sports Law: an Emerging ..., op. cit*, pp 20, and in: *International Sports law Review Pandektis*, Vol.8, Issues 1-2, p. 12.

[41]See L. Silance (1977), "Interaction des règles de droit du Sport et des lois et traités émanant des pouvoirs pulics" in : *Revew Olympic 120* : Lausanne, I.O.C., p. 622, Dimitrios P. Panagiotopoulos (2003), «Règlements Sportifs – Limites Juridiques et Lex Specialis Derogat Legi Generali», in: *Revue Juridique Et Economique Du Sport,* Dalloz: Paris, pp. 87-98.

[42]For this theory, See Max Kummer (1973), *Spielregel und Rechtsregel*, Stampfli & Cie AG, Berne, contra see Jean Pier Karaquilo (1989), «Le Droit du Sport et la Droit selon», *18th Conferesce for the European Community*, Counsil of Europe, p.48, J. P.Karaquilo (ed, 1995), *L'Activite Sportive Dans les Balances de la Justice*, Tom. II, Dalloz: Paris. See also, Dimitrios P. Panagiotopoulos (2009), "Sports Law Foundation: Lex Sportiva, a Fundamental Institutional Approach", in: *Sports Law: an Emerging Legal Order* op. cit., p.19 see also ibid (2011) *Lex Sportiva and Lex Olympica*…, op. cit., pp 107-114.

[43]See Antonis Bredimas, "Multilateral diplomacy for sport: the case of UNESCO", in: *Sports Law: Implementation and the Olympic Games*, [Dimitrios Panagiotopoulos Ed], Ant Sakkoulas: Athens, pp 327-334. see also A. Bredimas (2000),, "The International Constitution of Physical Education and Sports of UNESCO - Legal Political dimension and Prospect", in: *Sports Ethic*, [D. P. Panagiotopoulos Ed.], Ellin: Athens, pp. 87-97, see also ibid (2005), "Legal Order of CIO and international Sports Federations and relation to International Legal Order [in Gr. Η νομική φύση της ΔΟΕ και των διεθνών αθλητικών ομοσπονδιών και η σχέση τους προς την διεθνή και κρατική έννομη τάξη", in: *Olympic Games and Law* (N. Klamaris et all Ed..), Ant Sakkoulas: Athens, pp. 80-84.

as International Sports Law, but a different kind of law, Lex Sportiva /Olympica.

Lex Sportiva / Olympica, is another kind of law resulting from the synthesis of characteristics of international law (subject, object and content regulations) and internal characteristics of domestic legal orders (effective mechanism of coercion, automatic incorporation norms in national laws exclusive and binding jurisdiction of judicial bodies).

This new kind of international law poses necessarily old accepted practices and established organizational structures under another perspective that exists in parallel with the international law and constitutes a sui generis sports law international legal order, imposed heteronomously on the sporting world from these international organizations[44].

International Sports Law is consisted by the rules of international acts and conventions of bodies that are governed by rules of international law such as international treaties and acts on Sport, the rules of WADA Code and the International Charter for Sport but not by the rules lex Sportiva/Olympica. The need for fundamental changes in the organization of the international sport practice under the principle of legality in international sports field becomes imperative, via a constitutional charter for sport and an international jurisdiction.

[44]Dimitrios P. Panagiotopoulos (2011) *Lex Sportiva and Lex Olympica*... Op. cit., pp 392- 442, see also ibid (1991), Olympic Law [in Gr. *Δίκαιο των Ολυμπιακών...], Op*. cit., p. 249 next, see also ibid (1993) "The Olympic Games-an institutional dimension-perspective …», Op. cit., pp. 527-528.

THE NATIONALITY ISSUE IN INTERNATIONAL SPORTS LAW

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1. Nationality under the Olympic Charter

Yamilé Aldama, a world-class triple jumper, has competed in three Olympics – first, on the Cuban team at the 2000 Games in Sydney, then on the Sudanese team at the 2004 Games in Athens, and most recently on the British team at the 2012 Games in London. In the London Games, Félix Sanchez won the gold medal in the 400 men's hurdles as a member of the Dominican Republic team, even though he was born, schooled, trained, and domiciled in the United States. Should such country swapping concern us? Probably not.

A fundamental rule in the Olympic Charter is that "the Olympic Games are competitions between athletes in individual or team events and not between countries." Perhaps the most effective portrayal of this rule is the commingling of athletes, without regard to nationality, during their informal parade in the closing ceremony of the quadrennial Games. The Games rely, however, on national teams to form an organizational structure capable of aligning the public's patriotic sentiments and aspirations with the Olympic spirit.

Rules on the nationality of athletes are therefore fundamental in organizing international competition and generating popular support for it. Rule 46 of the Olympic Charter provides that "[a]ny competitor in the Olympic Games must be a national of the country of the NOC which is entering him." This nationality requirement raises a number of issues, beginning with the eligibility of an athlete who has competed internationally on a national team of one country, but has then has sought to join a national team of another country, perhaps after moving there. In such a case, the Charter imposes a three-year waiting period for the acquisition of a new nationality although the International Olympic Committee (IOC) Executive Board can grant a waiver of that requirement with the approval of the international federation (IF) for the migrant athlete's particular sport and the country's National Olympic Committee (NOC).

Despite these baseline residency requirements for veteran athletes who seek to change their nationality, there is no such thing as "Olympic citizenship" or

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any other sports-specific citizenship for international competition. The distinction between "national" and "citizen" varies among legal systems, but citizenship normally connotes a formal grant of nationality by a sovereign state. Rule 42 (1) of the Charter therefore refers only to nationality, not citizenship. This makes it possible to establish NOCs in, for example, the Cook Islands, Puerto Rico, Taiwan (designated as "Chinese Taipei"), American Samoa, and Guam, none of which is recognized as a sovereign state under international law. These entities have no capacity to grant citizenship, but they are sufficiently autonomous in international relations to lend their names to "national" teams in international competition.

The underlying explanation for the Charter's exclusive use of the term "national" is its Rule, cited earlier, that the Games are intended to be among individuals and not countries, the bestowers of citizenship. In making a parallel distinction between "legal nationality" and "sports nationality," the Court of Arbitration for Sport (CAS) has defined the "two different notions [of legal nationality], deriving personal status from citizenship of one or more states [and sports nationality], a uniquely sporting concept, defining the eligibility rules of players with a view to their participation in international competition."

In this era of globalization, dual nationality and widespread relocation of peoples, it is sometimes difficult to define sports nationality with integrity, however. It is a little like defining the nationality or even the country of origin of an automobile. It may be designed in one country, assembled in another country from parts made throughout the world, and bear the trademark of a company headquartered in still another country. Similarly an athlete may be born in one country, grow up and attend school in a second country, train for competition in a third country, and be domiciled in yet a fourth country.

The status of stateless athletes is also problematic. Two CAS cases are in point. In each case, a Cuban-born refugee who had competed internationally on a Cuban team defected from Cuba and then sought to compete in the 2000 Olympic Games for his country of refuge, the United States and Canada, respectively. Neither athlete had formally satisfied the requirement of a three-year waiting period to change their nationality, and Cuba refused to waive that requirement for either athlete. CAS decided against the Canada-based athlete because of his failure to show that he had sufficiently severed his link with Cuba to have become stateless and thereby to have effectively changed his nationality under Rule 46 of the Charter. As to the United States-based athlete, however, CAS concluded that because Cuba had deprived him of his rights when he defected to the United States, he had indeed become stateless more than three years prior to his acquisition of United States citizenship. He had therefore effectively changed his nationality and was eligible to compete internationally on a United States national team. In making the awards, CAS addressed issues of documentary in-

terpretation, *res judicata,* estoppel, the balance between fairness and finality in arbitration, and third-party interests.

Finally, suppose that an athlete is a citizen of state – he is therefore not stateless – but there is no NOC within that state. The Olympic Charter's mandate that every athlete "must be a national of the country" of a sponsoring NOC presupposes that an NOC exists. If there is no such NOC, the athlete must be designated to compete as an "independent athlete." One such athlete was Guor Marial, a South Sudanese marathon runner in the London Games. He wanted to join the national team of the United States, his domicile, but he was not a United States citizen and no NOC for South Sudan had been established during its first year of independence.

2. The Nationality Issue Beyond the Olympic Charter

The nationality issue in international sports law extends beyond Olympic competition. For example, in *Cowley v. Heatley* an English court questioned its jurisdiction to review a decision by the Commonwealth Games Federation (CGF) that had denied eligibility to a South African swimmer. The court nevertheless did examine a national domicile requirement imposed on all athletes under the Commonwealth Games Constitution. The plaintiff had recently established her residence in England wanted to represent England in the Games. The CGF denied her eligibility as a member of the English team on the basis that she was not yet domiciled in England. In court the plaintiff argued that under English common law she was domiciled there insofar as she could demonstrate her current residence in England, however brief, and her intent to remain there. The court concluded, however, that an ordinary meaning of domicile applied, rather than a common law definition. Under the ordinary meaning of the term, she simply had not resided long enough in England to establish her eligibility for international competition.

Beyond the frameworks of the Olympic and Commonwealth Games, the most restrictive rules of sports nationality are the "play and stay" ones, such as in professional soccer and basketball, which bar all transfers of nationality for athletes who have already competed at the international level. Most of the other IFs, as in the Olympic Charter, simply require athletes to establish a minimum duration of residence before being allowed to acquire a new nationality for the purpose of eligibility for international competition. The required duration of residence varies among the IFs.

The English Premier League of football/soccer recently adopted its own rule of nationality, beginning in the 2010-11 season. Accordingly, each squad is subject to a cap of 25 players, of whom at least eight must be "home grown." The

definition of "home grown" is a player who has been registered and thereby trained in either the English or Welsh professional association for a period of three years under the age of 21, regardless of his nationality.

3. Country Swapping

Country swapping may have a humanitarian basis, as in the case of Yamilé Aldama, or it may simply reflect an athlete's new or ancestral domicile, as in the Sanchez case. The argument that in other cases an athlete must demonstrate a "genuine link" of nationality merits consideration, however. Particularly controversial has been a growing practice of some countries to grant "quickie citizenship" to star foreign athletes who could enhance talent-challenged teams of those countries, but who exceed national quotas for international eligibility in their countries of origin. Quickie citizenship offers a country the prospect of basking in the glory of a prize foreign athlete. If the country of the athlete's national origin agrees to such a grant of citizenship by another country, that country may freely ignore, waive or minimize its normal durational residence for naturalization. If, however, a country of origin does not accept such a grant of citizenship by another country, then that country's normal durational residence requirement for citizenship would apply absent special circumstances such as statelessness.

What's wrong, then, with such sports-driven citizenships and other country swapping in a world increasingly tolerant of dual nationality? It is difficult to argue that anything is wrong with the practice. Giving a surplus Kenyan or Ethiopian distance runner a second chance on, say, the Qatar team, would strengthen the overall competition without causing "muscle drain" and would also confirm the fundamental rule that competition is between individuals, not countries.

Despite substantial litigation and arbitration of nationality issues, not to mention anxieties in academia, the trend in international sports law is toward relaxing both durational residency requirements and the traditional objection to dual nationality. Accordingly, a "quickie" grant of citizenship may be seen as simply a clever form of public investment to enhance a country's competitive position in sports and international relations. The public is the beneficiary, as are both athletes and athlete-investing countries. Surely, the resulting opportunities overshadow concerns about commodification of acquired athletes or confusion about their nationality.

If country swapping ever becomes a cancer in the international sports arena, the remedies might include an international agreement on threshold residency requirements for citizenship and "wild card" slots for additional athletes from historically wellendowed countries in a particular event. But the time for such measures has not yet arrived.

CURRENT ASPECTS OF INTERNATIONAL AND EUROPEAN SPORTS POLICY AND EUROPEAN SPORTS LAW

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Abstract: *The presentation looks at the main tasks of European and international sports policy as well as European sports law from the point of view of the German Federal Ministry of the Interior.*

The preparatory work undertaken to include sport in Community law, i.e. the incorporation of sport in the Lisbon Treaty, is specifically highlighted. The tasks and competences of the European Union are explained in detail.

Furthermore, sports policy cooperation with international organizations – in addition to supranational cooperation with the EU – is illustrated. In this context, the focus is on the Council of Europe and UNESCO. With regard to UNESCO, the Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS V) to be hosted in Berlin in May 2013 by Germany is mentioned and the conference's topics are presented (e.g. match fixing).

The third part of the presentation deals with the question of what sports law actually is. The answer focuses on both the national (i.e. Germany's) and the European perspective. The presentation also provides research results concerning the EU Member States with specific sports law. Furthermore the UNESCO Member States – such as the P.R. China – which have their own sports law – are also mentioned.

This is followed by the thesis that national and European sports law should develop into international sports law to ensure the necessary equality of all athletes before the law. A question to consider in future is whether unhindered access to sport (equally for women, girls and men) should be recognized as a human right.

Given increasing globalization and closer international cooperation, it is certainly necessary to create international sports law.

Introduction

I would like to thank you for the invitation to this major congress and I am looking forward to the interesting and stimulating discussion in the wonderful atmosphere here in Beijing. The title of my talk is: "Current Aspects of International and European Sports Policy and European Sports Law". Today, I would like to present a number of aspects illustrating how the Federal Government – in this case, the Federal Ministry of the Interior, since this falls within its remit – participates in the formative process of shaping European and international

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sport policies and how new and current developments are viewed.

I would like to divide my talk into three short sections:

I. (Firstly) A brief review of European sport polices over the last years and a definition of the term "European sport policies".The preparatory work undertaken to include sport in Community law, i.e. the incorporation of sport in the Lisbon Treaty, is specially highlighted. The tasks and competences of the European Union are explained in detail.

II. (Secondly) some aspects of the status quo and the current sport policies, and the aims of the EU White Paper, furthermore, sports policy cooperation with international organizations – in addition to supranational cooperation with the EU – is illustraded . With regard to UNESCO, the Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS V) to be hosted in Berlin in May 2013 by Germany is mentioned and the three main conference's topics are presented :Access to Sport as a Fundamental Right for All (Inclusion in sport – Implementing the UN Convention on the Rights of Persons with Disabilities-Access of women and girls), Promoting Investment in Sport and Physical Education Programmes (Promoting quality physical education, Awarding of sport mega events and their sustainability), Preserving the Integrity of Sport (Commitment to the values of sport and the fight against match fixing, doping and corruption in sport);

III. (Thirdly) I would like to offer a brief look ahead, addressing the issues that I consider will be of concern to Member States, associations and the EU Commission in the near future and the coming years, and where a solution needs to be found. In my opinion we have to come in the future to an international sports law. We need a harmonised international legal order governing sport. A lot of EU- and UNESCO Member States has specific sport laws. Globalisation requires us to put in place an international legal order governing sport (international sports law). Since there is no uniform global sports law, this leads to: Inequality, Fragmentation of legal provisions and Legal uncertainty.

I

By way of introduction, let me start by saying something about the term of "European sport policies". Due to the complex and diverse culture of sport in Europe, every kind of definition is always difficult. Nevertheless, as I see it, "European sport policies" refers to policies building on the so-called "European model of sport" and which, naturally, also include all actors in the sports sector represented on the European level, including social partners and international organisations such as, for example, the Council of Europe and UNESCO. In the

context of my contribution today, however, I would like to place the emphasis more on the European Commission's sport policies and less on bilateral cooperation with other European Union Member States or cooperation with the Council of Europe. Naturally, the Council of Europe also plays a key role – here, one only has to recall the area of the European Convention Against Doping – although one needs to bear in mind that the work on sport policies has, as I see it, been newly established and re-organised within the Council of Europe; the Federal Government will be observing this closely and considering how it can contribute here in future.

Although I mentioned in my introduction that I intended to offer a brief review of "European sport policies", I would like to reassure you that I am not planning to present the last 10 years of European sport policies in the context of a historical retrospective. Nonetheless, in my view, it does seem important to realise that we have indeed made significant progress in this area over the last 13 years. In 1999, when Germany held the EU Presidency, I can remember voluminous debates not only with numerous Member States but also with the EU Commission over the sense of incorporating a European Article on Sport into Community law and, at that time, there was considerable resistance from many States to declaring a readiness to openly support the incorporation of such an Article. Ten years ago, there was merely the so-called "Joint Declaration on Sport" agreed within the framework of the Amsterdam Treaty. However, this merely dealt with a political declaration of intent that had no import and binding force in Community law. Consequently, this "Joint Declaration" did not give the Commission the adequate competence to establish a requisite budget line, i.e., an independent "budget" in the sport sector or for the pertinent studies and actions. For the necessary expenditure, the European Court of Auditors required a clear legal basis in Community law. For this reason, the situation at that time did not offer a satisfactory basis for the Commission to pursue a correspondingly active sport policy.

II

I would now like to move on to the second part in which I intend to look at the status quo in somewhat more detail. As an introduction, I would like to say one or two sentences about how the Federal Government is at present contributing or can contribute to participating in forming European sport polices within the EU framework.

The 1957 Treaties of Rome failed to mention sport explicitly. Therefore, sport did not at first present an integral part of the European integration movement. It was not before 1985 that the EU recognised sport as an instrument of international understanding (Adonnino-Report 1985, Walrave and Koch case 1975, Bosman case 1995). Nowadays, sport is generally a subject matter of Community law (indirect EU sports policy) and the "specific characteristics" of sport are taken

into account by the ECJ (European Court of Justice). The ECJ is "sport-friendly".

Finally, Lisbon Treaty was adopted (entry into force on 1 December 2009). The procedures of changing the EU Presidency every six months are still in place, and meetings of EU Directors-General and Ministers Responsible for Sport respectively are held twice a year. Hence, essentially, as yet there have been four major meetings annually where the particular Director-Generals or Ministers can exchange views. In addition, there are also special meetings between the IOC and Ministers, and a range of Working Groups on the EU level that are primarily organised by the EU Commission in Brussels and deal with, for example, volunteer work, the EU White Paper, or the doping problem. I do not intend to give you any exhaustive list of these here. All in all, as things stand, adequate opportunities do exist for communication.

From today's perspective, the last years were truly successful years for European sport policies in a number of ways.

On the one hand, for the first time since the treaties establishing the European Economic Community, sport has now been successfully anchored in Community law and, on the other, following the German Presidency of the EU, the EU Commission has succeeded in presenting, from our perspective, a White Paper truly oriented to the future. In the White Paper put forward, the EU Commission addresses the topic of sport comprehensively for the first time, and naturally the German Federal Government has very much welcomed the inclusion in the EU White Paper of all the topics we also dealt with in the course of the EU Presidency, for example, sport and the economy, combating doping, dual career, and sport and integration. In the Federal Government's view, the 'Pierre de Coubertin' Action Plan similarly proposes crucial sport-related measures on the EU level for the coming years, and in principle they receive our support.

In this connection, I would like to emphasise that the German Bundestag's Sports Committee has also expressly welcomed the presentation of the Commission's White Paper on sport, and the White Paper was an object of related discussions and consultations on a number of occasions. In September 2007, the Bundesrat too expressed views indicating that it welcomes the Commission's White Paper as a contribution to promoting an important social and economic sector. Nevertheless, the Bundesrat also contained critical voices that noted with concern the one or other of the White Paper's goals, since they were regarded as tending to expand non-existent EU competences.

As far as the enactment of the White Paper is concerned and, naturally, also after the Lisbon Treaty has been ratified and Article 165 TFEU (Treaty on the Functioning of the European Union) with its provisions on sport is in force, the Federal Government will certainly be keeping a watchful eye on EU organs and

bodies to ensure that neither the autonomy of sport is encroached on nor the so-called principle of subsidiarity is violated.

Article 165 TFEU merely provides for a "supporting and supplementing competence". It does not empower the EU Commission to adopt legislative acts, neither in primary nor in secondary law. Nor does the Commission have the right to adopt legal measures seeking to harmonise the situation among Member states. This means that Art. 165 TFEU is mor or less a "toothless tiger". Main competences continues to rest with the EU Member States.

III

As regards European sport policies and international sport law, what do we need to work on especially in the coming years? What will be the main objectives and which problems will we have to try and solve?

Here, I would only like to mention a few key points, singling out some areas where, in my view, we will need to address these topics in particular:

- The question of greater legal certainty in the area of sport and antitrust law;
- The composition of national teams, youth training, the status of players' agents, safeguarding sports funding;
- Issues concerning the central marketing of media rights and its compatibility with antitrust law;
- Concerns about a dual career and controlling the management of professional clubs;
- Measures against match fixing and illegal on line betting and
- Implementation of an international Convention who protect the integrity of sport.

To achieve greater legal certainty within the States many of these points need to be settled in a comprehensive and in-depth way, and it is understandable that sport functionaries and associations are calling here for more legal certainty for their daily work.

There is no uniform "Sports Law". Legal conflicts tend to concern a great number of legal fields. With a view to globalisation in sport we should look at how to bring about a harmonised international legal sport order. In view of globalization and closer international cooperation the international community should make an effort to develop international sports law and recognise access and participation in sport as a human right.

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SPORTS LAW AFTER THE ENTRY INTO FORCE OF THE LISBON TREATY: WHAT'S CHANGED?

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Abstract: *For scholars is well-known how sport has been essentially indifferent for European Law, since it is ascribable to the private sphere of citizens where public legal systems ordinarily don't interfere, if not to settle emerging conflicts or to guarantee interests, that have a general nature.*

In the European Union this indifference is further stressed by its purely economic genesis: an approach that seems to be confirmed by various European judgments, whose arguments tended to identify the specificity of sport, specificity that receded when sport intersected spheres and spaces that are typically economic and, therefore, pertaining to the EU (especially for that regards the free movement of goods and workers). The long process of EU reform, that ended with the entry into force of the Treaty of Lisbon, reverses this trend: in fact the sport entered within the EU competences, although in a subsidiary perspective, inducing a series of changes, both at the institutional and at the regulatory level.

I wonder about the real extent of such changes: if from a legal theoretical point of view seems to have changed much, I wonder what is the real status of sport and lex sportiva in the EU as redesigned by the Lisbon Treaty. A lot of fuss about nothing? Or something has really changed?

1. The absence of rules in the E.U. legal system

Talking about the function assigned and/or recognized to sport in the EU means, therefore, to tell an absence of rules that continued until 2007, when the European Commission adopted the White Paper on Sport[1].

So EU is characterized by a prolonged legislative silence, whose reasons could be traced back to the purely economic genesis of this institution[2]: if sport is characterized by an inherent 'unnecessariness'[3], that constitutes it as an activity related to that private sphere of citizens, where legal systems don't interfere, there isn't many arguments to assert that sport is a legally relevant case for EU.

It is an approach confirmed by several European case law, whose judgments

[1]Adopted on July 11th 2007, COM (2007) 391, available online at the link http://ec.europa.eu/sport/white-paper/doc/wp_on_sport_en.pdf.

[2]In this sense it's emblematic the original denomination of the EU, established initially as European Economic Community, later renaming as European Community, up to assume the current name.

[3]About this feature of the sport *inter alia* see L. Di Nella, *Lo sport. Profili teorici e metodologici*, in L. Di Nella (ed.), *Manuale di diritto dello sport*, ESI, Naples, 2010, especially pp. 15 and 19-21.

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

tended to identify a specificity of sport[4]: an indifference that fails as soon as the sport assumes the characteristic of an economic activity, falling, therefore, within the disciplinary competence of EU[5].

2. The White Paper on sport

That jus outlined is an overview out of date because of the evolutionary vicissitudes of EU that, exceeding the original motivations of aggregation, appears to have acquired an identity of a political nature, after the adoption of the Lisbon Treaty[6].

In this trend places itself the publication of the *White Paper on Sport*, that has constituted the first European global action in the field of sport. This is a document drawn up after a wide consultation, that involved sports organizations, Member States and other stakeholders, with the aim of providing a strategic guidance on the role of sport in the EU, recognizing the importance of social and economic function performed by sport within the EU.

In particular, the European Commission has recognized the autonomy of sports organizations in the EU legal framework: an autonomy that has its origin in the specificity of sport; an autonomy that, however, doesn't subtracted sport entirely to the European jurisdiction, which unfolds when this assumes characteristics of a genuine economic activity[7].

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[4]*Ex pluribus* see the judgement of 11 April, joined cases C. 51/96 and C-191/97, *ChristelleDeliège v Ligue francophone de judo et disciplines associées ASBL, Liguebelge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)*, especially at paragraphs 64-68, where the Court argues punctually and extensively about the specificity of sport.

[5]In this sense go the considerations of the European Court of Justice in the judgment of December 15th, 1995, C-415/93, *Union Royale Belge des Sociétés de Football Association v. Jean-Marc Bosman, Royal Club Lidgeois v. Jean-Marc Bosman and others, and UEFA v. Jean-Marc Bosman*, at paragraph 108, as well as the judgment of the Court of First Instance (Fourth Chamber), 26 January 2005, case T-193/02, *Laurent Piau v. Commission of the European Communities,* where considerations on this subject are developed starting from paragraph 68 of the judgment.

[6]The events of the Treaty are too well known to resume them here. Just remember how the first step can be identified in the writing what will be remembered as the *Nice Treaty*, drawn in view of the upcoming EU enlargement: a process that has undergone an initial fulfilment in the drafting and the signing of the *Treaty establishing a Constitution for Europe*, signed in Rome on October 29th, 2004 (thus remembered as the Treaty of Rome);process that was interrupted because of a double rejection in referendums regarding its approval, in France and the Netherlands; process, which beganagainafter a long periodof reflection thatled to the draftingof theTreatysigned inLisbon on 13 December2007 and entered intoforce on 1 December 2009.

[7]In the *White Paper* is noted that "sport activity is subject to the application of EU law. This is described in detail in the Staff Working Document and its annexes. Competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of

So the *White Paper* is inserted itself in a process of transformation of the main purposes of EU, that are extended up to include sport: it is an interest dictated by the acknowledgement of its unique educational function that determined its introduction among the spheres of competence of a redesigned EU.

3. Sport in EU after the Lisbon Treaty

It is an interest that seems to be realized by the entry into force of the Lisbon Treaty, where sport is cited explicitly in the headingof XII Title (*Education, Vocational Training, Youth and Sport*), sanctioning its entry into the sphere of competences of the EU policies.

In particular, the art. 165 stipulates that "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function"[8], because the action of EU is aimed at "developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen"[9].

Only one article, therefore, better just a few paragraphs of an article, which, however, according to the legislative text, produce several changes, both at an institutional level and at a normative level.

a) Institutional changes

For the first profile, it can be observed how the *inclusion of sport among the EU spheres of competence determined the need to rethink formally the composition of the Council of European Union*[10], that now has to be widened to the

nationality, provisions regarding citizenship of the Union and equality between men and women in employment. At the same time, sport has certain specific characteristics, which are often referred to as the *specificity of sport*" (Sect. 4.1 – *The specificity of sport*, p. 13).

[8]Art. 165, point 1 paragraph 2.

[9]Art. 165, point 2 paragraph 8.

[10]Remember how the Council is the institution responsible for the adoption of measures which have a direct impact on citizens' life; an institution that works with the European Parliament; an institution that meets with a changeable composition, which is constituted by the Ministers of member States, competent for the scope, interested time by time. It's interesting to note how the Council in the new composition held a first official meeting on May 2010 and successively adopted a Conclusion on *the role of sport as a source of and a driver for active social inclusion* (Conclusion n. 15213/10, adopted on 22 October 2010), and a Conclusion on the *role of the EU in the international fight against doping* (Conclusion 15459/10, adopted on 9 November 2010), followed by the Resolution on *the EU structured dialogue on sport* (Brussels, 18-19 November 2010).

Ministers of Sport, when matters, pertaining them, are under discussion. So it's instituted a new formal working group of the Council that meet alongside others already existing[11].

There is a change concerning also the power of intervention by *Commission and Parliament*, that, even if within the limits stated by the law, *are legitimated to participate to the processes of law production as well as to adopt Resolutions about sport*: a competence that Commission and Parliament have practiced immediately[12].

b) The law dispositions

At the legislative level, examining the legal provisions in detail, *first of all, emerges as the EU's competence acts in a regime of subsidiarity*, pursuant to the joint provisions, prescribed by articles 6 and 2 of the consolidated version of the TFEU[13].

It's a competence of a subsidiary nature which extends to the European profiles of sport, considering that it's possible to adopt "incentive measures, excluding any harmonisation of the laws and regulations of the Member States"[14].

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[11]In this sense arguesVagelisAlexandrakis in his *European Union and Sport: a New Beginning?*, in "International Sports Law Review Pandektis", Vol. 3-4, 2010, p. 331.

[12]Remember the Communication of the Commission *Developing the European Dimension of Sport*, COM (2011) 12 of January 18th 2011, such as the European Parliament resolution of 2 February 2012 on *the European dimension in sport*.

[13]Without claiming to relate here exhaustively the debate about the principle of subsidiarity, just remember how subsidiarity is the idea that a society, an organization or institution of superior order to another, should not interfere in the activity of the latter, lower than them, limiting its competence, but rather should support it in case necessary, helping to coordinate with other social formations, having regard of the common good. This principle of political philosophy has been embraced by the social doctrine of the Catholic Church and only since the second half of twentieth is extended from a strictly philosophical level to a properly legal. This principlehas been upheldinItalyby thelegal doctrinewith mistrust,as it is consideredambiguousbecause of its intrinsic polysemy (in this sense, *ex pluribus* see the considerationsofS.Cassesein his *L'aquila e le mosche. Principio di sussidiarietà e dirittoamministrativonell'areaeuropea*, in "ilForoitaliano", 1995, V, cc. 373-378), or ineffectivein terms ofjusticiability (in this sense, *ex pluribus* see the considerationsof G. Berti in his *Principi del diritto e sussidiarietà*, in "Quadernifiorentini", 2002, XXXI, pp. 381-400): perplexities contradicted by subsequent legislative and jurisprudential events. The principle of subsidiarity was established as a general principle of EU Law: it was established for the first time in the Treaty of Maastricht, signed on 7 February 1992, and now is contained in the Article 5, point 3, of the Treaty on European Union.For more about subsidiarity from a legal or political philosophical approach see C. Millon Delsol, *Le Principe de subsidiarité*, Presses Universitaires de France, Paris, 1993, and M. Sirimarco – M. C. Ivaldi (eds.), *Casa, borgo, Stato*, Nuova Cultura, Roma, 2011; from a legal point of view see M. Abrescia, *Il principio costituzionale di sussidiarietà*, Bonomo, Bologna, 2005; I. Massa Pinto, *Il principio di sussidiarietà. Profili storici e costituzionali*, Jovene, Napoli, 2003.

[14]Art. 165, point 4.

A subsidiary competence concerning, moreover, the distinctive features of sport and that terminates when sport intersects issues, closely pertaining to EU, as, for example, the discipline of competition and work.

A subsidiarity, which is based on *the specific nature of sport*, as sanctioned by art. 165, point 1: this is a feature that isn't possible anymore to question, although its significance maintains a substantial ambiguity.

In fact, I wonder what constitutes the specificity of sport. Correctly, someone has observed that the autonomy of sport doesn't exist in an empty space, in a *vacuum*, but the sports rules must be compatible with laws democratically adopted by States[15].

Not only, given the evolution undergone by the professional practice of sport, which records the increasing involvement of interests of an economic nature, I wonder what is the range of this autonomy, also considering that this may lead to unusual restrictions of the competition regime such as of fundamental freedom rights[16].

It's obviouslya key issuethat the rulesof the TFEUhave not clarified, setting rather a consolidated trend of European jurisprudence, with which were sanctioned the autonomy of sports organizations and their capacity of self-regulation[17]; a trend riveted by the European Commission, with its adoption of the *White Paper on Sport*, where are dictated the guideline to achieve this goal[18].

This is *a competence that acts in a promotional manner*: an action that needs the coordination among Member States and Sports organizations and/or societies; an action that is realized by means of incentive measures, about which, how-

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[15]In this sense arguesAlexandrakis(*European Union and Sport: a New Beginning?*, cit., p. 333); in the same direction goes D. Panagiotopoulos (in his*Sports Law. LexSportiva&LexOlympica. Theory and Praxis*, Ant. N. Sakkoulas Publishers, Athens, 2011, p. 208).

[16]Some sports rules, as UEFA "home-grown players rules" or those known as whereabouts systems, established by WADA, are emblematic: they violate clearly fundamental freedom rights, but they aren't considered illegal, because of the specific nature of sport. This is an approach, that ECJ confirmed again after entry into force of the Lisbon Treaty (see the judgment of case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC*).

[17]There are too many and too well-known judgments that go in this direction. Here it suffices remember only some of there as the cases C-36/74,*B.N.O. Walrave and L.J.N. Koch v. Association Union cyclisteinternationale, KoninklijkeNederlandscheWielrenUnie and Federación Española Ciclismo*; C-13/76, *Gaetano Donà v. Mario Mantero*; C-51/96 and C-191/97, *ChristelleDeliège v.Ligue francophone de judo et disciplines associées ASBL, Liguebelge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)*; C-438/00, *DeutscherHandballbundeV v. MarosKolpak*; C-519/04*, David Meca-Medina and Igor Majcen v. Commission of the European Communities*; T-193/02, *Laurent Piau v. Commission of the European Communities*; up to C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC*.

[18]Remember how the *White Paper* has a section explicitly dedicated to this matter (see the Sect. 4.1 -*The specificity of sport*).

ever, seems be told anything, except that is excluded any purpose of legislative and/or regulatory harmonization.

I wonder, therefore, in what consist these incentive measures: in this sense, the legislative text, according to the art. 6 of TFEU, seems to suggest that they may substantiatedin forms of supports or supplements to the activities carried out by Member States; measures that could be take the form of a proposal of an European Sports Program by the Commission[19].

It is a support that could be aimed both at the preservation of sport specificity and at an its further development: a promotion, therefore, tending to preserve this specificity, characterized by a structure based on volunteering, as well as its social and educational function.

Considering the purpose of this supporting action, the EU could act in a supplementary manner, replacing itself to the organizations "naturally" responsible or Member States, when their acts and/or policies are insufficient or are too distant from European legal provisions: a power of intervention, deriving from the article 5, point 2, TFEU.

The legislation outlines, so, *an European pattern of sport*, that is qualified as an instrument particularly suitable to promote solidarity, integration and volunteering, as well as to counter the diffusion of some phenomena as social exclusion or marginalization, intolerance and every addiction (alcoholism and/or toxic-dependence).

Not only a pattern, but also an European dimension: the EU action should be aimed at developing an European dimension in sport (*ex* article165, point 2). It is a dimension to which the legislative text doesn't connect any adjective, suggesting so the possibility of a broad interpretation that recognizes the possibility of intervention and action all accomplished (subject, of course to the limits of competence outlined above)[20]. The placement of sport in a Title also dedicated to education, vocational training and youth indicates, however, that EU policies unfold, in first instance, in these areas, paying special attention to the needs of youth protection, without, however, leaving off the possibility of providing actions, concerning a broader social dimension, as well as don't seem entirely out of place actions that have an impact on the economic field.

[19]So is the hypothesis formulated by Alexandrakis (in *European Union and Sport: a New Beginning?*, cit., p. 330), as well as that one made by Panagiotopoulos (in *Sports Law. Lex Sportiva &LexOlympica. Theory and Praxis*, cit., p. 168).

[20]In thissenseargues Luca Di Nella in his*Lo sport nel diritto primario dell'Unione Europea: il nuovo quadro normativo del fenomeno sportivo*, available online at the link http://www.giustizia-sportiva.it/pdf/3_2010/LDNella.pdf

Considerations

This brief, and also obviously not exhaustive, examination excites immediately some considerations.

Before all, emerges the novelty of the sport expressly mentioned in the legislative text of the TFEU: it is a novelty undoubtedly very important, because, since the entry into force of the Lisbon Treaty, the EU and the ECJ no longer have to resort to argumentations, often artificial, to justify their intervention in this field[21].It is a competence that, among other things, gives the possibility of addressing funds specifically designated to European programs aimed at promoting the sport in its own peculiar social and educational function[22].

This is *a novelty, esteemed positively by scholars: a novelty which, however, at a closer glance, gives way to a sort of disappointment*[23]. To raise doubts, in particular, is the subsidiary nature of EU competence: a competence that is, in fact, severely limited in the possibility of intervention; a competence which doesn't seem to add much to what has been acquired by the judgments[24].

Really, as well as uncritical enthusiasms seem out of place, equally I believe that concerns and disappointments up to now expressed are misplaced, for at least two reasons.

The first can be ascribed to the nature of sport: if we consider that sport is an activity that is essentially pertinent to that private sphere of citizens which

[21]So observes Stephen Weatherill in its *EU Sports Law: The Effect of the Lisbon Treaty*, in A. Biondi, P. Eeckhout S. Ripley (eds), *EU Law after Lisbon*, Oxford University Press, Oxford, 2012, p. 415.

[22]In this sense comments Alexandrakis in the final considerations of his *European Union and Sport: a New Beginning?*, cit., pp. 341-342.

[23]Weatherill notes that "the influence of the Treaty of Lisbon on sport in Europe is both profound and trivial. It is *profound* in that for the first time sport is subject to explicit reference within the Treaties establishing and governing the European Union. […] But for two reasons the Treaty's influence is also *trivial*. First, because the content of the new acquired powers in fact represent a most modest grant made by the Member States. And second, because, notwithstanding the barren text of the pre-Lisbon Treat, the EU has in fact long exercised a significant influence over the autonomy enjoyed by sports federation operating on its territory" (*EU Sports Law: The Effect of the Lisbon Treaty*, cit., p. 403). He continues affirming that "the changes to substantive EU law made by the Lisbon Treaty are very few and mostly cosmetic" (*Ibidem*, p. 418). In the same direction goes Alexandrakis especially in his final considerations. *Contra* Di Nella, that esteems positively this novelty, observing how this legislative text represents a continuation of an European action well-established, however innovating by placing a legal framework of primary degree, within the limits of competence outlined, by enhancing the principle of sports specificity and invoking the method of cooperation as a guarantee of respect of this feature (see the *Conclusions* of his *Lo sport neldirittoprimariodell'UnioneEuropea: ilnuovoquadronormativo del fenomenosportivo*,cit.).

[24]In this sense goes Alexandrakishis *European Union and Sport: a New Beginning?*, cit., specially p. 336.

ordinarily isn't regulate by States, do not see how could be hypothesized a more penetrating capacity for intervention by the EU. If already at the State level there are significant difficulties in justifying legislative measures concerning sport, so that States often use reasons of social nature and/or of health protection[25], even harder appears the justification for EU action, if it is not qualified in the manner provided by the TFEU.

The second reason is ascribable to the distinctive feature of EU that makes more difficult to hypothesize a competence that isn't subsidiary. Here is important to underline how, notwithstanding the changes made by the Lisbon Treaty and even if the EU is going to acquire a political identity, it's still far from being an Union of States, both in a Federal manner and a Confederal one[26], so that the States maintain a broad autonomy in ruling many matters, left under their competence. How be conceivable an EU competence that isn't subsidiary, considering the great variety as regard the consideration of sport and its legal significance, recorded among the Member States[27]?

[25]It's interesting to note how France defines sport and physical activity as important factors of education, culture, and social life, useful instruments to counter school leaving and to promote social integration, as well as health (art. L100-1 of the *Code du sport*); Italy hasjustified itsinterventionlegislativesportusingmotivationsthat leadto the need forhealth protection (in thissenseethelaw14December2000, no.376,on*Discipline ofprotectionofhealthand thefightagainstsports-doping*); the Spanish Constitution places the provisions on sport in art. 43, dedicated to health and its protection.

[26]The legal nature of EU is still under investigation and was outlined by two fundamental judgments of ECJ, as the judgment of 5 February 1963, *NV Algemene Transport- en ExpeditieOnderneming van Gend& Loos v Netherlands Inland Revenue Administration*, Case C- 26/62 and the judgment of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, Case C-6/64. According to these judgments, can be said that it's an union of States, which determines a sort of integration among different and at the same time, coordinated legal systems; an union that gives rise to a kind of multilevel governance, with the participation of all States that constitute it, in all their components - governments and peoples (a feature confirmed by the legislative text of art. 10, par. 2, TUE). Particularly, EU has certain features in common with the usual kind of international organisation or federal-type structure, as well as several differences. It is constituted as an entity that penetrates incisively the right of Member States, even if encountering a limit in the enduring sovereignty of each State: it is a persistence of sovereignty which retains the derivative character of the Union, without preventing, that it detaches itself from the founding members, to assume a legal capacity and personality. About the inquiry on the EU legal nature *ex pluribus* see G. De Búrca – J. H. H. Veiler (eds.) *The Worlds of EuropeanConstitutionalism*, Cambridge University Press, Cambridge, 2012 and N. Parisi, *Considerazioni sulla natura giuridica dell'Unione europea alla luce dei rapporti fra gli Stati membri e fra questi e l'organizzazione*, in U. Draetta – A. Santini (eds.), *L'Unione europea in cerca di identità. Problemi e prospettive dopo il fallimento della "Costituzione"*, Giuffrè, Milano, 2008.

[27]It suffices remember how France has dedicated a Code specifically to discipline sport (the so called Code du sport); Italy considers sport as a matter subject to a concurring legislation (ex art. 117 Const.) and disciplines several matters regarding sport activity (remember the law 23 March 1981, n. 91, on *Discipline of professional sport*, and the law 14 December 2000, n. 376, on *Disci-*

Finally, the power of address, acting in a promotional manner, recognized to the EU for what concerns sport, could be a way to concretize the European model of sport, as outlined in the TFEU, in a perhaps more effectively manner than would be achieved by recognizing an European competence of primary rank.

Returning now on the initial question*, I wonder what is the real status of sport and lexsportiva in the EU as redesigned by the Lisbon Treaty*.

First, in this regard it seems possible to say that sport, although it's explicitly entered on the list of EU competences, retains its specificity and consequent autonomy: the express mention of its specificity, consisting in its structure based on voluntary activity, may confirm this impression[28].

Further, according to the legislative text, there is a formal entrance within the areas of jurisdiction, but it's realized a sort of sovereignty subjected at a condition. So this results in an oxymoron: in fact, there is an absolute novelty in terms of legislation, but it is a novelty that does not bring anything innovative to those already established by the courts.

The same could be said for the status of *lexsportiva* after the entry into force of the Lisbon Treaty. The express mention of sport in the legislative text of TFEU, mention that constituted an European competence characterized by a subsidiary nature, is undeniably a novelty, a novelty that, however, hypostatizes a reality that was consolidated from a jurisprudential and social point of view: nothing seems to be added to all that has already been elaborated by the legal doctrine about this matter[29].

In conclusion, the initial doubt remains unresolved: the question of whether this is much fuss about nothing or something has really changed hasn't at present a conclusive answer. Probably will require further inquiries, which, also in the

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pline of health protection of sports and the fight against doping); Spain considers sport among the matters which are under the public competence (art. 43 and 148 Const.); while Germany doesn't believe that the discipline of sport falls within the competence of the State; in the same direction goes the United Kingdom, that adopted a non-interventionist model on sports matters.

[28]Alexandrakis emphasized how the specificity of sport emerges from consideration of the constitutive value carried out by volunteering: a special feature that sets it apart from all other area and/or activity mentioned in the EU (in *European Union and Sport: a New Beginning?*, cit., p. 331).

[29]Although the doctrine has not yet reached consensus with regard to the recognition of consistency and legal significance of *lexsportiva*, does not seem further to be sustainable a denialist view. Law, in the processes of a more and more marked globalization, records the resumption of forms of self-regulation because they meet in a perhaps more effective manner the needs of justiciability coming from contemporary society: in this evolving trend experienced by Law, it's highlighted the obsolescence of normativist models, which show an inherent inadequacy in the discipline of legal relations as they configured in the contemporary. About the status of *lexsportiva* see *amplius* D. Panagiotopoulos, *Sports Law. LexSportiva&LexOlympica. Theory and Praxis*, cit., specially his reflection about the *LexSportiva Theory*, pp. 102-152; and R. C. R. Siekmann – J. Soek (eds.), *LexSportiva: What is Sports Law?*, Springer, Berlin, 2012.

light of legislative developments and case law, will allow to undo this problematic knot.

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THE CURIOUS CASE OF FC SION THE RELATION BETWEEN SPORTS CLUBS AND NATIONAL AND INTERNATIONAL SPORTS ASSOCIATIONS

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Abstract: *In 2008 FC Sion, a club playing in the highest Swiss Football League signed Essam El Hadary. The problem was that El Hadary was still under contract with Egyptian club Al Ahly when he was signed by FC Sion. This led to a transfer ban imposed on FC Sion by FIFA. FC Sion vehemently fought this transfer ban and this led to a prolonged domestic and international legal battle. FC Sion ultimately decided to ignore the transfer ban and it acquired a number of players in the new football season. Because FC Sion played these players in various competitions, they were deducted points and were thrown out of the Europa League competition. This paper will look at the legal battles fought by FC Sion, both domestically as well as internationally. This paper will further address the relation between a club and the various national and international associations which can make rules that can affect that club. This paper will finally look at the relation between sporting associations incorporated in Switzerland and the powers of domestic courts over these associations.*

1. The factual background

In February 2008 Olympique des Alpes SA, a Swiss professional football club registered with the Swiss Football Association (SFA) and competing under the name FC Sion in the highest Swiss professional league (the Swiss Super League) signed a new goalkeeper. FC Sion signed Essam El- Hadary from Egyptian Al- Ahly Sporting Club to a three- year contract. However, there was one small problem. El- Hadary was still under contract with Al- Ahly and was not free to sign a contract with FC Sion.

Al- Ahly brought a complaint against El- Hadary and FC Sion with the FIFA Dispute Resolution Chamber (DRC) for (inducement to) breach of contract. On 16 April 2009, the FIFA's DRC ordered El- Hadary and FC Sion to pay compensation to Al-Ahly and it handed a transfer ban to FC Sion for two consecutive transfer windows.

FC Sion on 18 June 2009 appealed the decision of the FIFA DRC to the Court of Arbitration for Sports (CAS). On 1 June 2010, the CAS turned down the appeal of FC Sion and upheld the transfer ban against FC Sion. On 1 July 2010, FC Sion appealed the decision of the CAS to the Swiss *Bundesgericht*, the Federal Tribunal to ask for annulment of the CAS award of 1 June 2010.

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

On 12 January 2011, the Federal Tribunal dismissed FC Sion's appeal. On 7 April 2011, the FIFA notified FC Sion and the SFA that the transfer ban would be valid for the upcoming transfer window that summer and instructed FC Sion to act in accordance with this transfer ban. However, FC Sion chose to ignore the transfer ban and signed six new players for the upcoming 2011/12 season in the beginning of July 2011, Stefan Glarner, Pascal Feiduno, José Julio Gomes Gonçalves, Billy Ketkeophomphone, Mario Mutsch and Gabriel Garcia de la Torre. FC Sion requested the SFA to register the six players.

On 15 July 2011, the SFA refused to register the six players for the upcoming season, relying on the decision of the FIFA DRC of 16 April 2009. FC Sion and the six players appealed the decision of the SFA to the SFA Appeals Tribunal. The SFA Appeals Tribunal confirmed the decision of the SFA.

The six players applied to the District Court of Martigny St- Maurice for provisional measures. The District Court of Martigny St- Maurice on 3 August 2011, ordered the SFA and FIFA to allow the six players to immediately play in official matches for FC Sion.

In August 2011, FC Sion qualified for the group stages of the Europa League competition in two play- off matches against Celtic Football Club. Celtic FC played these matches under protest, because it alleged that FC Sion had fielded ineligible players during these two matches.

On 2 September 2011, right before the group phase of the 2011/12 Europa League was about to start, the UEFA Control and Disciplinary Body (CDB) excluded FC Sion from the Europa League. The UEFA CDB found that FC Sion had fielded players that were not sanctioned to play in these matches in accordance with the FIFA and SFA regulations and awarded Celtic FC forfeit victories for both qualification matches. The players and FC Sion appealed the decision of the UEFA CDB to the Martigny St-Maurice District Court, the Valais State Court and the Vaud State Court.

On 13 September 2011, the Vaud State Court ordered provisional measures to reintegrate FC Sion and the six players into the Europa League Competition 2011/12. However, UEFA refused to reintegrate FC Sion into the Europa League and on 26 September 2011 filed an appeal with the CAS.

On 16 November 2011, the State Court of Valais canceled the provisional measures of the District Court of Martigny St-Maurice of 3 August 2011. From this moment on the SFA is no longer required to let the six players play in any official matches of FC Sion.

2. The case before the CAS

The case before the CAS strictly deals with the exclusion of FC Sion from the 2011/12 Europa League Competition. Before the CAS, FC Sion had two main

arguments. The first argument relates to the admissibility of the arbitration clause of the UEFA Statutes. FC Sion in particular stated that CAS lacked the required independence and impartiality.[1] FC Sion pointed to the financial links between international sporting organizations (like FIFA and UEFA) on the one hand and CAS on the other hand.[2] FC Sion further pointed to the possible influence of the Secretary General of the CAS on the proceedings, the relatively small number of arbitrators who can be selected for this kind of case, the possible influence of FIFA and UEFA on the arbitrators and the closed nature of the list of arbitrators.[3]

In its second main argument, FC Sion argued that UEFA's exclusion of FC Sion from the Europa League violated both Swiss and European Union competition law.[4] FC Sion argued that UEFA abused its dominant position as an undertaking, by excluding FC Sion from the 2011/12 Europa League Competition.[5]

The CAS first found that it has jurisdiction to arbitrate the case, based on the entry form for the Europa League signed by FC Sion, on the UEFA Europa League Regulations and the UEFA Statutes.[6] The CAS then dealt with a number of procedural request made by FC Sion. The evidence procured with these procedural request could possibly help FC Sion in establishing that CAS in not an independent and impartial tribunal. FC Sion for example requested FIFA President Sepp Blatter to testify in the procedure and requested to look into the financial records of CAS, to establish in how far the CAS was dependent on FIFA and UEFA financially. Most of the witnesses refused to appear before the tribunal, stating scheduling conflicts as reasons for their non- appearance.

However, the Secretary General of CAS, Mr. Matthieu Reeb, issued a written statement answering some of the questions and concerns of FC Sion. The arbitral panel was satisfied that Mr. Reeb in his testimony had given sufficient answers establishing the independence and impartiality of CAS.[7] Mr. Reeb testified that although the caseload of CAS has grown considerably since it was recognized by FIFA in 2004, CAS' financing system has withstood scrutiny by the Swiss Federal Supreme Court in the *Lazutina* case.[8] Furthermore, Mr. Reeb stated that although FIFA was a key contributor to CAS' budget, CAS would be able to exist

[1]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*, para. 188

[2]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 188

[3]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 188

[4]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 190

[5]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 190

[6]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 230

[7]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 248

[8]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 120

without football, as it had done before 2004.[9] On the financial links between CAS and FIFA, the panel pointed to case ATF 129 III 445 of the Federal Tribunal, a 2003 decision in which the Federal Tribunal confirmed the independence of CAS from the IOC.[10] In this decision the Federal Tribunal further held that the closed list of arbitrators complied with constitutional guarantees of independence and impartiality.[11] The arbitral panel found that because of the specialized nature of sports law cases, a closed list of arbitrators is not a violation of the principle of independence and impartiality.[12]

In its final decision on the merits, the arbitral panel first reviewed whether the decision to find the players ineligible was correct. The arbitral panel held that UEFA was allowed to review the eligibility of the players following a protest of Celtic FC. FC Sion had argued that the primary competence with regard to the eligibility of players resides with the national association, in this case the Swiss Football Association. Since the SFA had declared the players eligible following the provisional measures ordered by the Martigny St-Maurice District Court, FC Sion argued that the players were eligible for the qualifiers against Celtic FC. UEFA argued that with regard to player eligibility for an international competition like the UEFA Europa League, the principle of equality among participants should govern.[13]

The arbitral panel found that an ex post facto review of the eligibility of players is allowed to ensure the equality and fairness of the competition. The mere fact that a club deposits a list with players and the acceptance of this list by UEFA, does not mean that UEFA cannot review the eligibility of players anymore upon a complaint regarding the eligibility of a player.[14] The arbitral panel describes the procedure regarding eligibility as follows. UEFA receives from each participant in the international competitions a list with players. All in all this amounts to hundreds of players and it would be impossible for UEFA to review the eligibility of all these players. Therefore, UEFA should be afforded the possibility to inquire into a claim of ineligibility of a certain player upon a complaint of another club. Accordingly, the mere acceptance of the list of players submitted by the club does not constitute a binding decision by UEFA regarding the eligibility of these players.[15]

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[9]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 120

[10]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 255

[11]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 255

[12]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 263

[13]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 303

[14]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 304

[15]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 306

The arbitral panel further held that UEFA is not bound by the provisional measures of the Martigny St-Maurice District Court.[16] The provisional measures were directed at the SFA and FIFA, but similar measures against UEFA were rejected. The mere fact that a national association authorizes a player to play based on a domestic court order, does not bind UEFA in its eligibility decisions for international competitions. In such a case, the eligibility rules of FIFA and UEFA still apply and overrule the domestic registration, even if it is based on a court order.[17] The arbitral panel motivates this decision by pointing at the principles of equality and fairness for all participants in the international competition.[18] The arbitral panel subsequently looked at whether FC Sion was in fact prohibited from acquiring new players during the 2011/12 summer transfer window. The arbitral panel found that there was a final and binding decision that banned FC Sion from acquiring any new players during this transfer window.[19] Since the six players were acquired and played in official matches in violation of the transfer ban, UEFA correctly ruled the players ineligible for the matches with Celtic FC and was correct in ruling these matches a forfeit.[20]

The final argument brought forward by FC Sion related to competition law. FC Sion alleged that UEFA was abusing its dominant market position by declaring the players ineligible on false grounds and by excluding FC Sion from the 2011/12 Europa League.[21] For the determination of this claim the arbitral panel had to review the provisions of the Swiss Cartel Act. The arbitral panel found that UEFA is an undertaking according to the Swiss Cartel Act.[22] The arbitral panel further established that UEFA held a dominant market position.[23] The arbitral panel determined the international competition between European football clubs to be the relevant market and the countries of the national associations that can compete in the Europa League to be the relevant geographic market.[24] Article 4 of the Swiss Cartel Act establishes: "Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competi-

[16]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 315
[17]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 315
[18]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 316
[19]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 324
[20]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 327
[21]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 328
[22]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 334
[23]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 338
[24]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 335

tors, suppliers or consumers) in the market."[25] The arbitral panel determined that UEFA, as the sole organizer of international football tournaments in Europe has a dominant market position.[26] The arbitral panel then looked at whether UEFA had abused its dominant market position. Article 7 of the Swiss Cartel Act stipulates:

Art. 7 Unlawful practices by dominant undertakings

Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

The following behaviour is in particular considered unlawful:

a. any refusal to deal (e.g. refusal to supply or to purchase goods);

b. any discrimination between trading partners in relation to prices or other conditions of trade;

c. any imposition of unfair prices or other unfair conditions of trade;

d. any under-cutting of prices or other conditions directed against a specific competitor;

e. any limitation of production, supply or technical development;

f. any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

The arbitral panel was asked to determine whether UEFA had abused its dominant market position. It had to assess whether the behavior of UEFA led to a restraint of competition, and if so, whether there were legitimate business reason which justified UEFA's behavior.[27] The arbitral panel held that the term 'legitimate business reasons' in a sporting context should not be limited to mere economic reasons.[28] The arbitral panel held that in these cases "the behaviour of sports associations must be legitimated by reasons that are necessary for the proper functioning of the sport".[29] Accordingly, a broader reading of the notion 'legitimate business reasons' in sporting matters was suggested. The arbitral panel found that FC Sion had not at all been prevented from entering into a business relationship. As a matter of fact, FC Sion had been able to compete in the Europa League 2011/12 (and thus been able to enter into a business relationship).[30] However, since FC Sion had competed with ineligible players, UEFA was justified in sanctioning FC Sion and ruling a forfeit for the matches against Celtic FC. The

[25]Federal Act on Cartels and other Restraints of Competition, article 4, available at: http://www.admin.ch/ch/e/rs/251/a4.html

[26]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 338

[27]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 343

[28]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 344

[29]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 344

[30]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 348

penalty was a purely sporting matter and necessary for the proper functioning of the sport and therefore justified under the provisions of the Swiss Cartel Act.

The arbitral panel further ruled that UEFA had not applied the sanctions against FC Sion in a discriminatory manner, since the Europa League Regulations and sanctions applied to all the participants in the 2011/12 Europa League Competition in the same manner.[31] Any club fielding ineligible players could (and would) be punished in exactly the same manner as had happened to FC Sion. There was thus no unfair singling out of FC Sion on the basis of a discriminatory motive, but a mere application of clear rules and sanctions as would have been done against any club taking part in the competition. The arbitral panel further found that the Europa League Regulations itself were not an abuse of a dominant position. The arbitral panel found that the rules were there to guarantee the proper functioning of the Europa League Competition and to ensure equal treatment of the clubs competing in the competition.[32] The arbitral panel further held that the sanctions applied to FC Sion were necessary and proportionate, once again pointing at the proper functioning of the Europa League itself and the equal treatment of the clubs in the competition.[33] The arbitral panel underlined that these sanctions add to the legal certainty for the clubs competing in the Europa League and that such sanctions would be applied equally to all competitors in the Europa League.[34] The panel concluded that the rules regarding registration of players and player eligibility were necessary and proportionate for the proper functioning of the Europa League and thus justified under the provisions of the Swiss Cartel Act.

3. Appeal before the Federal Supreme Court

However, the CAS award in favor of UEFA did not the end of the conflict. FC Sion had proven a willingness to fight the decisions of FIFA, UEFA, CAS and the Swiss Football Association and they were not about to give up now. FC Sion appealed the decision of the CAS to uphold the decision of the UEFA CDB to forfeit the matches against Celtic FC and to exclude them from the 2011/12 Europa League Competition to the Swiss Federal Tribunal. In accordance with article 393 of the Swiss Civil Procedure Code[35] there are limited grounds for

[31]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 350

[32]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 353

[33]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 356

[34]CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 357

[35]Swiss Civil Procedure Code of 19 December 2008 (Status as of 1 January 2012), available at: www.admin.ch/ch/e/rs/2/272.en.pdf

appeal to an arbitral award in a domestic arbitration.[36] FC Sion before the Federal Tribunal requested the annulment of the award arguing that the CAS lacked jurisdiction and that the CAS lacked the necessary independence from FIFA.[37] The Federal Tribunal found that the appeal was inadmissible in so far as it was not moot.[38] The Federal Tribunal found that since the 2011/12 Europa League Competition had come to an end, it was no longer possible for FC Sion to be reintegrated into the competition. Therefore FC Sion lacked the requisite current legal interest in the dispute and it could not be assumed that the same legal interests would return in the same circumstances.[39] With this the CAS award had become final and the dispute between UEFA and FC Sion before the CAS had been concluded.

4. The story continues…

The ruling by the Federal Tribunal did however not put an end to the conflict between FC Sion and the various footballing associations. FC Sion continued to explore various legal avenues to continue its battle against FIFA, UEFA, the SFA and the Swiss Football League. The battle furthermore also continued to play out in the media, with both sides vehemently attacking each other.[40] On 5 October 2011, FIFA's Emergency Committee directed the SFA to execute the decision of the Swiss Football League's appeals body to deny the six players concerned their eligibility to play in official matches for FC Sion.[41] The Emergency Committee also reminded the SFA of its obligation to comply with FIFA statutes, regulations, directives and decisions.[42] In a resolution of 20 October 2011, the

[36]In this case, both UEFA and FC Sion are domiciled in Switzerland and the arbitral tribunal, CAS, has its seat in Switzerland. Therefore, the arbitration was a classified a domestic arbitration. This means that the rules from the Swiss Civil Procedure Code (article 353 et seq.) are applicable in this case, rather than the provisions of the Swiss Private International Law Act.

[37]CAS media release FC Sion

[38]*Olympique des Alpes SA v. UEFA, Atletico Madrid SAD, Stade Rennais FC, Celtic PLC and Udinese Calcio SpA*, 16 July 2012, 4A_134/2012

[39]*Olympique des Alpes SA v. UEFA, Atletico Madrid SAD, Stade Rennais FC, Celtic PLC and Udinese Calcio SpA*, 16 July 2012, 4A_134/2012

[40]See for example this article where Mr. Constantin, the President of FC Sion compares FIFA President Sepp Blatter to the former Libyan Dictator Gaddafi: Focus.de, *Vergleich mit Gaddafi, Sion-Präsident nennt Blatter verrückten Diktator,* 20 December 2011, available at: http://www.focus.de/sport/fussball/vergleich-mit-gaddafi-sion-praesident-nennt-blatter-verrueckten-diktator_aid_695865.html

[41]FIFA.com, *FIFA Emergency Committee directs Swiss FA to execute decision related to transfer ban on FC Sion/Olympique des Alpes*, 5 October 2011, available at: http://www.fifa.com/aboutfifa/organisation/news/newsid=1522313/index

[42]FIFA.com, *FIFA Emergency Committee directs Swiss FA to execute decision related to transfer ban on FC Sion/Olympique des Alpes*, 5 October 2011

Executive Committee of the FIFA took a stance on the legal case involving FC Sion. The Executive Committee's Resolution, after outlining the stance of FIFA regarding the dispute and the legal discourse to date and the eligibility of the players concerned, stated:

Recalling that according to art. 64 par. 2 of the FIFA Statutes recourse to ordinary courts of law is prohibited, *Recalling* that both FC Sion/OLA and the six players accepted by several agreement and due to the FIFA Statutes that CAS is the sole judicial authority to resolve disputes between FIFA, clubs and players,

Recalling that organised football of FIFA would no longer be possible if every club or player went to a local court when they disagreed with decisions which became final and binding, *Reiterating* its serious concern that the structure of organised football is in danger if clubs and players do not respect the Statutes of FIFA, the Confederations and the associations,[43]

The Executive Committee called upon the members of the FIFA to act in accordance with article 64 (2) of the FIFA Statutes and accept the jurisdiction of the CAS, in favor of the jurisdiction of ordinary courts and to respect the decisions of FIFA, the Confederations, the national federations and CAS.[44]

During its meeting of 16 and 17 December 2011, the Executive Committee of FIFA decided to give the SFA an ultimatum to penalize FC Sion for fielding ineligible players and for acting in a 'legally abusive manner'.[45] The Executive Committee stated that the SFA should hold that "all matches in which the relevant players participated shall be declared forfeit or three points shall be deducted respectively".[46] The Executive Committee gave the SFA a deadline of 13 January 2012 before which it needed to sanction FC Sion. If the SFA did not comply with this ultimatum, FIFA would suspend the SFA as of 14 January 2012. Disobeying this ultimatum would have very grave consequences for Swiss football. Swiss national and club teams would be excluded from international football competitions. It would for example mean that FC Basel, which had qualified for the round of 16 of the 2011/12 Champions League Competition by eliminating Manchester United, would not be able to play its games against FC Bayern Munich. The SFA was forced by this ultimatum to make a tough decision and punish one of its member clubs. The SFA on 30 December 2011 decided to bind in and

[43]FIFA.com, *FIFA Executive Committee adopts a resolution to defend the statutes of football's governing bodies*, 20 October 2011, available at: http://www.fifa.com/aboutfifa/organisation/bodies/news/newsid=1529955/index.html

[44]FIFA.com, *FIFA Executive Committee adopts a resolution to defend the statutes of football's governing bodies*, 20 October 2011

[45]FIFA.com, *Reform road map speeds up*, 17 December 2011, available at: http://www.fifa.com/aboutfifa/organisation/bodies/news/newsid=1558624/index.html

[46]FIFA.com, *Reform road map speeds up*, 17 December 2011

punish FC Sion. The SFA deducted FC Sion 36 league points for the 2011/12 season. The FIFA Emergency Committee on 5 January 2012 decided that the SFA had complied with the decision of the Executive Committee and would not be suspended.[47] FC Sion complained against the decision of the SFA to deduct 36 league points to the Bern District Court and the Bern Court of Appeals, but lost in both instances.[48]

At the end of a tumultuous 2011/12 football season, FC Basel secured the Swiss Football League title and won the Swiss Cup by defeating FC Luzern in the penalty shoot- out. No team relegated directly out of the Swiss Football League, because Neuchatel Xamax went bankrupt and was demoted to the amateur leagues. FC Sion ended the season, largely due to the point deduction on the ninth place in the Swiss Super League and was forced to play relegation matches against the runners- up of the Swiss Challenge League, the second level in Switzerland. FC Sion secured its place in the Swiss Football League by beating FC Aarau 3-1 on aggregate over two matches.

5. A lesson?

After a prolonged legal battle of over three years, many hours spend in various court- rooms, many hours billed by lawyers and a lot of negative media attention, is there a lesson to learn at the end of this case? This whole affair has done a lot of damage to the reputation and the public perception of FC Sion, the SFA, the Swiss Football League, UEFA and FIFA. The media and the public have viewed the prolonged battle between these sides with a mixture of amazement and embarrassment. In the end FC Sion lost most of its court cases and the football authorities proved mostly victorious in the courts and tribunals, but this battle really did not have any winners.

Football has become a billion euro business. The stakes in national and international football have become bigger and bigger. Football by many involved is viewed as a way of life and losing on or off the field is no longer allowed. Football brings with it a certain prestige. Being a part of footballing success makes those involved also seem more prestigious. Clubs are no longer mere representations of (local) talent and pride, but are bought and sold as toys in displays of wealth.

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[47]FIFA.com, *FIFA Emergency Committee decision regarding Swiss Football Association*, 6 January 2012, available at: http://www.fifa.com/aboutfifa/organisation/news/newsid=1564438/

[48]Berner Zeitung, *Sions Punkteabzug bleibt - Basel kann am Sonntag Meister werden*, 19 April 2012, available at: http://www.bernerzeitung.ch/sport/fussball/Punkteabzug-fuer-Sion-Berner-Obergericht-weist-Berufung-ab/story/12026476

UEFA was founded in Basel, Switzerland on 15 June 1954.[49] UEFA is the confederation which represents European football, and as such one of six continental confederations in the world operating under the umbrella of FIFA, the global football association. UEFA's role is "working with and acting on behalf of Europe's national football associations and other stakeholders in the game to promote football and strengthen its position as arguably the most popular sport in the world."[50] But UEFA views its role broader than that. UEFA sees itself as 'the guardian of football in Europe', watching over all aspects (amateur as well as professional) of the sport on the continent.[51] UEFA's organization has grown to comprise over 340 staff nowadays in the headquarters in Nyon, Switzerland.[52] UEFA currently represents 53 national football associations in Europe.[53]

The governance of world football is structured as a pyramid.[54] FIFA sits at the top of the pyramid. The second level of the pyramid is formed by the six confederations, including its European representative UEFA. The third level of the pyramid are the national associations and the bottom level is formed by the individual clubs and the players. FIFA, as the top layer of the football governance pyramid, accordingly has a large influence on football in Europe. In the first place, FIFA has regulatory powers over European football and in the second place because under the FIFA Statutes the confederations (article 20) and the national associations (article 13) have the obligation to comply with the statutes, regulations, directives and decisions of FIFA.[55]

The pyramid structure of global football represents a hierarchical structure.[56] Decisions taken at the higher level of the pyramid have to be followed by subsequent levels. Clubs and players are accordingly bound by the decisions of FIFA, UEFA and the national associations if they want to participate in various football competitions.[57] This can be seen in the case *UEFA v. Olympique des Alpes SA/ FC Sion* by the fact that the FIFA ban led to the ineligibility of the players for the national football competition organized by the SFA and for the international

[49]UEFA.com, *Overview*, 28 January 2012, available at: http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html

[50]UEFA.com, *Overview*, 28 January 2012

[51]UEFA.com, *Overview*, 28 January 2012

[52]UEFA.com, *Overview*, 28 January 2012

[53]UEFA.com, *Overview*, 28 January 2012

[54]Borja García (2007), *UEFA and the European Union, from confrontation to co-operation?*, Journal of Contemporary European Research, vol. 3, n. 3, pp. 202-223

[55]Borja García (2007), *UEFA and the European Union, from confrontation to co-operation?*

[56]Borja García (2007), *UEFA and the European Union, from confrontation to co-operation?*

[57]Borja García (2007), *UEFA and the European Union, from confrontation to co-operation?*

football competition organized by UEFA.

UEFA's legal form is a society entered in the register of companies in accordance with article 60 seq. of the Swiss Civil Code.[58] UEFA according to its statutes is a neutral organization, politically as well as religiously.[59] This is important to realize. UEFA is a neutral society in accordance with the Swiss Civil Code. UEFA is not a government instance, nor does UEFA represent a government. UEFA represents the interests of its members, the national football associations and ultimately the clubs and the players. Although not a company in a classic sense, UEFA is an undertaking that profits from the commercial exploitation of football. UEFA's core business is dealing with all questions regarding European Football and UEFA has a right and an obligation to do so.[60] UEFA has a right to protect the integrity and the value of its brand or the brands of its competitions (Champions League, Europa League, European Championships, etc.) and thus and obligation to protect the integrity of the competitions it organizes. The tribunal described the role of UEFA in organizing the Europa League Competition as follows:

"*The UEL 2011/2012 is an international sports competition between European football clubs. By participating at the UEFA Europe League 2011/2012 the football clubs pursue financial interests. UEFA, by organising the UEL 2011/2012 in a professional manner, is seeking to maximise its profits. To this end, UEFA issues every year specific regulations that apply to all football clubs aiming to participate in the UEL. Moreover, UEFA controls the marketing of the UEL 2011/2012 as well as the selling of the television rights and the distributions of the proceeds generated with the UEL 2011/2012*."[61]

In the interplay between UEFA and the other tiers of the football governance pyramid conflicts can (and do) arise. Both FIFA and UEFA have designated the CAS as the final instance to deal with these conflicts to the exclusion of ordinary courts or other courts of arbitration.[62] FIFA and UEFA are very careful to avoid conflict resolution by the ordinary courts, referring to the specificity of sports. FIFA and UEFA, as commercial undertakings are entitled to have their disputes resolved through arbitration. They are entitled to have a stipulation in their statutes designating the CAS as the instance with ultimate jurisdiction to arbitrate their disputes.

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[58] *UEFA Statutes*, Article 1, 2012 ed., available at: http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/WhatUEFAis/01/80/54/03/1805403_DOWNLOAD.pdf

[59] *UEFA Statutes*, Article 1, 2012 ed.

[60] *UEFA Statutes*, Article 2, 2012 ed.

[61] CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion,* at 333

[62] *FIFA Statutes*, articles 61 & 62, 2012 Ed., available at: http://www.fifa.com/mm/document/affederation/generic/01/66/54/21/fifastatutes2012e.

Sports disputes, including those of FIFA and UEFA, are ultimately decided by the CAS, whose independence and impartiality was tested and upheld by the Swiss Federal Tribunal in the *Lazutina* case.[63] In the case of *A. v. WADA, FIFA and the Cyprus Football Association (CFA)* of 18 April 2011, the Swiss Federal Supreme Court stated that in sporting matters it will look with a certain goodwill to the agreement to arbitrate disputes before an arbitral tribunal.[64] The Swiss Federal Tribunal stated that it does so because it enables a quick resolution of the conflict by a specialized tribunal, like the CAS, whose independence and impartiality had been established by the Swiss Federal Tribunal.[65]

This brings us to the case of FC Sion. The FIFA DRC had sanctioned FC Sion. FC Sion had appealed this sanction to the CAS in accordance with the FIFA Statutes and lost. This meant that the sanction became final and enforceable. This sanction meant that FC Sion could not contract any new players. By doing so anyway, FC Sion was willfully ignoring the rules of the game. Marco Villiger, the Director of Legal Affairs of FIFA, in an interview gave his view on the decision of FC Sion to ignore the mandatory arbitration clauses in the various official documents of the footballing instances and take the dispute to the ordinary courts: "Mr Constantin, as President of FC Sion, not to mention the players, signed an agreement and therefore knew the rules. Because results weren't going their way, they went to court. It has caused chaos. If every club went to a local court when they disagreed with something, international football would no longer be possible."[66] The arbitration clauses in the FIFA and UEFA Statutes ensure that competitions can be played out fairly and evenly. Opening up sporting decisions of the various football instances to national courts all over the globe would lead to legal and sporting uncertainty. The sporting world is best served by swift and fair decisions and this is what the CAS can deliver. This is what also what CAS delivered in this case.

This whole drama was unnecessary and embarrassing for all the parties involved. It has generated a flurry of negative attention for FC Sion, FIFA, UEFA, the SFA and the Swiss Football League. There have been no winners in all of this. The only thing that has become clear is that when FC Sion chose to ignore the rules set by those in whose competitions it chooses to play, it knew the consequences and no court (arbitration or ordinary) was going to change that.

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[63] *Larissa Lazutina & Olga Danilova v. CIO, FIS & CAS*, 27 May 2003, ATF 129 III 445

[64] *A. v. WADA, FIFA and the Cyprus Football Association*, 18 April 2011, 4A_640/2010

[65] *A. v. WADA, FIFA and the Cyprus Football Association*, 18 April 2011, 4A_640/2010

[66] FIFA.com, *Villiger: Autonomy of the sport in danger, 30 September 2011*, available at: http://www.fifa.com/aboutfifa/organisation/footballgovernance/news/newsid=1519729/index.html

LEX SPORTIVA: HOW EFFECTIVE FIFA EMERGENCY COMMITTEE TO SOLVE INDONESIA FOOTBALL ASSOCIATION'S CRISIS?

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Abstract: *FIFA has a typical way to protect the sovereignty of its organization with full control of all its members on the basis of its own law system as outlined in the statutes. It makes its own rules and then enforces them too without the state law intervention. That's what is called Lex Sportiva. The question is how effective the FIFA has controlled the crisis occurring in its members, especially Indonesia Football Association's crisis?*

Lex Sportiva

To ensure the FIFA Legal System (Lex Sportiva) is effectively applied and obeyed by all its members, since 2001 FIFA has urged all its members to revise their respective statutes to comply with the statute standards issued by FIFA. Article 10 paragraph (4) of FIFA Statutes provides the conditions that ensure its members are subject to the *self-regulation* made by FIFA before becoming a member of FIFA.

"*The Association's legally valid statutes shall be enclosed with the application for membership and shall contain the following mandatory provisions:* ***a)*** *always to comply with the Statutes, regulations and decisions of FIFA and of its Confederation;* ***b)*** *to comply with the Laws of the Game in force;* ***c)*** *to recognise the Court of Arbitration for Sport, as specified in these Statutes*".

The terms have been able to ensure FIFA is the only and unequaled world football organization since its foundation in 1904. In such a position, FIFA makes sure that Lex Sportiva runs effectively. Especially then in Article 13 paragraph (1) of FIFA Statutes, the obligations of its members are expressly stipulated.

"*Members have the following obligations:* ***(a)*** *to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art. 66 par. 1 of the FIFA Statutes;* ***(b)*** *to take part in competitions organized by FIFA;* ***(c)*** *to pay their membership subscriptions;* ***(d)*** *to ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies;* ***(e)*** *to create a Referees Committee that is directly subordinate to the Member;* ***(f)*** *to respect the*

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

Laws of the Game; ***(g)*** *to manage their affairs independently and ensure that their own affairs are not influenced by any third parties;* ***(h)*** *to comply fully with all other duties arising from these Statutes and other regulations*".

These obligations are coupled with the threat of sanctions, as stipulated in Article 13 paragraph (2) of FIFA Statutes, "violation of the Above-Mentioned obligations by any Member may lead to sanctions provided for in these Statutes." Even special for violations of the provisions of Article 13 paragraph (1) letter g it is expressed: *may also lead to sanctions even if the third-party influence was not the fault of the Member concerned*. There are two kinds of sanctions provided, namely sanction of suspension as provided in Article 14 and sanction of expulsion, Article 15 of the FIFA Statute.

Suspension

"***1.*** *The Congress is responsible for suspending a Member. The Executive Committee may, however, suspend a Member that seriously violates its obligations as a Member with immediate effect. The suspension shall last until the next Congress, unless the Executive Committee has lifted it in the meantime.*

2. *A suspension shall be confirmed at the next Congress by a three-quarter majority of the votes taken. If it is not confirmed, the suspension is automatically lifted.*

3. *A suspended Member shall lose its membership rights. Other Members may not entertain sporting contact with a suspended Member. The Disciplinary Committee may impose further sanctions.*

4. *Members which do not participate in at least two of all FIFA competitions over a period of four consecutive years shall be suspended from voting at the Congress until they have fulfilled their obligations in this respect*".

Expulsion

"***1.*** *The Congress may expel a Member:* ***(a)*** *if it fails to fulfill its financial obligations towards FIFA; or* ***(b)*** *if it seriously violates the Statutes, regulations, decisions or the Code of Ethics of FIFA; or* ***(c)*** *if it loses the status of an Association representing Association Football in its country.*

2. *The presence of an absolute majority of Members entitled to vote at the Congress is necessary for an expulsion to be valid, and the motion for expulsion must be adopted by a three-quarter majority of the votes taken*".

Indonesia case

Of 208 Football associations of FIFA members, the Football Association of Indonesia (PSSI) has successfully adjusted its statutes in 2009. Since then, PSSI organizational system has conformed to the standards required by FIFA. For the

first time, the PSSI Statutes of 2009 were applied in the Extraordinary Congress (EC) on July 9, 2011, to elect 11 members of the Executive Committee as the control holder of PSSI until 2015. This EC was unique, because apparently to implement PSSI's new Statutes must be done through an Extraordinary Congress existing directly under the control of FIFA, through the FIFA Normalization Committee established by the FIFA Emergency Committee on March 31, 2011. [1]

Why Normalisation Committee?

The situation of the Football Association of Indonesia (PSSI) was discussed during the FIFA Associations Committee which was held in Zurich on 1 March and during the FIFA Executive Committee held in Zurich on 3 March. In that meeting stated that both Committees were briefed about the latest events surrounding the PSSI, notably the existence of the breakaway league (Liga Premiere, LPI) and the controversies linked to the upcoming elections of a new PSSI board scheduled on 26 March 2011 by PSSI, especially with regard to the legitimacy of the nominated electoral commission. Under the circumstances, the FIFA Executive Committee made the decision that the PSSI should organize the general assembly on 26 March 2011 to elect the electoral commission and adopt an electoral code based on the FIFA standard electoral code. The electoral commission will then organize elections before 30 April 2011. In addition, if the PSSI is not able to regain control of the breakaway league, the case will be submitted to the FIFA Executive Committee for a potential suspension. The Executive Committee has also acknowledged that the PSSI Appeal Committee has invalidated the application of the four candidates running for PSSI presidency.[2]

This FIFA's award (decision) apparently could not be implemented by the PSSI since there was a great unrest on the day. The FIFA Emergency Committee was even forced to convene and make a decision after the PSSI's failure to hold the congress in Pekanbaru on March 26, 2011. Decisions of the FIFA Emergency Committee were submitted to PSSI under its letter dated 4 April 2011, which among other things are stated as follows.[3]

"*Following the latest events linked to the Football Association of Indonesia (PSSI), the FIFA Emergency Committee decided on 1 April 2011 that, in accordance with article 7 paragraphs 2 of the FIFA Statutes, a Normalisation Committee will take over from the current PSSI executive committee.*

[1]http://www.fifa.com/associations/association=idn/news/newsid=1411950/index.html

[2]ttp://www.fifa.com/aboutfifa/organisation/footballgovernance/news/newsid=1395733/index.html

[3]http://www.fifa.com/associations/association=idn/news/newsid=1411950/index.html

The FIFA Emergency Committee estimated that the current PSSI leadership was not in control of football in Indonesia as proven by the failure to gain control of the run-away league (Liga Premiere, LPI) set up without the involvement of PSSI or by the fact it could not organize a congress whose sole goals were to adopt an electoral code and elect an electoral commission. The FIFA Emergency Committee came thus to the conclusion that the PSSI leadership had lost all credibility within Indonesia and was not in a position anymore to lead the process to solve the current crisis.

Under these circumstances, the FIFA Emergency Committee decided to remove the current PSSI executive and to replace it with a Normalisation Committee according to article 7 paragraph 2 of the FIFA Statutes. The mission of the Normalisation Committee is: to organize elections based on the FIFA electoral code and PSSI statutes before 21 May 2011; to bring the run-away league under PSSI control or have it stopped as soon as possible; to run the day-to-day activities of PSSI in a spirit of reconciliation for the good of the Indonesian football.

The FIFA Emergency Committee stressed that the members of the Normalisastion Committee would not be able to run for any of the PSSI positions and would act as an electoral commission. It confirmed as well the non-eligibility to the Presidency of PSSI of the four candidates who were rejected by the PSSI appeal committee on 28 February 2011.

The Normalisation Committee is composed by personalities of the Indonesian football who will not be able to run for any of the PSSI positions and would act as an electoral commission. It confirmed as well the non-eligibility to the Presidency of PSSI of the four candidates who were rejected by the PSSI appeal committee on 28 February 2011".

Why they did not appealed?

Why did PSSI and four of the men receive the decision of The FIFA Emergency Committee? Did they not have the right to defend their legal interests of the verdict? Bring them to the State Court, for example?

Article 68 paragraph 2 FIFA Statutes stated that recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited. But they may recourse this case to CAS. This regulation stated by FIFA to ensure and protect *Lex Sportiva* more fairness and democratily. FIFA Statutes stated in the article 66 that FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

Then in the article 67 FIFA Statutes mentioned the juridiction of CAS as follows:

"*1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members, or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from: ***(a)*** *violations of the Laws of the Game;* ***(b)*** *suspensions of up to four matches or up to three months (with the exception of doping decisions);* ***(c)*** *decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.*

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.

5. FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, Members, or Leagues under the terms of par. 1 and par. 2 above.

6. The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed by FIFA, the Confederations, Members or Leagues under the terms of par. 1 and par. 2 above.

7. Any internally final and binding doping-related decision passed by the Confederations, Members or Leagues shall be sent immediately to FIFA and WADA by the body passing that decision. The time allowed for FIFA or WADA to lodge an appeal begins upon receipt by FIFA or WADA, respectively, of the internally final and binding decision in an official FIFA language".

Beside that FIFA Statutes article 68 paragraphs 1 stated that the Confederations, Members, and Leagues shall agree to recognize CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to licensed match and players' agents. To ensure all FIFA members respect to the statutes article 68 paragraph 3 FIFA Statutes stated that the Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognized under the rules of the Association or Confederation or to CAS.

The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law.

In order this regulations respected by all members, article 70 FIFA Statutes stated sanctions. Any violation of the foregoing provisions will be punished in compliance with the FIFA Disciplinary Code. The priciple of this regulations as mentioned in article 69 is the Confederations, Members and Leagues shall agree to comply fully with any decisions passed by the relevant FIFA bodies which, according to these Statutes, are final and not subject to appeal. They shall take every precaution necessary to ensure that their own members, Players and Officials comply with these decisions. The same obligation applies to licensed match and players' agents. As mentioned at article 14 and article 15, the sanction will be suspension or expulsion.

The Emergency Committee FIFA

Article 33 FIFA Statutes regulate The Emergency Committee[4]. The Emergency Committee shall deal with all matters requiring immediate settlement between two meetings of the Executive Committee. The committee shall consist of the FIFA President and one member from each Confederation appointed by the Executive Committee and chosen from among its members for a period of four years. Emergency Committee consists of Joseph S BLATTER as chairman, Issa HAYATOU, Michel PLATINI, David CHUNG, Jeffrey WEBB, Nicolas LEOZ, and Zhang JILONG as members.

The President shall convene the Emergency Committee meetings. If a meeting cannot be convened within an appropriate period of time, decisions may be passed through other means of communication. Such decisions shall have immediate legal effect. The President shall notify the Executive Committee immediately of the decisions passed by the Emergency Committee. All decisions taken by the Emergency Committee shall be ratified by the Executive Committee at its next meeting. If the President is unable to attend a meeting, the longest serving vice-president available shall deputies. The President is entitled to designate a deputy for any member who is unable to attend or has a conflict of interests. The deputy shall belong to the Executive Committee and the same Confederation as the member who is unable to attend or has a conflict of interests.

In the case of Indonesia the Emergency Committee FIFA decided to implement article 7 paragraph 2 that set up the Normalisation Committee.

[4]http://www.fifa.com/aboutfifa/organisation/bodies/excoandemergency/committee=1882020.html

Normalization Committee working hard

Being guided directly by FIFA, the FIFA Normalisation Committee for PSSI organized PSSI congress on May 20, 2011 in Jakarta. The result was a total failure. The congress was closed by the chairperson to avoid a greater chaos. After asking FIFA for directions, the FIFA Normalization Committee for PSSI then decided that the execution of the Extraordinary Congress would be held on July 9, 2011 in Solo. Being very strictly guarded by security apparatus, the Extraordinary Congress was going well and managed to elect 11 members of the PSSI Executive Committee of 2011-2015. Thus the FIFA Task was completely performed.

Is the crisis in PSSI will solved?

Indeed, FIFA has just managed to replace the management of PSSI using its last strength through the FIFA Emergency Committee by establishing the FIFA Normalization Committee for PSSI since April 4, 2011 and then ensured the PSSI Executive Committee of 2011-2015, the result of the Extraordinary Congress, would organize PSSI and replace the FIFA Normalization Committee for PSSI since July 9, 2011. But in fact it has not resolved the crisis in PSSI completely.

Only about 60 days after the PSSI's new Executive Committee has been elected, crisis in PSSI has been born again, and the case was same, namely the organization of the league. On 21st September 2011 in an acrimonious Executive Committee Meeting, PSSI decided to declare LPI as the league organizer (actually as the point of problem for the crisis in PSSI since the beginning) ignoring the existing regulations by including the problematic clubs. PSSI's members and ISL Member clubs reacted and rejected the decision, and held a professional league competition by themselves. So there are two professional league competitions in Indonesia, namely IPL and ISL.

The crisis in PSSI culminated, namely the birth of *the Pullman Declaration* on December 18, 2011. Being led by the Provincial Management Forum Board of PSSI, a great meeting was made, attended by 452 members of PSSI and ISL Member clubs and produced decisions, among others stating 7 Executive Committee of PSSI lost their credibility and were not recognized, and asked that an Extraordinary Congress would be called. To prepare and implement the Extraordinary Congress, the Indonesian Football Rescuing Committee was formed. After going through several steps toward the implementation of the Extraordinary Congress under the PSSI's Statute and the Electoral Code, finally on March 18, 2012 the Congress was held and successfully elected the PSSI Executive Committee of 2012-2016. Since then there have been two organizations of PSSI and previously there were two professional league competitions. These two facts

are the new crisis in the PSSI that violate the FIFA Statutes and therefore should be subject to disciplinary sanctions.

Task Force AFC as FIFA others way to solve the crisis in PSSI

AFC take initiative to solve the part two crisis of PSSI. On 26 March 2012, AFC kindly informed FIFA that the AFC Executive Committee discussed the situation of PSSI during its meeting on 23 March 2012. The committee was briefed on the current crisis facing Indonesian football and the joint FIFA/AFC letter dated 21 December 2011, which set a deadline of 20 March 2012 for the "breakaway league" to be subordinate to and recognized by PSSI to avoid the matter being reported to the FIFA Associations Committee for review and possible sanction. AFC came up with decisions and recommendations to the FIFA Associations Committee as follows:

"*1. The above deadline to recognize and bring the breakaway league under the umbrella of PSSI be extended until after the FIFA congress on 24/25 May 2012. We recommended a new deadline of Friday 15 June 2012; and 2. AFC establish a task force for the purposes of facilitating a resolution between the PSSI and the breakaway league to avoid a sanction. The members of this task force would included AFC Vice President HRH Prince Abdullah Ibni Sultan Shah, FIFA and AFC Executive Committee member Dato' Worawi Makudi, AFC General Secretary Dato' Alex Soosay and AFC Head of member Associations and International Relations James Johnson*".

FIFA agreed with the AFC's recommendation. In the letter of 30 March 2012 sent to PSSI, FIFA informed the current situation of the Indonesian football and more particularly the PSSI was debated at the FIFA Executive meeting held in Zurich on 30 March 2012. The members of the FIFA Executive Committee were briefed on the recent developments, such as the failed attempts to have a single professional league and the apparent split within the Indonesian football family which materialized in the holding of two simultaneous Congresses on the same day, both claiming to have the necessary statutory quorum. The FIFA Executive Committee showed concern about the risk of seeing the emergence of a breakaway association and a breakway league.

The FIFA Executive Committee took note that, in an effort to still bring the situation under control, the PSSI leadership stated that it was ready to create a new league next season with a new brand and open to all clubs of the current two. The Committee also acknowledge the decision of the AFC Executive Committee to establish a task force, comprising AFC Vice President HRH Prince Abdullah Ibni Sultan Shah, and FIFA and AFC Executive Committee member

Dato' Worawi Makudi for the purpose of facilitating a resolution of the current issues. Under those circumstances, the FIFA Executive Committee decided to grant PSSI until 15 June 2012 to definitively settle the current problems or to face immediate and indefinite suspensions.

With this decision, FIFA find out another way to solve the part two crisis in PSSI before using the last resources that we called The Emergency Committee to state Normalisation Committee based on article 7 paragraph 2 FIFA statues.

MOU as the key

The Task Force AFC worked very hard. On 7 June 2012, just only one week before the FIFA deadline, the Task Force succeed to set up a Memorandum of Understanding (MOU) that signed by PSSI, Indonesia Super League, and The Save Indonesia Football Committee and also FIFA and AFC as a witness.

The objective of the MOU is to clearly identify the roles and the responsibilities of each party in relation to the aforementioned protection of Indonesia football. Each party must respectively undertake the following responsibilities:

"*1. The Four Expelled Members of PSSI Committee. PSSI agrees to reinstate the four expelled PSSI Executive Committee members: La Nyalla Mattalitti, Roberto Rouw, Erwin Dwi Budiawan and Tony Aprilani. However, the procedure of reinstatement will be established by the Joint PSSI Committee.*

2. The Statutes of the ISL. ISL agrees to immediately come under the jurisdiction of PSSI, particularly with respect to disciplinary matters, player administration and transfers, and appointment of match officials until one and only one top-tier professional football league is established. Until such time, ISL may continue to operate autonomously.

3. The Status of KPI. The parties agree that KPSI will be dissolved and cease to exist as a sp-called national football governing body. Furthermore, the parties agree that KPSI will be dissolved and cease to exist as a body immediately after the next PSSI congress.

4. The Establishment of a Joint PSSI Committee. The parties agree to establish a joint PSSI committee comprised of members from each parties to evaluate the IPL and ISL in order to create one and only one top-tier Indonesian football league as soon as possible. The Committee shall work under the supervision and in close cooperation with AFC's Task Force Indonesia and be responsible for working with FIFA and AFC on the review on the PSSI statutes and association matters. The Joint PSSI Committee shall compose as follows; chairman to be appointed by PSSI, deputy chairman to be appointed by ISL/KPSI, members: 3 members to be appointed by IPL and 3 members to be appointed by ISL/KPSI.

5. PSSI Congress. The parties agree to hold a PSSI Congress by the end of

2012, which shall include the adoption of new statutes. The composition of the PSSI congress shall remain as the PSSI Congress held 9 July 2011 in the presence of FIFA and AFC and the Congress agenda shall be approved by the AFC Task Force Indonesia. The verification of the composition of such congress shall be discussed and determined by the Joint PSSI Committee in order to avoid illegitimate members from participating".

It was not easy to run Joint PSSI Committee smoothly. There was no progress with the first meeting. Then the next meeting held on 20 September 2012 conducted directly by *The Task Force*, because the Task Force shall be report to The FIFA Association Committee meeting will held in Zurich 24 September 2012. The decision is follows:

"*i) in principle, agreed that ISL and IPL would run as separate operational organisastions for the 2013 football season, but would both be affiliated to and operate under the jurisdiction of the PSSU. The Joint Committee further agree that as of the 2014 or 2015 season, one and only one top-tier professional league would exist. The 2013 season would be used as a year for the clubs to be evaluated and qualify for the one and only one top-tier professional league. (While we note the preference of the ISL/KPSI to implement the one and only one top-tier professional league in 2015, our position is that the league should be implemented in 2014. We are also of the opinion that the leagues should be renamed for the 2013 season).*

ii) agreed that each party would appoint two representative to work alongside FIFA and AFC in revising the PSSI Statutes, to be submitted to the next PSSI Congress for adoption. The Joint PSSI Committee also agreed that this working group would be tasked with verifying the membership for the next PSSI Congress.

iii) agreed that the four previously expelled members (La Nyalla, Erwin Dwi Buadiawan, Tony Aprilani and Robertho Rouw) of the PSSI Executive Committee would be reinstated immediately, and that the General Secretary of the PSSI would organise the necessary procedures for reinstatement.

iv) agreed that the next PSSI Congress would take place before the end of 2012, which would include the adoption of the new PSSI Statutes. The Agenda of the PSSI Congress will be confirmed by FIFA and AFC".

The Task Force also confirmed that the Indonesia national team must come under the sole jurisdiction on the PSSI. However, the Joint PSSI Committee may be used as a forum to harmonize any disputes concerning the release of players by clubs.

The ball in the FIFA's hand

Since 24 September 2012, the way to solve the part two crisis in the PSSI back to the FIFA Associations Committee again. It is really depending to the FIFA while to give a chance to Task Force to continue its decision until the end of 2012 or will be take decision based on the FIFA Statues.

What happened in the PSSI current situation actually showed that FIFA is not effectively yet to control and to solve the crisis in their members. FIFA still needs and find out another good way as a law enforcement as effective as well to ensure *Lex Sportiva* more *bonafide* based on the FIFA Statutes before using article 7 paragraph 2 to set up a Normalisation Committee again. To create a task force actually is an alternative to solve the part two crisis in the PSSI that still needs time. FIFA just directly take decision to sanction PSSI may be will be the best solution to solve the part two crisis in the PSSI for the feature of football in Indonesia. This way also stated at the FIFA Statutes as we called *Lex Sportiva*. Indeed, *Lex Sportiva* as a new special law in sports need more time to exercise to become the trully *Lex Sportiva.*

ON THE RIGHTS OF PUBLICITY TO THE SPORTS CELEBRITY

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Introduction

In August 2012, Diego Armando Maradona took judicial proceedings to protect his right of image and name, with claiming for RMB 20.000.000 compensation.[1] No matter how it ends, the case does not involve an appeal of offence to the right of publicity, that's because there is no definition on rights of publicity in China. Even that, the case does attract people's concern about the celebrity's right of publicity. Certainly, sports celebrity's right herein may also in the discussion.

With the ever-growing development of sports and the enhancement of modernized technology, sports celebrity's right of publicity may be offended sometimes. On those occasions, just like Maradona, the celebrity who has been infringed can only bring a lawsuit of being violated for their images. Given this, in order to protect the economic interest behind, specify the commercial value of celebrity's publicity and promote the commercialization of benefit of publicity, we are here to explore the right of publicity, which is of great theoretical and practical value.

1. The concept of right of publicity

Though academia introduced rights of publicity for a long time, the legislature has not officially confirmed it until now and Tort Law does not establish such a system. Neither do the judicial practice refer to the publicity theory, such as *YaoMing v. Coca-Cola case, LiuXiang v. Shopping Guide case*, the court can only quote regulations about the image right to give judgment.

Scholars in and abroad explore the concept of the right of the publicity from different angles. American famous judge Jerome Frank think that every natural person can control the commercial use of his own image and name, which may be concluded as the right of publicity.[2] As stated by American scholar Pamela Edwards, the right of publicity can be treated as control of his own image characteristic, and the right to avoid being illegally using. For these elements, it may

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* Research directions: Civil and Commercial Law, Sports Law

[1]Maradona infringement appeared in court in Beijing.
http://world.people.com.cn/n/2012/0818/c157278-18772719.html.2012-9-14.

[2]DonR. Pember. Mass Media Law Fifth Edition, Wm. C. Brown Publishers, 1990.214.

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include the name, image, performances under certain circumstance and other market-oriented factors.[3] As for Japanese scholar Hagiwara Yuri, he thinks it be exclusive enjoyment towards the characteristic elements which are attractive for the customers.[4]

In China, there are different opinions. Some scholars think every natural person has right to control the commercial use of his own name, likeness and other personal identification, which can be deemed as the right of publicity. [5]Some others consider the right as the name and likeness being involved in commerce. [6]Whilst others state that all the civil subjects can hold exclusive enjoyment, usage and beneficial rights towards their own image of personality. [7]Though there are some differences among these definitions, it's the same that all the definitions confirm the commercial value of image characteristic. The author believes that the concept of the publicity right may be defined from both broad sense and narrow sense. The broad publicity right is the object of protection extended to all objects can be commercialized, including real character, fictional characters, as well as other commercialization mark, symbol, work pieces, etc.; the narrow publicity right only means real characters. As for the concept of the publicity right in this article is in the narrow sense. In author's opinion, the author may agree with Professor Yang Lixin, holding the last view stating civil subjects exclusive enjoyment, usage and beneficial rights toward their own image of personality.

2. The nature

There is not a single unequivocal view of what is the nature behind the right of publicity. In this context, the author will list out some representative doctrine as follows.

2.1. The right on edge

First doctrine takes it as right on edge. By view of this, scholars think the right generated from the fringe of traditional personality rights and intellectual property rights, inextricably linked with the traditional private rights system.

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[3]Pamela Edwards. What's Score?: Does the right of publicity protect professional Sports Leagues?"62ALB.L.IZEV579, 581(1998):see, e.g., CAL.CIVCODE §3344(West1997).

[4]Diyuan • Youli. "Japanese legal protection to the commercial image rights". INTELLEDTUAL PROPERTY, 2003.5.

[5]LI Mingde. Study on the Right of Publicity in Amercia. GLOBLE LAW REVIEW, 2003 Winter:474.

[6]ZHENG Chengsi. Intelledtual Property Law. LAW PRESS·CHINA. 2003: 25.

[7]YANG Lixin, LIN Xuxia. TheRight ofPublicity: TheIndependent StatusandEssential Content.Jilin University Journal Social Sciences Edition.Vol46 No.2,2006:53-55.

Still, you can not put the right of publicity either into the range of personality rights or property rights. It's much better to be adjusted by the Law against Unfair Competition, based on its nature. [8]Putting this, this doctrine does not predict the nature.

2.2. The new intellectual property rights

Most scholars hold the second doctrine, stating the right as a new type of intellectual property rights. By stating this, they think the right of publicity is characterized by its monopoly and timeliness, which owned by the IPR, so you can put it in the range of IPR.[9] Notwithstanding this, the right of publicity does not have strict territorial characteristics. What's more, natural person's image like his own likeness and name is inherent, not created, which is also different from the intellectual property rights.

2.3. The commercial personality right

The third doctrine sticks that the right herein is commercial personality right, indicating the right is the product of personality's expansion and extension in commerce sphere. In some scholars' view, upon with the development of society, either the regulation of personality rights or property rights would be incompetent in explanation and protection of the commercialization of natural person's image. Therefore, the civil law theory should conclude a completely new legal concept from the generality of these newly appeared phenomena.[10]Notwithstanding the dual characteristic of personality and property rights, the right of publicity has significant distinction with the former two rights, which is preferred to be a kind of new rights during the interact developments with property and personality rights.

2.4. The intangible property rights

There are still some people holding the doctrine that the right should be deemed as a kind of intangible property rights. Once upon a time, the academia alleged copyright, trademark, patent and other intellectual rights should be classified as intangible rights. From their inspective, intangible property mainly

[8]XIE Xiaoyao. merchandising right: interests expansion and equity to the personality symbol. STUDIES IN LAW AND BUSINESS, 2003(5):81.

[9]GUO Yujun, GAN Yong. Study on the legal nature of the character's image Right,INTELLEDTUAL PROPERTY,2005(3): 28.

[10]CHENG Honghe. On Commericial Rights of Personality - The Economical Interests Connotation of the Rights of Personality and Its Realization, Protection. CHINA RENMIN UNIVERSITY PRESS CO. LTD,2001:13.

points to but not limited to intellectual properties. Apart from intellectual properties, newly intangible properties (like goodwill, credit right and franchise rights) - little relevant with creative activities - formed a new kind of intangible property system. In this context, equivalent the intellectual property rights to intangible property rights will be behind the times. Like business reputation, credit right and franchise rights, the right of publicity is a kind of intangible rights to behave in an intangible nature while can not be classified as the intellectual property rights. [11]Stating so, this doctrine draws more attention on the material interests, while less attention on the spiritual elements, as freedom and fairness for example, and the personality characteristic behind. What's more, intangible property is too broad to make a clear definition.

2.5. The new kind of personality right

Many scholars think the right of publicity is a new kind of personality right. From the very beginning, the right of publicity may derive from the right to privacy, so there is a close link between these two rights. And the right to privacy, as well as the right to name and image, is aim to protect one's own personality legal interest, is a kind of personality right. In this sense, we may come to a conclusion that the right of publicity is also a kind of personality right, which appears to overcome the limitations of traditional personality right on the protection of personality interests. Professor Yang Lixin also proposed that the right of publicity should be taken as a concrete right of personality. By stating so, professor Yang explains that the benefit of publicity has its independent nature and value, quite different from other concrete personality rights. Still, the right of publicity is aim to protect special personality interest, which is also out of the reach of other personality rights.[12]

From my perspective, the last doctrine may be easier to accept. It will be the trend that the right of publicity be defined as a new kind of concrete personality rights.

3. Distinctions

3.1. Comparison with the right to privacy

Though the right of publicity originates from the right to privacy, there still exist some differences.

The first distinction between them may be about the value goal. The right to

[11]WU Handong. Commercialization of the Image and the Publicity Right of the Commercialization. LAW , 2004(10):78-88.

[12]YANG Lixin, LIN Xuxia. TheRight ofPublicity: TheIndependent StatusandEssential Content. Jilin University Journal Social Sciences Edition.Vol46 No.2,2006:53-55.

privacy may prefer to protect private information and keep one's own peaceful life, aiming to maintain the human dignity. While the main goal of the right of publicity is to avoid illegal commercial use of one's own image characteristic like likeness and name without consent, aiming to protect the benefit of publicity. Next, the infringements come in a different way. For the right to privacy, disclosure one's private information without consent of the person may constitute infringement while its illegal commercial using of the right of publicity that deemed as torts. Last but the least, the consequences and relief will be different. Once being infringed, the right to privacy can not recover to its former status, so the way to relieve can be cessation of the infringement, apology and compensation for moral damage. When it comes to relieve the right of publicity, you can ask for a ban and compensation at the same time.

3.2. Comparison with the right to image and name

As the two important personality rights, the right to image and name, same as the right of publicity, is carried by image or name. And, infringements of the right to image involve the use for the purpose of profit. Infringements upon the right to image may be the relief for most sports celebrity in the cases. Despite all this, there are still some distinctions, such as the coverage, the relief range and the extent of protection. For the scope of the rights, the right to one's own image and name is enjoyed by the natural person himself exclusively; he may not discard it, assign it to others or inherit it from others. The right of publicity works in a different way, which emphasis on the commercial value and can be assigned to others for commercial publicity to earn a big profit. As for the method for relief, the compensation for the right to one's own image and name is limited while for the right of publicity it may vary from the recognition of the celebrity. When comes to the extension of the protection, the range of the right of publicity is much broader to cover similar image characteristic.

4. Subject, object and content of the publicity right

4.1. Subject

Every civil subject, natural person, legal person and other organizations, do enjoy the right of publicity in its own name.

In general, considering its origin, the subject may be a natural person who owns the image characteristic like image or name. Natural person may assign his own right of publicity by signing a contract with others while holding the right at the same time. Since the emphasis is the commercial value therein, the right of publicity works better on those celebrities, whose commercial value will

increase by their greater fame and more attraction for the customers.

When comes to sports field, some native scholars may define the subject as well-known sportsman. I am not in the same group. There are some athletes do have special image characteristic and can be known easily, in these circumstances, they can certainly enjoy their rights of publicity. And if we decide whether someone is famous or not, the standards will be a big problem since the benefit behind the athlete will be different according the programs.

In my view, the subject of the publicity to natural person should be every natural person. Legal person and other organizations can not be treated as subject as far as the right of publicity of natural person is concerned. Though there still some other ideas stating the right of publicity will be granted to the nation for the regulation that *the right of national athletes' image and intangible properties therein should attribute to the nation.* The author thinks it's a misunderstanding of the right. The holder of the right should only be the athlete himself, and it's the assignment grants the nation the right to manage and allocate the commercial benefit. In this sense, we should take athletes as the holder, whilst the nation owns usage of the right. More exactly, the nation takes the benefit from the commercial use of the right. After athletes' death, the right of publicity disappeared; only the benefit left. And at this time it's due to the nation who owns the benefit of publicity while there are no successors for them.

4.2. Object

As an independent personality right, the object of this right is the personal elements of commercial value, such as one's own name, likeness, signature and gestures, which can be divided into three categories. The first is body image except the facial image, quite distinguished from one's own image. For the former, it may points to body characteristics, silhouette, view of one's back and etc. the hand-figure, model figure and some other body image in the ads can be protected by the right. As for the latter, one's image is the visual image of his own facial characteristic reproduced on the material carrier. [13]Next may go to overall image. On some circumstances, we can specify someone by distinctive dressing style, unique actions and other elements, and then this overall image construed by these elements is covered by the right. For example, an infringement upon Chairman Mao's image is violating the overall image. For the third aspect, the object can also be particular features, which include all symbols that specify the subject, such as voice, name and signature.

[13]YANG Lixin, LIN Xuxia. TheRight ofPublicity: TheIndependent StatusandEssential Content. Jilin University Journal Social Sciences Edition.Vol46 No.2,2006:53-55.

4.3. Content

In general, the content points to the rights and obligations performed by holders. As for this new concrete personality right, the right can be enjoyed in three ways.

The holder can use the right himself, which means that the holder himself engage in the commercial activities by use of his own publicity to acquire a profit. It's the direct way to use one's own right of publicity. Nobody else can proceed with the right without holder's consent. Also, the holder may make a great deal of transfer fee by assigning his right of publicity through a transfer agreement. After that, the assignee may enjoy the exclusive usage of the holder's right while the holder is deprived exclusive enjoyment of the right.

Apart from aforementioned, the right can also be licensed through a license agreement. With limitation of time, capacity and experience, the holder may access someone else to use his right of publicity for a commercial purpose. By signing a license agreement, the licensee can use the right in certain territory while the holder still enjoys the exclusive usage of his own right of publicity.

5. Torts and remedy

5.1. Factors of tort in right of publicity

Based on general theory about tort, four factors together determine whether an action constitutes infringement or not.

First is the usage. The infringer must implement some actions with someone's name, image, voice or gestures. Of course, the usage must point to a specific person exactly. The offence to sportsman must indicate the specific athlete and other sports celebrity, or else it would be out of the range of tort law. Second is without the owner's consent. The owner here may point to the holder himself, the assignee and the licensee. What's more, the manager and exploitation agent who have been granted to manage and explore one's right of publicity can also be the owner. The third requirement is the commercial purpose. This factor regulates the subjective requirements. According to the torts law, the infringement of this right is a kind of common infringement, with premise of the infringer's fault, no matter intentional or negligent. On most occasions, the infringement may be out of intention. Moreover, the infringed use should be commercial, which is the premise of tort in right of publicity. The last factor should be harmful consequences, meaning that the infringement does harm to the benefit of publicity, which indicate loss in spiritual interests as well as interests of property. For these two, the loss in interests of property may come first.

5.2. Remedy system

The victim can turn to help when the rights are infringed. Upon the commercial usage assist to highlight the enterprise, or attracts more attention on its products or services, the action constitutes threat to damage the right of obligee and victims can ask for compensation.

Article 15 of the Torts Law provides specific ways of responsibility. Stating that when being infringed, victims can choose either one to protect themselves. Based on its absolute quality, specificity and exclusivity, the right of publicity can be recovered by claims to cease infringement, apologize, eliminate the effects and rehab etc.

Property relief, also known as compensation for damages, is a measure to compensate the victims materially. Since the infringers' purpose is to gain economic interest, they need to compensate the obligee, which works best in remedy system. To coordinate with the benefits, compensation here needs to cover both the spiritual and property loss. Even more, the obligee can ask for punitive damages.

Conclusion

With the quick development of economy and the big progress of social civilization, exploitation of benefit of publicity is on a growing trend and the interests behind also attracts more attention. The extension of personality rights can not go far as the right of publicity does. Therefore, a newly concrete personality right appears which is known as right of publicity. Whatever the nature is, the right herein is mainly to protect celebrity from being infringed, especially the commercial value in celebrity's publicity. Though there is not a clear definition about the right herein in Torts Law, victims still can resort to the Torts Law, for general clauses in Torts Law specifying all the civil legal interests should be under protection. What's more, the words in Article 2 shows signal of open principle, meaning that victims can get help from Torts Law once the right herein being infringed.

Upon with the rapid development of sports, sports activities plays such an important role that it even becomes one of the most attractive and most internationalized activities. Along with this, sportsman's image value soars. But when it comes to practice, the remedy for infringement on right of publicity limit to the protection of the right to one's own image, and no cases introduce the theory of right of publicity. Therefore, it's of great significance to specify the definition and then put it into the legislation. By doing this, we can proceed with sports celebrity's right of publicity, which enhance the development of sports on the other hand.

ON THE GOVERNMENT INSTITUTIONS CONSTRUCTION OF PUBLIC SPORTS SERVICE

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Abstract: *Analyze the concept of sports and public service from the perspective of historical materialism. With the development of the society, sports are endowed with different connotations. A new definition of modern sports is that it's a kind of life style, a part of life with the public attribute. In addition, with the conversion of government functions and development of a service-oriented government, sports become an important part of government public service. Historical materialism reveals that people are the creator of history so as to find the target of public service. Sports development is a part of social development, due to the sharp shift in life style, it is urgent to use sports to fill the defects of civilization. Moreover, it is the institution construction that ensures government to provide the public sports service. This paper expounds that the institution construction of public sports service should establish the correct understanding of human nature, strengthen the construction of service culture and pay attention to system of the implementation of the program in the government authorities to strengthen service culture construction, pay attention to the procedure of implementation of the institution*.

1. Analysis of the concept of public sports service

1.1. Some views about sports

From the view of culture point, sports is a body language of the human, is a culture developed by the human body movements. That show in three respects:a kind of culture that characterization of the rhythm of human life\touch people heartstrings\can feel it but can not say it out.This explanation is concise sports most essential aspect, is the soul of sport.

However, as a product of society, the function and outside of sports now has changed. From the historical development of view as a rough depiction for the evolution of the main theme of human sports culture, in the earlier period, Sports were closely linked to religion and witchcraft. The ancient times:on one hand, the veil of religion and witchcraft gradually faded; on the other hand, political\ military and medical towering Tau Kok emerge.The middle ancient times, instrumental sports for political point to serve in the counrt can kernelization. Otherwise, is the people of sports, can only be stifled or to its own devices and marginalized. Recent times, dominant sports concept from court to state-centered. Modern times, there are signs of which government sports concept transferred from the country-centered to people-centered.

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With the continuous progress of social civilization and the highlights of the rights-based, people's rights has been constantly enriched. New era gives sports new meanings. Today, people come to realize that sports are a right for human, everyone is equally entitled the right to pursuit health and to participate in sports. Sports belongs to everyone, it is public property. The latest explanation for sports is a kind of life style, a part of life. Our governments transform their functions, to build a service-oriented government, and sports is an important part of the public service. Sports is a kind of public production, is a tangible and intangible resources that the national government obligation to provided, is a part of life for human, states have the responsibility to be protected this.

1.2. The essence of service-oriented government

For the public sports service is an important exemplification to the service-oriented government basic functions, so when to discuss government institution construction of public sports service, the first thing is to clear the essence of the service-oriented government, it decide the direction of the service-oriented government, it is aslo the soul of the institution construction of public service. National School of Administration Liu xirui has a definition for service-oriented government:under the guidance of citizen-orientation and social-orientation, according to legal procedures and citizen mind, the government what is called service-oriented government is set up.The definition regulate the content of a service-oriented government from five aspects, they are idear, produce, objectives, functions and responsibilities. Among this, idea is the first, because it determines the guiding ideology of the service-oriented government, the other four aspects including the generation process must be through legal procedures and set up in accordance with the civil will; After being produce, it must transform the correct relationship between government and people into own correct purpose of service, then carry this purpose out the government functions and do it. If the service is bad, the government need to responsibility and investigated. From this five aspects, we can distinguish it from our old model of government with highly centralized features in the era of planned economy.

Service-oriented government and the theory western democratic has certain origin. This can understand from Locke and Rousseau state the Social Contract Theory. But the theory also has nature defect. So only Marxist philosophy history materialism is up to standard the theory guidance for service-oriented government. As is known to all, only the theory of historical materialism reveals that people is the creator of the history and the motives of history's development; The people's interests always represents the direction of historical development; all political form including democracy is a historical process, with the development of social productive forces, it gradually evolves. At the present the trend of social produc-

tive forces development and production socialization, it is time for the overwhelming majority of the people's rights, also the democratic have material base.

2. The indispensability of institution construction of public sports service

2.1. Inevitable outcome of development of society-public sports service

Firstly, it is the result of the development of society. The development of society has three forms: Agricultural society, industrial society and knowledge society. Industrial society also knows as modern society, and then agricultural society is named front-modern society and knowledge society named behind-modern society. Our country has been learning western to go the industrial road after the Reform and Open, so be named late-modern society. As the computer age and pluralism comes, our country comes into transitional period, the late-modern society. The feature of the late-modern society is: information society, leisure society and healthy society. Because of that, the ask of society development for sports come into high and turn, the government transform of fuctions and sport for all is come true.

Secondly, in the need of the transformation of social life pattern. With the popularization of network and the development of urbanization in China, the way of life become huge changes. First, people lessen going out. Because network, people can stay at home and achieve shopping, diet, see a movie, study and so on. Second, people lessen activities. Home appliance make people save many steps when doing things; agricultural mechanization makes the acception and seed one pace reaches the designated position.

Thirdly, people lessen speaking. For example, supermarket cover to save many bargaining and so on. Fourth, people lessen walking. The popularity of bus and motor vehicles replace walking and cycling. These are made people as a biological in degradation, but the natural and social being for people at the same time, only at the balance between both can human body and mind health growth and develop. Sports, it is urgent to use sports to fill the defects of civilization, reduce the social harm and social crime occurred.

2.2. Institution Construction - a necessary request to development of public sports service

From the philosophical point of view, social existence determines social consciousness, then culture belongs to ideology of people.Relatively, institution is social existence and finally determin people's behavior consciousness. So, if sports want to achieve public service function, institution construction of public sports service is necessary. From the view of sports culture, sports laws and

regulations is the main reflect of sports institution construction. Therefore, we can say the necessary for institution construction of public sports service means the necessary for its rule of law. At the process of government provid the function of public sports service,both because of the movement needs greatest satisfaction to the public, citizens sports participation rights need the law to protect; also due to all kinds of interests relationship among all participation in sports, just the law can standard to adjust the balance to obtain the harmony between society and interpersonal; the third reason is that the dominant position and powers mettle when government provide the public service, must put it into the framework of the rule of law to constrain in order to prevent their departure from the public interest.

Due to people's social existence, social relationship need institution to standardize and adjust,the human society is the development at the continuous optimization of the institution. The social transformation that constantly promoted since china's reform and opening up, that essence is a continue process of revolutionary for structural reform and institutional change. The building of service government and the provided of public sports service, also need keep pace to making institutional arrange and innovate with the times, and because that decided by the social nature of marked economy and rule by law, what the first thing is to construct and improve the legal system and the order by law. The existing basis and legal functions for modern government is public sercvice, and rule by law is the foundation and way for government administration, the public service government must be based on foundation of the rule of law, if not, no matter from whatever the function or the management way will appear deviation. It is because provide public sports service need in a certain legal institution framework and on basis by law, can't do without the adjustment by the rule of law, safeguard and promote, so inevitable require us to profound know and strengthening the construction of legal institution, to take public sports service and government institution construction organic interaction and combination.

3. Some advices of Government Institution Construction of Public Sports Service

The institution construction of public sports service need to establish correct institution construction guide, people-oriented, earnestly practicable the sovereignty of citizens.

3.1. A correct understanding of human nature

A correct understanding of human nature can solve the problem of training 'service personality'. Since reform and opening up, the greatest achievement is under the conditions of market mechanism was introduced. Among that one of

the price is, the individual value, individualism legalization and enlargement and even become the social leading consciousness within the market framework, then self-interested prevail is followed. Conversely, the spirit for public\the custom of help each other\the responsibility of service is greatly desalination, so that people form illusion: people are selfish, individualism and egoism perfectly justified, it is impossible to have selfless man in the world. And the reason of produce the problem is relevant to what is social Darwinism trend has been done over the years. Darwin's on the *origin of species* reveals the idea of struggle for life"" survival of the fittest in natural selection", many people regard it as the universal principle. But in fact, this is very ridiculous. Because after that Darwin published a book *the origin of the human,* in the book, he deeply analyzed the situation of human society, and draws a different conclusion: Do not use "the weakness is the prey of the strong" logic to guide the human society. So, Darwinism is wrong, while use the extreme individualism do the survival and development principle for human society is both reverse Darwinism and against the human. We should have full of confidence for human inherent (may be some time repressed) spirit of unity, love and service.

3.2. Enhancement of driving force of public service

Enhancement the construction of service culture in government and solve the problem of driving force of public service. Driving force includes both extrinsic motivation and endogenous motivation. The so-called extrinsic motivation is the problem "want me to service". The produce mechanism includes three aspects: incentive, spur and regulations. First, to build the reward mechanism for the service behavior, it is a leading function, can make the civil servants aggrandizement of his own service behavior under the premise of pursuit the good results. Second, establish mechanism to supervise and urge, the aim is to promote the civil servants forward from behind, put the screws on the development of their service behavior. Finally, use the regulation to restrain their behavior, to make civil servants walk up the service road. But this just solve the problem" want me to service", only endogenous motivation can solve the problem "I want to service". The point is make civil servants produce service idea and have the strong service impulse, not others want him to service, just service on the voluntary. The mentioned extrinsic motivation help form endogenous motivation but not equal to it. Endogenous motivation focuses on transformation of the thought.

Firstly, driving force of public service produces by learning. Studies are two processes. One is to solve ideological understanding, the other one is to practice by themselves and then find the pleasure among it. This experience is a kind of consolidate and improve for learning outcomes.

Secondly, the driving force produces by organizational culture. An organization can form their inherent culture at a long work time. Among them, the leading role for leader have very important significance, what kind of leader can form what kind of organization culture; an extreme selfish leaders can not be form service culture in the place of power. Deeper phase produces by social culture. A society, when help each other and mutual service form culture, this kind of atmosphere will naturally get more strong reaction in government. When the authority of people doing not enough, society will form a strong pressure, prompted the leader walk up the way of service. In this sense, government service consciousness training is inseparable to society. Both should be combined, in the government authorities to strengthen education, the society should open to discussions at the same time. That can not only have pressure effect, and can play a dynamic role, still can plays the standard role for government, To promote the body's legislation so as to play guarantee function.

Finally, it is very important to establish service responsibility mechanism. Because responsibilities and obligations have difference in principle, when the government civil servants with service responsibility consciousness replaced the obligation consciousness, the properties of responsibility to be practiced\the rule of law and to be investigated can naturally play an important promote role at training their service spirit.

3.3. Problem of procedure

As is well-known, from the different content as standard, law can be divided into substantive law and procedural law. Establish a good system principle and content is not to less, but it is the same important about the implement procedural, abide by the procedures is to further supervise the content. Walter lippmann said in *Public Policy Study*: the way of action generally affect the attitude of public acceptance policy. Justice, in the course of public service,we should pay attention to the procedure and emphasize the legal method. Under order and effective government, the key for public interests is process rather than the content of the policy. The public interest is the law rather than specific laws, the legal method rather than the law content, the contract′s sacred rather than a particular contract, the understand at the custom basis rather than this or that custom. In the study of public interest, one of the method is to investigate organization and procedure, the conclusion is they are representative and balance the interest. The importance of the program is obvious.

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II. LEGAL ISSUES IN AMATEUR AND PROFESSIONAL SPORTS

- Sports Right and Obligations of Athletes, Economics and Private Freedom
- Professional Sports Activities and Players Protection
- Legal Protection in Sports, Civil, Penal Liability and Responsibility
- Sports law Contracts and Player's Agents' Regulations
- Anti-Doping Regulation, WADA Code and Techno-Doping

THE IMPLICATIONS AND CHALLENGES OF THE SCHOOL SPORTS (PHYSICAL EDUCATION) PROMOTION ACT

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Abstract: *This study focuses on the implication and the challenges in the enactment of the School Physical Education Promotion Act, which was passed by the National Assembly on December 30, 2011, promulgated on January 21st of this year, and planned to be enforced on January 27, 2013. In mean time, the emergence of the physical deterioration in the youths, the protagonists of the future of the nation, has become a serious social phenomenon, due to the nation's test centered education have toll on the physical activities of the students, and the student athletes guarantee for rights for learning and human rights have been demanded. Therefore, the School Physical Education Promotion Act has been enacted in order to normalize the school physical education and to develop health and balanced body and mind in students.*

This act contains obligated information such as, state and local governments to establish policy and enforce obligation, secure budgets so that school head masters can assess annual student health (PAP), operate physical education classes for students with low-stamina or obesity, and operate school fitness centers, etc. it This act also regulates the security of the basic education standards for the student athletes, rational operation on school sports, matters concerning the duty and remuneration of the athletic directors and the professional sports instructors, and the establishment basis for the School Physical Education Promotion Committee. Though the regulatory plans such as safety measures for the accidents on school sports, exclusive organization to administrate school physical education, and securing the school physical education fund, have been presented, but they do not reflect on this act.

The following significances of the enactment of the School Physical Education Promotion Act 1) the establishment of the rights to the physical education, among the basic sports right 2) the establishment of the policy on normalization and invigoration of school physical education 3) the establishment of new paradigm of the national physical education and sports 4) the establishment of a foundation for the realization of the National Sports Welfare were looked.

Future challenges, such as 1) enactment of right sub-regulation (enforcement ordinance, enforcement regulations, ordinance), 2)the guarantee of student athletes' rights for learning and human rights which include minimum schooling, 3) The rights guaranteed and quality recognition of the person in charge of the school sports (athletic director of the school, sports trainer, 4) financing for normalization of school physical education, 5) reasonable organization and operation of School Physical Education Promotion Committee, 6) organization and operation of School Physical Education Promotion Committee, 7) strengthening in exclusive administration for school physical education, 8) the prevention of threat and expansion of safe facilities, are also presented.

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The most important challenge, from this point on, is to mandate the matters in this act or to enact the need for sub-regulation to be enforced such as enforcement ordinance, enforcement regulations, ordinances, within a year of preparation period before the law takes its effect.

Introduction

School Sports (Physical Education) Promotion Act, which has been passed by the Congress last December 30th, will be enforced on January 27th 2013, after being proclaimed on January 26th. Until now, deterioration in the physique of teenagers, who are the future national heroes, has been on the rise as the serious social phenomenon while sports has been made light due to the education mainly on university entrance examination. On the other side, demand on student athletes' right for learning has been raising. To normalize school sports and to develop students' healthy and balanced body and sound, the school sports promotion act has been legislated.

This law includes firstly to grant duties to develop policy on vitalizing school sports to the government and city council, secondly to secure the budget to make indication of assessing student physical ability by the school principle, manage physic classes for the obese or students with low strength, and to manage school sports clubs. The law also indicates basic education security system for student athletes, rational management of school sports team, details on salary of sports team leaders and sports expert educators, and establishment basis of school sports promotion agency. Some opinions on accidents from school sports and security measure, equipment of school sports administration, and security of school sports funds occurred, however they failed to apply.

However, the fact that political and legal ground to show direction to school sports should be welcomed, since school sports has been drifting around for a long time. The law also shows the reflection of school sports-related academia, the media, and civil organization, who have been bringing up the importance of legislation.

Now we are here, having a time of 1 year to prepare before this law is activated, the most essential task we have are to correctly legislate terms of references and low-rank legislations such as enforcement ordinance, regulations, and ordinance.

Therefore, the author would like to organize the legislative meaning and future assignments of School Sports Promotion Act here.

I. Legislative Meaning of School Sports Promotion Act

1. Guarantee Right to Educate Sports

Most of scholars of constitution admit that the Constitution guarantees basic right of sports.[1] This right is not written in Korean Constitution (KC); however, it is explained to be protected by the article 10 KC, human dignity worth and pursuit of happiness. Article 10 KC provides that: 'All citizens have the dignity and worth as human, and pursuit of happiness. Country has a duty to classify and protect this fundamental right that individual has, which cannot be violated. Especially, with a fundamental idea that sports will bring satisfaction through physical activities, freedom of sports activities should be protected. Sports activity contributes people's lives to be wealthier, and rises above 2nd term on Article 37 of the Korean Constitution, that implies the freedom which cannot be forced by the nation through limitation or prohibition. In other word, individual's freedom of sports activities is freedom that is not forced against one's intent. Along with this freedom, freedom to form a sports organizations, manage and play an active part is included, and moreover, organization's self-government is also recognized. Through this, we can assume that the right to sports basically has character of civil liberties.

Today's sports does not only signify physical activity. In modern society, sports includes all the activities needed for people's growth and development, by detonating human potential for improvement in social adaptation. Today's nations with Constitution guarantees its duty to protect fundamental right. Article 10 's back in our Constitution provides nation's duty to guarantee fundamental rights. Right to sports' constitutional guarantee cannot be completed only with its freedom to play an act. Country should put effort for facilities or security of space if demanded – although that is not directly for one's satisfaction – for individual's leisure, improvement in health, or cultivating body and mind, or job. moreover, if we consider sports as part of culture, and as one of the methods for people to live healthy lives, and for their wealthy development, we can also find its constitutional foundation from 1st clause on Article 34, meaning it has social characteristics in some part in constitutional system.[2]

Fundamental rights to sports, as detailed right in pursuit of happiness, includes right to enjoy sports (freedom of sports activity), right to know sports information, right to choose jobs related to sports, and right to educate sports (right to educate sports in school). On 1st clause from Article 31, it states "All

[1]KIM Sangkyeum, "Constitutional Guarantees of Sports Right", Sports & Law Vol. 1(2000) pp 57~82: KWON Youngseong, Constitutional Law(Text), 2007, 347; SEONG Nakin, Constitutional Law(Text), 2007, 331: STEINER, Staat, Sport un Verfassung, DÖV 1983, 174.

[2]KIM Sangkyeum, Ibid, pp. 75-76.

citizens have right to be educated equally depending on individual capabilities", which guarantees citizens' fundamental right for education. This is understood as the right to actively require guaranteed equal opportunities of education and improvement of education conditions to the government.[3] Guarantee of right to study, as fundamental right for education, is a prerequisite and a major premise to have dignity and worth as a human, pursue happiness (from Article 10 on Constitution), and to live wealthy (clause 1 on Article 34 on Constitution). With no question, this should be understood as right for sports education is included, guaranteed right to study rights (or right for school sports) is also admitted as social fundamental right (right to live), and moreover, freedom for sports education, which is the right not to be violated when being educated sports by the government, is also included.

On clause 1, Article 1 of "UNESCO International Charter of Physical Education and Sports", which was introduced at the 20th UNESCO Assembly in Paris on 21st of November, 1978, it states that "All has fundamental rights to participate in physical education and sports, and this is precondition for individual's complete development. UNESCO has made a declaration that in all social area, including education system, freedom to build physical, mental, and moral power through physical education and sports should be guaranteed.

2. Policy Settlement for Normalization and Activation in School Physical Education

(1) Activating Physical Activity and Improvement in Physical Stamina

Until 2008, student physical ability test, which is to examine elementary, junior high, and high school students' basic physical ability, had been operated, however, Physical Activity Promotion System(PAPS) started to operate since 2009 from elementary school, and operated up to junior high now in 2010. Therefore, we don't know the exact recent trend since there is not enough statistics on student physical abilities, however, according to the statistics that have been gathered till, decline in students' overall physical abilities have become a serious matter.[4] Furthermore, in 2010, 13.5% of 5th to 6th graders were low-fitness, 10.4% were obese, and 4.2% had both conditions (low fitness and obesity), and in case of low fitness students, there were more of them in 5th grade than 6th. Compared to 2009, there were 0.7%, 1.2%, and 0.6% declines in each of low fitness, overweight and both. In junior high, there were 16.6% of low fitness, 12.7% with obesity, 6.2% for both.[5]

[3]SEONG Nakin, Ibid, p. 596.

[4]Ministry of Culture, Sports and Tourism, "Report on Sports & Physical Education" 2010, p. 199.

[5]Ministry of Culture, Sports and Tourism, Ibid, p. 202.

Now the leaders(Principal) of the schools, for improvement in student physical stamina and activation of physical educations, should 1) raise faithful management and quality of physical education course, 2) operate PAPS, 3) operate school sports club and school sports division, 4) activate girls' physical education activity, 5) activate kids and handicapped students, 6) hold school sports events, 7) activate inter-school exchange activities such as inter-school competitions, and 8) secure budget and encourage and enforce faculty's training related to physical education. (Accorded to Article 6 of the law)

Physical education course has been operated irregularly due to wrong university entrance policy, which only focuses on English, Maths, and Korean Language & Literature. This results in declined nation's competitive power by blocking human's right to live healthy and raise welfare expenses. The problems were lack of knowledge on physical education, and way too lack of physical education hours. However, it is fortunate to have alternatives as to provide longer P.E. class and enforce sports club activity as one of means to rooting up school violation. It's obvious to opera physical education not only to build up physical capability but also as a human nature education.

The government has prescribed as government's duty for PAPS's overall founding and operation (Article 8). The leader of the school should manage physical activity class for those who gets low weight or obese from the PAPS (Article 9). Also, the leader of the school should operate school sports club and faculty with full responsibility to encourage student's participations in physical activity. Furthermore, the school must record sports club activity in student's individual report so it could be used for students to enter higher grade (Article 10).

Government and local self-government should station professional sports tutors in elementary school for students' higher interest in P.E. class and activation of physical activities (Article 13).

(2) Expansion of School Sports Facilities

Even now, Facilities such as ground and gymnasium, for students' physical activities, are not enough. Security of sports utilities is urgently needed. Now, school sports facilities are insufficient, but what is worse is that bad management caused various difficulties. Due to enlargement of school buildings, school play ground's contraction have occurred, and most of newly built schools is becoming smaller, resulting in the shortage of space for physical activities. Moreover, space for in-school physical activities is lacked, as well. Gymnasium and swimming pool are badly lacking, and there are more than 50% of schools without in-school swimming pools. Also, there are out-school facilities deficient for standard or falling behind, and hardly used because of athletes' training during or

after school schedule.[6]

Government and local self-governments are given duties to secure enlargements of facilities, textbooks and utilities for physical activities (Article 7).

(3) Normalization of School Sports Division

Student athletes normally take class for around 4 hours a day in elementary, middle, and high school, and this has resulted in their deterioration of schooling. The athletes usually have morning, afternoon and evening trainings, and their desire for education is getting even weaker. On the other hand, parents of those student athletes have such philosophy of education with arrivism, achievement and competition, and force students solely focus on sports not their lives or education. Number of hours that school sports team train is overall 5~6 hours a day, and number goes up as the level of school goes higher. Among those, the number of hours the students train is the highest in boy's high school with 6 days overall, and girls train a little more than boys. Especially, too much training for elementary school students declines the growth progress and is not adequate for their emotion development.

To solve such problems, the school leaders must manage basic education security program. For security of students' right for education and physical and emotional development, school also should put efforts to exterminate all-time camp trainings, and operate the division rationally by enrolling division related funds to school's. Government and the self local-government have provided for funding school sports division management (Article 11).

Meanwhile, it is obvious to have a leader with competitor experience, as a leader with ability, who can excavate gifted ones early and train and educate them.[7]

The principal of the school have stationed school sports team teachers for student athletes' training and guiding them, while the government and the local self-governments have operated research study for temperament improvement and strengthening of professionalism, and to support the needs. In addition, when the manager of the school sports team violates the right to study of the athletes or do violence or transfer money and articles, the school commit can call the discussion and terminate the contract (Article 12).

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[6]Daejeon Metropolitan Office of Education, "School Sports and substantiality plan in Daejeon Metropolitan school athletic policy research report", 2004, p.42.

[7]LEE Won - Young, Korean personalized school athletic proposed policy direction, Elite Sports Leaders Association, 2009, pp. 16 ~ 17.

3. Expulsion of the New Paradigm in National Physical Activity and Sports

The politic basement of the national physical activity and the sports is legislated as a measurement in national physical activity promotion law. Raise and the management of the school sports consist of important contents as one of the assignments for the government policies. Therefore, a legal measurement on raising sports is included partially in national physical activity promotion act.

The act that represents the role of controlling the function of school sports, daily sports and professional sports is national physical activity promotion act. This act aims "to strength citizen physical stamina by promoting national sports, to encourage cheerful life hood by implementing sound mental, and further, to contribute enhancing national glory by physical activities". For the school sports promotion, the act provides that "the school should furnish the needs for students physical improvement and sports activity promotion". This is quite a declaration that shows to admit that the school sport is essential division for national sports promotion.

In national sports promotion act, Article 11, clause 1 describes "the government should prepare for the needed policy for sports managers' education and improvement in temperament, and Article 14, under title of focusing on protecting and educating the athletes, "the government and the local self-government should prescribe protection and education of students and sports managers" (Clause 1), "the government and the local self-government should prescribe the award ceremony for the outstanding athletes and education of the sports managers" (Clause 2), "the government should hire the athletes and sports manger when demanded by the culture and physical sports tourism minister, for outstanding athletes to participate in amateur competition" (Clause 3), "the government should compensate awarded athletes, such as Olympics, Paralympics or other competitions that are admitted by the president, the managers and elder athletes who have contributed to the sports promotion" (Clause 4). The act shows that the ultimate goal of the national sports promotion act is to educate elite athletes for the national glory.

Now the school sports promotion act functions to manage the promotion of school sports, and the national sports promotion act has dual system of national sports to support politically for daily sports and elite sports.

4. Creation of Foundation for Attainment of National Sports Welfare

School sports education and management takes important contents as national assignment for cultural policy and welfare policy. The foundation ideology of this act is surely for promotion of school sports. School sports will ultimately

contribute to inspiriting national awareness and mortal value. Education plays essential role in human socialization. People learn to respect and show leniency as part of the union through education. Respect for others is one of the traditional goals of education. Moreover, the leniency which is education goal is about fairness in sports. Educational value of sports directly connects to the cultural value of the country. As important part of the culture, it's also important for the government to encourage and educate sports through school.

On sight of public welfare, in the end, the school sports promotion aims physical improvement and cheerful life hood, which will eventually contributes to realization of welfare.

II. **Future Assignment**

Least Education and Right to Study, Human Right Security of Student Athletes.

"Student athlete" is a student belongs to the school sports team and train, but according to the 'national physical activity promotion act' Article 33 and 34, is a student registered to the sports organization and trains (Article 2, Clause 4). Also, about the management of the school sports team under the lead of the principal of the school, is it made as a law to secure the least education and right to study (Article 11).

The reason these rules are needed is because the educational value of the school sports has lost its worth due to the trend to only focus on the record at the competition, and students become to have tendencies solely on improving its competitiveness. To overcome this, sports field and the government is putting various efforts.

Least education security policy has already been activated since 2010 by the government (Cooperation between Ministry of Education, Science and Technology and Ministry of Culture, Sports and Tourism), arranging developed school sports team management system building plan, setting a goal to upbringing studying athletes and whole-man sports talented man.[8] In addition, due to the deepening of social worries on students athletes' education getting lower and violation of right to study, the government has legislated a law to secure their right to study to build ideology on studying student athletes. The law is works as to draw a least education standard, and to restrict in some part if the student athlete has not met the standard. Starting with exhibition protect in 2010, will activate the law up to 4~6th grade in elementary school in 2011, and will broaden up to 3rd grade in high school by 2017.[9]

[8]Ministry of Culture, Sports and Tourism, Ibid, p. 211.

[9]Ministry of Culture, Sports and Tourism, Ibid, p. 212.

To some subjects appointed in 1st and 2nd final exams in school, comparing to average score of whole students in school, if the athletes could meet the standard of 50% for elementary school, 40% for middle school and 30% of high school, it will be considered as being lack of the minimum education standard. But if the student was only lack of 1st and 2nd grade final exam, in case of getting up to the standard in upcoming midterm exam, or gets over "basic" in education achievement test, it will be considered as the student has met the standard.[10]

Student athletes' human right security matter has been dealt mostly with solution to serious illegal violation and sexual violation.[11] Recent occurring matter is on right to grow human right relating to the youth protection, right to grow as a human, also called right to form human right.[12] According to the UN Convention on the Rights of the Child and the Youth, Article 6, this right is defined "Every child has the right to life. Governments must do all they can to ensure that children survive and grow up healthy."

On school sports promotion act Article 6, clause 1, sub-clause 6, the act grants duty to "secure right to study and human right for student athlete" to the principal of the school. Not to turn it into a dead letter, idea conversion of the officers and strict supervision of government is needed.

2. Temperament Improvement and Security of Right of School Sports Manager (Sports Team Manager, Sports Tutor)

Qualification and training related law on common sports educator, based on national physical activity promotion law Article 11, is described in Article 22-24. It's also described in Article 9 (training and qualification approval of sports educator), rule on sports educator training and qualification approval (culture, sports and tourism law). However, the problem occurred because legislative system of overall policy on sports educator's qualification is authorized too inclusively to delegated legislation to presidential law or lower laws. Legislative deficiency is pointed due to lack of official regulations of reason for disqualification, cancelation of qualification, and stop of qualification.

[10]Ministry of Culture, Sports and Tourism, Ibid, p. 212.

[11]The National Human Rights Commission of the 2008 Survey of important human rights issues of our society about human rights issues in the field of sports violence and arrange the results were reported to the National Assembly. .About the educational rights of student athletes, violence and sexual abuse status, you can discover the shocking contents. For more information, see the National Human Rights Commission (SEO Hyeonsu), "the human rights situation of middle and high school student athletes and measures", Human Rights Vol. 53 (Nov.-Dec. 2008).

[12]KIM Sangkyuem, "Study on the human rights of student athletes and the educational (learning) rights of all student", Sports and Law Vol. 12 No. 1 (No. 18), pp. 23-25.

Besides, Korea Sports Massage Certificate Association, Korea Leisure and Recreation Association, and Korean Pork Dance Association are registered as nonofficial private qualification issue association to national nonofficial private certificate, and there are some other sports organizations over issue certificates.

Sports team educators and school sports club managers who are responsible for school sports should be aware of legal authority, and make it an obligatory on certain safety education and training, then gets certificate. When presenting a standard for qualification of the managers and tutors, the law should describe reason for disqualification, cancellation of qualification, and stop of qualification.[13]

Better treatment of school sports educator is also important. One of deteriorated conditions of school sports team manager can be low income system, which is way lower than city labor's average monthly income according to the payment the city and the state's education office, so recruitment of admirable professional educator is difficult. Leaving this deteriorated condition, and restriction only influences the educators, it's also difficult to get effectiveness. Moreover, competitiveness of elite sports will be weakened. Therefore, to strength sports competitiveness through working on the matters on school sports team and high records in international competitions, security of position and better treatment for educators should be achieved.

Surely, prerequisites are temperament improvement and professionalism of leaders. School Physical Education Promotion Association that will be established by this law will also make it a law to examine educating ability of the school sports team manager, and to approve it. At the association, the training program for the future educator's temperament improvement or re-education will improve competitiveness and will cultivate educational ability of the athletes as students athletes' educator.

3. Matter to Establish "School Sports Promotion Fund" *or "School Sports Promotion Foundation" for Normalization of School Sports*

Most importantly, revenue source is ought to be accomplished for normalization of school sports. A trillion and 550 hundred million is expected for school sports facility for school sports promotion, better improvement for school sports educators, activation of health and physical ability examination policy, and stationing professional sports tutors. School sports administration is under the education, science and technology department, but is also connected to culture, sports and tourism department, ministry of health and welfare and ministry of

[13]Detailed information about this, KIM Yongseop, "Problems and Improvement of the License of the Life Sports Instructors", Legal Policy of Sports for the realization of the welfare state (Proceedings of the International Conference 2006 Sports Law), 2006, pp. 185-209.

gender equality. We may also consider to establish <school sports policy discussion committee> under the prime minister as a chairman for the close cooperation and duty government between the ministries. Also, this may encounter some difficulties. The government and local self-government may use national sports promotion fund, youth growth fund or national health promotion fund for a period beside national budget to establish and activate national sports promotion, but it is expect to face difficulties due to difficult cooperation between the ministries. In the long run, the government should establish <school sports promotion fund> or <school sports promotion foundation> for an active participation

4. Rational Formation and Management of School Sports Promotion Committee

To examine important factors of school sports promotion, school sports promotion committee should be established and managed (Article 16). The central school sports promotion committee should be established under the ministry of education, science and technology, and the ministry of culture, sports and tourism, also in local self-governments. Of course, the composition and management of the committee are authorized to presidential law.

There is no current legal proof, but school sports promotion committee is established and managed now after enacting instruction of <school sports promotion committee management regulation> (language department instruction 51 in January 2nd, 2009, education department instruction 112, January 6th, 2009). To establish policies on activation of school sports and its effective propulsion, under prime minister of education, science and technology and prime minister of culture, sports and tourism, school sports promotion committee is consist of 25 commissioners including 1 chairman, 2 deputy chairmen. Commissioners are consist of those of director of education and welfare support in ministry of education, science and technology, and commissioner in director of sports in ministry of culture, sports and tourism, and with broad knowledge and experience on sports, such as school sports, daily sports and professional sports, nominated by ministers of both ministries (Article 3).

Based on currently formed foundation's experience of management, now the school sports promotion committee, based on school sports promotion act, should raise as a committee that can examine practically important school sports regulation and propose long and short political counterproposal. The committee should make it permanent and establish a office so both ministry can settle their interests and be substance. Under the committee, department committee and professional committee should be managed with the professionals with experience and knowledge through research and consultation.

5. Formation and Management Plan for School Sports Promotion Institute

The establishment of "the school sports promotion institute" is made as a law that manages continuous political research, program development and supply, development and management of student physical ability examination policy, and school sports manager training (Article 17). There's also a way to apply existing sports related educational·research department or organization, but since the need for establish and manage department with professionalism for promoting school sports occurred, it has made a law.

The most urgent matter is to secure budget for establishment of the institute. To perform various function such as research, education, training and program development, considerable scale of human, and material facilities are required.

6. School Sports Department Strengthening Matter On-Government

Now the department which is in charge of school sports related duty in the ministry of education, science and technology is "student health and safety department", and only 1 educational researcher who majored in physical education is responsible for all the massive amount of school sports administrative duties. Some department of sports politic in department of sports, the ministry of culture, sports and tourism do support school sports related duties, nevertheless, the human resource is way too lacked to propel various school sports projects. By establishing "executive office" that controls school sports promotion committee's administrative duty, two ministries can cooperate and settle duty and maintain independence.

The survey on whether the ministry of education, science, and technology should establish "school sports office" has a result that 25.2% of P.E educators answered "it's mandatory", and 51.9% of the respondents said "it will be better to have one if possible". [14]

7. Danger Prevention and Safety Matter Related to School Sports

The rule "law related on precaution and compensation of school safety accidents" will be applied related to the sports should be added. The object of this law does not include university, so the law should be reformed so that university will also be included. School safety accident compensation and insurance association's subject is city/state superintendent of education, therefore, if this

[14]LEE Jaeoh, "Survey report on problems for school sports & physical education", 2002 National Assembly Education Committee, 2002, p. 34.

law is reformed, the ministry of education, science and technology should also be included as project subject. On the other side, considering the higher danger of school sports activity comparing to other school activities, there is a need to deeply examine introducing responsible insurance policy.

8. Matter of Hours of Physical Education

Now in the 7th educational course process, the number of hours of P.E classes has decreased, and 2nd, 3rd years in high school even have choices on the subject. If such course process goes on, normalization of school P.E can be difficultly expected. To solve such problems, way to increase sports education subjects, make it essential subject, entrance to university to reflection of sports club activity to school grade should be provided. In addition, "education process" under the ministry of education, science and technology and "basic factor of university entrance type" under the ministry of Korea university education.[15]

Conclusion

We are now standing at the point where school sports promotion act is now legislated so that new vision is proposed and way to develop is being groped. There have been some problems on effectiveness side of administration because this school sports field's main departments were divided. Thankfully, the ministry of culture, sports and tourism and the ministry of education, science and technology are working on various detailed projects that are required, such as physical activities for student athletes and normal students and creation of facility and human resource. However, more effort to solve existing problems is needed to normalize school sports.

Along with right to study that is protected to student athlete, security of right to be educated physical sports for all students, and contribution to get rid of school violation is urgently required. School sports promotion act is expected to be a political key to solve current problems such as raising school sports team and sports specialist, education of teachers, obesity and low weight, and balanced growth development plan for students. The author would like to emphasize that the attitude of people who activate this act is more important than any, rationally and to be coincidence with the justice.

[15]CHOI Jungil, "The legal problems of The sports in school Act", Sports and Law, Vol. 12 No. 3 (No. 20), 2009, p. 100.

CONTRACTUAL STABILITY IN FOOTBALL: FIFA REGULATIONS, TAS/CAS ROLE AND JURISPRUDENCE**

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Abstract: *Contemporary football is caught between two very powerful concepts: the freedom of movement of players on one side and contractual stability on the other.*

FIFA, as the international governing body for football, attempts to provide a universal guideline on how to deal with contractual stability and international mobility. The Court of Arbitration for Sports (TAS/CAS) based in Lausanne - as judicial body of last instance within the world of football - had to decide upon several cases of unilateral breach of contract under the article 17 of the FIFA Regulations on the Status and Transfer of Players. Yet the sentences so far have still left some of the issues unclear mainly because both FIFA and CAS had to discover this rather new territory. The keyword "specificity of sport" has been abundantly used to justify some of the decisions made. It remains to be seen what further developments in the legal regulations will bring.

FIFA and TAS/CAS are generally of the opinion that contractual stability is crucial for the continuous functioning of the transfer system and, evidently in the cases we will consider, incorporate a far more complete calculation of the value of a player in the compensation fee.

In such a scenario, the present paper has the aim to analyze the most interesting case law on the matter, underlining the importance of a case-by-case approach since the uncertainty of the outcome encourages the respect of contracts and the stability in the game.

1. Contractual Stability

1.1. General outline

Contemporary football is caught between two very powerful concepts: the freedom of movement of players on one side and contractual stability on the other. The freedom of movement is the consequence of many social, cultural and political developments which have caused an increase in international mobility

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**Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public" (FIFA Circular Letter n.769).

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of players in the recent past. Professional footballers are rather "special" as their value to clubs goes far beyond comparison to that of regular workers. Naturally, clubs must finance the acquisition and maintenance of these "assets" as to compete in an industry which shows a very diverging trend between big and small.

FIFA, as the international governing body for football, attempts to provide a universal guideline on how to deal with contractual stability and international mobility. The Court of Arbitration for Sports (CAS) based in Lausanne had to decide upon several cases of unilateral breach of contract under the article 17 of the FIFA Regulations on the Status and Transfer of Players. Yet the sentences so far have still left some of the issues unclear mainly because both FIFA and CAS had to discover this rather new territory. The keyword "specificity of sport" has been abundantly used to justify some of the decisions made. It remains to be seen what further developments in the legal regulations will bring. The articles from 13 to 18 of the FIFA RSTP specifically regard a fundamental principle of the international sports legal order: contractual stability between clubs and footballers.

Firstly, Article 13, introducing the main rule, states that a contract between a professional and a club "*may only be terminated upon expiry of the term of the contract or by mutual agreement*".

Furthermore, the following 2 articles regard the possibility of an early termination with just cause or sporting just cause, as exceptions to art. 13.

1.2. Unilateral contract termination under art. 17 of FIFA RSTP

Article 17 deals with the consequences of terminating a contract without just cause (hence, completing the framework introduced by the aforementioned articles 13-16).

In all cases, the party in breach shall pay a compensation to be calculated ("*unless otherwise provided for in the contract*") with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club.

Furthermore, in case of breach during the protected period (i.e. "*a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional*"), sporting sanctions (4 months restriction on playing in official matches, 6 months in the case of aggravating

circumstances) shall also be imposed on the player in addition to the obligation to pay compensation.

FIFA Dispute Resolution Chamber (DRC) and CAS firmly and unanimously always established that Art. 17 of FIFA Regulations does not allow a club or a player to unilaterally terminate an employment agreement. The unilateral termination of an agreement between a player and a club without just cause or without "sporting just cause" is legally a breach of a contract. Any interpretation of Art. 17 that is inconsistent with such a principle, would result in a wrong application of the rule. Indeed, the EU accepted that "*certain restrictions on players mobility are justified in order to protect certain important features of sporting competition*" (José Luis Arnault, Independent European Sport Review, 2006).

2. The Role of CAS in Football Disputes

FIFA has the responsibility and the monopoly on any dispute connected to the matches it directly organizes and, consequently, it has the power to issue disciplinary sanctions to footballers, clubs and National Federations.

Any decision, enacted by FIFA justice bodies (both the Players' Status Committee and the Dispute Resolution Chamber - according to articles 23 and 24 of the RSTP), may be appealed before the CAS (article 62 of FIFA Statutes).

FIFA generally recognizes CAS to "*resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents*" (art. 62 FIFA Statutes). Furthermore, article 63 on jurisdiction of CAS, states that "*appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*".

At the same time, it is important to underline that "*recourse may only be made to CAS after all other internal channels have been exhausted*". However, CAS does not deal with appeals arising from: "*a) violations of the Laws of the Game; b) suspensions of up to four matches or up to three months (with the exception of doping decisions); c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognized under the rules of an Association or Confederation may be made*".

Moreover, in order to reinforce the authority of CAS, as a judicial body of last instance within the world of football, article 64 clearly states that "*the Confederations, Members and Leagues shall agree to recognize CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to licensed match and players' agents*".

In this regard, we have to mention the circular letter n.827/2002, in which FIFA recognized the jurisdiction of CAS, taking into account the failed experiment of the Arbitration Tribunal for Football (TAF). In fact, FIFA was *"convinced that the recognition of the jurisdiction of the CAS by the football family will create the basis required to ensure and preserve a clear and comprehensible legal and factual security in the world of football and that it will guarantee continuity and development in the spirit of FIFA"*.

Finally, FIFA recently enacted the circular letter n.1270 (July 2011), which draws the attention to some amendments made to the Disciplinary Code.

The most relevant one involves art. 64, stating that: "*the range of application of art. 64 of the FDC concerning the enforcement of decisions rendered by the Court of Arbitration for Sport (CAS) is now exclusively limited to those cases that had previously been dealt with by a body or a committee of FIFA*".

In other words, the amendment FIFA made on its Disciplinary Code implies that the only CAS decisions it will enforce are those which have been previously dealt with by FIFA.

At first glance, FIFA could have decided to increase its power on sporting disputes, as it is intuitive that from now on there could be arbitration awards of "first class" (those whose questions had been previously dealt by FIFA, or its decision-making bodies), and arbitration awards of "second class" (those whose questions had been previously dealt by each national federation or by the CAS Ordinary proceedings).

This most likely will have a significant impact on the use of arbitration clauses in contracts. In fact, without the possibility of enforcing a breach of a CAS award by applying to the FIFA Disciplinary Committee, the parties could decide to modify their agreements by the insertion of a "FIFA-clause" (plus an appeal to CAS) to ensure the enforceability of them.

3. The CAS Jurisprudence on Article 17 FIFA RSTP

Any dispute arising in international transfers of players will be dealt in accordance with the FIFA Regulations, disregarding any national laws and provisions of the involved players and clubs. If a dispute is settled at the CAS, this independent arbitrational body will as a final instance apply such Regulations and, additionally, the Swiss Law, never undermining the universal principles of law. Clubs and players must follow the aforementioned regulations to prevent any possible damage from a breach in their contractual relationship or in order not to suffer any unexpected losses due to an agreement which runs contrary to what is established by FIFA.

In this paragraph we will particularly focus on some relevant cases regarding

the application of the parameters settled by article 17 in order to calculate the compensation to be paid in case of termination of contract without just cause.

3.1. The case of Andrew Webster

One of the most influential cases in relation to the freedom of movement and contractual stability of football players after Bosman is the case of Andrew Webster. In March 2001, Heart of Midlothian and Webster signed an employment contract that was due to expire in June 2005. On July 31st 2003, two years before the expiry of the initial contract and following a renegotiation of its terms, the Scottish club and the player entered into a new employment contract, which provided for a term of four years until June 2007.

In accordance with article 17 of the FIFA Regulations, he unilaterally terminated his contract with the club and signed a three-year employment agreement with Wigan Athletic FC in August 2006. Heart of Midlothian was not paid any compensation upon the departure of the player. Webster became the first player to unilaterally terminate his contract under article 17, something which was to create considerable insecurity among clubs and players.

In November 2006, Hearts filed a claim with FIFA against Webster and Wigan claiming a compensation for breach of contract in the amount of about £5 million against the player and his new club as they were deemed jointly and severally liable for having induced the breach. The key issue to be defined in this leading case was whether the compensation fee should be based on an assessment of the loss suffered by player's former club or whether it should be limited to the residual value of the contract which essentially means the sum of player's salary payments until the hypothetical conclusion of the contract. For Heart of Midlothian, the compensation should be measured by the cost of replacing Webster with a player of similar age, ability and experience or, alternatively, the loss of opportunity to receive a transfer fee. On the other hand, Wigan Athletic and the player advanced the view that the compensation should be limited to the residual value of the contract. Anything else would be an unlawful restriction on the right of free movement as established by the European Union Treaty.

The DRC, determining the amount of the compensation, settled that Webster had to pay £625.000 to Hearts due to the unilateral breach of contract and, furthermore, the player was disqualified for 2 weeks. All the parties decided, then, to appeal this decision to the CAS, which established its invalidity because DRC did not specify clearly either procedure or criteria used in its ruling.

The Panel stated that the compensation should be limited to the residual value of the contract primarily because any higher compensation would impose heavy restrictions on the free movement of players similar to the pre-Bosman era. The compensation fee to be paid by Webster and his former club was only £150.000.

Therefore, the CAS established that, in case of both an unilateral breach of contract by a player after the so-called protected period and the absence of a termination clause in the agreement, the only way to properly quantify the compensation was to refer to remaining amount of terminated contract.

3.2. The case of Matuzalem

Another recent decision regarding the compensation of breach of contract was taken in the case of the player Matuzalem. This award has been considered as the anti-Webster as it provides for a substantial compensation to be paid to player's former club Shakhtar Donetsk. In any respect, it sets out a new precedent for any future litigation over contractual breach under article 17 and the criteria used to arrive at a compensation fee.

The Brazilian player Matuzalem signed a five-year employment contract with the Ukranian club Shakthar Donetsk in 2004. After three years of contract, the player breached his contract without just cause and signed a new agreement with the Spanish club Real Zaragoza SAD.

The former club claimed that the compensation for breach of contract should be fixed in €25 million as established by the buy-out clause inserted into Matuzalem's contract (stating that "*in case the*

club receives a transfer offer in an amount of €25 million or more the club undertakes to arrange the transfer within the agreed period").

FIFA DRC decided that the €25 million referred to in the contract was not an agreement between the parties and that compensation should be €25 million in the event of termination.

Assessing the compensation payable in accordance with Art. 17, DRC decided that amount should have been set at €6.8 million.

This sum comprised unamortized acquisition costs - €3.2 million, residual value of the playing contract - €2.4 million, plus €1.2 million in lieu of the "sporting and commercial losses" arising from the particular circumstances of the player's breach of contract. Then, both parties appealed to CAS, which stated that the correct amount was €11.2 million. Article 17 is intended to maintain contractual stability. Termination under this provision whether in or outside the so-called protected period is a "serious violation", which has to be properly compensated by an assessment of the true loss to the former club.

This compensation will be assessed on the facts of each case, considering what is necessary to put the club in the position it would have been in, if the contract had not been terminated. This sum was not calculated by simply considering residual value and unamortized acquisition costs. Rather, CAS considered all the factors that indicate a player's value to a club, including that Italian club SS Lazio agreed to pay Real Zaragoza between €13-15 million and to give the

player a salary from €1.8 to 2.5 million, during the period that Matuzalem would have been with Shakhtar if he had not terminated his contract. From this, CAS deducted the amount of salary that Shakhtar saved.

The specificity of sport requires that awards are legally correct but also reflect the special circumstances of employment within the sport of football. Also the timing of Matuzalem's move (a few weeks before the start of UEFA Champions League qualification, after a season where he had captained the team) impacted on the amount of the award.

Finally, on 30 March 2012, the Swiss Supreme Court upheld the claim of the player against the threat of FIFA to suspend him from any activity until the payment of the amount for the breach to Shakhtar Donetsk. In fact, the Court deemed that such a possibility represented an unlawful conduct, clearly in violation of his rights. However, the player is still condemned to pay the compensation, as well as an interest rate of 5%.

3.3. The case of Morgan De Sanctis

The case of De Sanctis is the third major case dealing with art. 17 RSTP and the compensation payable for breach of contract. The Italian goalkeeper, currently playing for S.S. Napoli, breached his contract with Udinese outside the protected period and joined Spanish club Valencia in 2007, paying an indemnity lower than player's market value. Therefore, the Italian club recourse to FIFA DRC asking for a compensation of around €23 million, but the Panel valued the damages flowing from the breach of contract at €3.9 million. Consequently, the parties lodged an appeal with the CAS, claiming the club to be rewarded of player's market value (in accordance with Matuzalem award), while the player only wanted to pay the return of the missing salary (in accordance with Webster award). According to CAS, the DRC failed to sufficiently explain the reasoning behind its decision ("*there is no written reasoning behind the DRC's key decision*"). CAS, then, decided to take into account broad parameters for its own award and calculated the compensation taking into account the replacement costs of the player and the savings made for the unpaid salary. Furthermore, regarding the specificity of sport, CAS awarded to Udinese an additional compensation equivalent to 6 monthly salaries: therefore, the total amount due to the former club was €2.25 million.

Conclusion

This case shows that all breaches of contract falling within the scope of Article 17 of the RSTP must be dealt with on a case by case basis, whereby the outcome is dependent on the factual circumstances, the claims and the proof

brought forward. Further, the uncertainty of outcome in any individual case encourages respect of contracts and stability in the game.

FIFA and CAS are of the opinion that contractual stability is crucial for the continuous functioning of the transfer system and, evidently in the cases considered, incorporate a far more complete calculation of the value of a player in the compensation fee.

A general opinion is that article 17 will lead to case-by-case jurisprudence and that the facts of each situation are going to be of maximum importance. Therefore, a similar situation like the one Bosman, which was treated as *erga omnes*, cannot be expected but, instead much more *ad hoc* decisions.

‘TECHNO-DOPING’ – LEGAL ISSUES CONCERNING A NEBULOUS AND CONTROVERSIAL PHENOMENON

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Introduction

So-called techno-doping is one of the most exciting and topical subjects in sports law worldwide: ‘Techno-doping’ was the main topic of the congress of the German Association of Sports Law at the beginning of October 2012.

The discussion which took place there demonstrated that the term ‘techno-doping’ is not very clearly defined and must be linked to the aims which it seeks to achieve, in particular, those of equal opportunities and fairness in sport. In that discussion, I favoured a broad definition (see I.), bearing in mind that sporting performance is the result of various different factors which form a complete system. Proceeding from this broad definition, it is then up to the federations to prohibit specific measures, methods and equipment in order to achieve equal opportunities and fairness (see II.).

With regard to this general approach, I would like to refer to the ‘classic cases’ of Casey Martin and Oscar Pistorius. These cases highlight the general problems relating to disability in sports (see III.).

To give an initial introduction to the topic, I refer to the 200-meter final of the Paralympics in London this summer and some photographs showing the ‘catapult shoe’ used by the Soviet high-jumper, Yuriy Stepanov, Casey Martin with his golf cart and ‘jump weights’ used by a Spartan competitor (Akmatidas) in the Olympics (ca. 550–525 B.C.).

I. Definition

As already mentioned, a precise definition of ‘techno-doping’ is very difficult to arrive at, as sporting performance depends on a complete system which encompasses the physical and mental abilities of the athlete, the equipment and apparatus and the training opportunities. In this context, it should be mentioned that athletes with disabilities, whose use of technical apparatus in order to participate in their respective sports is legitimate, are sensitive to being linked to doping, which is clearly forbidden.

In order to provide an impression of the broad scope of the phenomenon of ‘techno-doping’, I would like to draw attention to the following *scenarios*:

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(1) Body enhancement by means of surgery (e.g., breast reduction, the strengthening of sinews and ligaments by means of bodily tissues and artificial tissues, implants and amputations);

(2) The supplementation of missing body parts, or of body parts which do not function well (e.g., Oscar Pistorius' blades; more generally, prosthetics and orthotics, glasses for participants in shooting);

(3) Additional equipment to balance any physical and/or mental deficits (e.g., Casey Martin's golf cart; more generally: wheelchairs);

(4) Equipment (e.g., Stepanov's catapult shoes; full-body swimsuits; suits used in ski-jumping);

(5) Sporting apparatus (e.g., technical developments with regard to bicycles, bobsleighs and rowing boats; software in Formula One cars);

(6) Training methods and possibilities (e.g., wind tunnels, low pressure chamber, training with a new artificial knee);

(7) Competition (e.g., adjudicative technology, such as Hawk Eye and video recordings).

Irrespective of the criticism with which the term 'techno-doping' is generally met, in my view it is helpful to have regard to the classical definition of 'doping' in order to arrive at the decision as to what is permissible, and what is not. In doing so, one must consider the three classic grounds, upon which doping is forbidden: the avoidance of an unfair advantage in competition, the protection of the health and bodily integrity of the athlete and his competitors, and, finally, the reputation of the particular sport.[1]

Regarding the seven scenarios mentioned above, it is instructive to apply these three grounds which lead to the prohibition of doping, however, in order to avoid misunderstandings and regulatory loopholes, I would suggest replacing the term 'techno-doping' with 'forbidden measures and methods'. This definition would include technical measures which are suited to creating unfair advantages in competition, to endangering the health and bodily integrity of the athletes, and/or damaging the reputation of the sporting discipline and the organisations representing it. This definition allows us to comply with the principle of fairness, which requires differentiation without discrimination.[2]

[1]See e.g. *K. Vieweg,* The Appeal of Sports Law, www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf, p. 39 (accessed on December 18, 2012).

[2]See e.g. *K. Vieweg,* Bans on Discrimination and Duties to Differentiate in the German Law of Sports Organizations, in: The International Sports Law Journal 2006, p. 96 et seqq.

II. **Competence to rule on 'techno-doping' cases**

The matter of competence to rule on 'techno-doping' cases can be regarded as a new aspect of the well-known problem in sports law of the autonomy of associations and federations and its limits. To this extent, I can confine myself to saying that, primarily, the federations and associations have the right to set and enact norms in order to regulate their sports. Accordingly, they can define 'techno-doping' and can rule on specific cases. However, such decisions may be subject to judicial review by courts of law and courts of arbitration. Consequently, the IAAF (International Association of Athletics Federations) had the right to forbid Stepanov's catapult shoes and the FIS (Federation Internationale de Ski) was entitled to allow the 'skating style' in cross-country skiing.

The matter of the obligation of the sporting associations and federations to regulate and to decide is much more complicated. In an earlier work of mine, I concluded as follows: "Uncertainty, loopholes and, partly, the complete absence of provisions is widespread among sporting associations and federations. This is based on various grounds: apart from the pragmatic considerations of ensuring that charters and by-laws are as brief as possible, two additional aspects are also significant. These are a lack of consciousness of the conflicts, and the aim of the associations and federations not to limit their own ability to act by means of self-binding regulations. The lack and uncertainty of regulations lead to two questions: First, do the associations and federations have a duty to create regulations which are sufficiently clear in order to be applied by the competent organs of the associations and federations, as well as a basis for the decisions of the members? Secondly, is there an obligation on the part of the associations and federations to reach decisions if their rules and regulations do not expressly mention such decisions? What is the legal basis, what are the conditions, and what are the objects of such duties to regulate and to decide?"[3] In my view, there exists a duty of the associations and federations to support their members. Consequently, there is a duty on the part of the associations and federations to make clear rules and regulations, and to apply them consistently.[4] Regarding forbidden measures and methods, I would like to refer to my lecture at the conference of the German Sports Law Association which took place in October 2012.[5]

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[3] *K. Vieweg,* Normsetzung und -anwendung deutscher und internationaler Verbände, Berlin 1990, p. 143 et seqq.

[4] *K. Vieweg,* ibid., p. 244 et seqq.; The Appeal of Sports Law http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf, p. 7 et seqq, accessed on 28.11.2012.

[5] *K. Vieweg,* 'Techno-Doping' – Regelungs- und Durchsetzungsmöglichkeiten der Sportverbände, in: K. Vieweg (ed.), 'Techno-Doping', Stuttgart 2013 (in print).

In addition, a further problem should be mentioned – it is not enough to formulate and apply rules and regulations. It is also necessary to ensure, by means of checks, that athletes comply with these rules and regulations. For example, it is imperative that, in the Paralympics in the sprint competitions, only permitted blades are used.[6] Another example is the control of the thickness of the underwear worn by ski-jumpers, taking into account that the International Ski Federation (FIS) requires a maximum thickness of 3 mm.[7]

III. **The cases of Casey Martin and Oscar Pistorius as examples of disability in sports**

Traditionally, the set of problems relating to 'techno-doping' are associated with two well-known cases: that of Casey Martin, and that of Oscar Pistorius. Both cases were of global significance, dealing, as they did, with the problem of discrimination against disabled athletes. At this juncture, I would like to cite the relevant part of the contribution made by Saskia Lettmaier and myself to the Handbook on International Sports Law, edited by James A.R. Nafziger and Stephen F. Ross.[8] There, we wrote:

The principle of equal opportunities in sports led to a distinction between the able-bodied, on the one hand, and handicapped persons, on the other. In time, the concept of competition gained acceptance in disabled sports and caused the evolution of new types of competition (e.g. wheelchair-basketball) as well as the definition of disability categories. At an international level, certain competitions are pointing the way to the future – in particular, the Paralympics which have been taking place since 1992. Some spectacular cases (Casey Martin, Oscar Pistorius) have drawn the attention of sports law to this difficulty. These cases will be examined in more detail below. In particular, problems relate to the participation of handicapped persons using technological aids in able-bodied competitions (see 1.); the exclusion of athletes because of a risk of self-injury (see 2.); the participation of the able-bodied in contests for the disabled (see 3.); and the classification of disabled sports by type and degree of disability (see 4.).

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[6]As to the conflict between H. Popow and W. Czyz, see Frankfurter Allgemeine Zeitung (September 8, 2012), p. 28.

[7]FIS Changes to the Specifications for Competition Equipment Ski Jumping 2012, No. 4.3.

[8]*K. Vieweg/S. Lettmaier*, Anti-discrimination law and policy, in: J. Nafziger/S. Ross (eds.), Handbook on International Sports Law, Cheltenham, UK/Northampton, MA, USA, 2011, p. 258 (271 et seqq.).

1. Ensuring access through special accommodations

Until relatively recently, there had been little litigation involving persons with disabilities and sports. The most highly publicized case on the issue arose in 2001, when Casey Martin, a professional golfer afflicted with Klippel-Trenaunay-Weber syndrome, a degenerative circulatory disorder that obstructs the flow of blood from Martin's right leg back to his heart, fought all the way to the United States Supreme Court to obtain a reasonable accommodation for his disability in the form of the use of a golf cart in professional golf tournaments.[9] The *Martin* case marked the first stage in a growing controversy surrounding the integration of disabled athletes into mainstream competitive athletics. Most recently, the focus of this debate has been on the South African sprinter Oscar Pistorius, who was aiming to run at the Beijing Olympics in the summer of 2008, either in the 200 meter or the 400 meter or as a member of the South African relay team, despite the fact that – born without fibula bones – he had had both legs amputated below the knee before his first birthday.[10] The question was whether Oscar Pistorius should be allowed to compete in the Olympics using a pair of J-shaped carbon fiber blades known as 'Cheetahs' attached to his legs.[11]

Requests like those by Martin and Pistorius – for special accommodations or a change in the rules of the game on account of their physical shortcomings – present the tension between equality and the competitive ethos of sport in unusually stark relief. Thus, one might argue that the very idea of special accommodations is inappropriate for sports competitions because these competitions, by their very nature, are intended to identify and reward the very best. As Justice Scalia of the United States Supreme Court remarked in his forceful *Martin* dissent:

[T]he very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers – and artificially to 'even out' that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game.[12]

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[9] *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661 (2001). For an in-depth discussion, see *S. Zinger*, Diskriminierungsverbote und Sportautonomie, Berlin 2003, p. 192 et seq.

[10] Pistorius was the gold medalist in the 200 meter as well as the bronze medalist in the 100 meter at the 2004 Summer Paralympics in Athens. In addition, he is the double amputee world record-holder in the 100-, 200- and 400-meter events. See, e.g., *P. Charlish/S. Riley* (2008), 'Should Oscar Run?', 18 Fordham Intell. Prop., Media and Ent. L.J. 929.

[11] *M. Pryor,* 'Oscar Pistorius is Put through his Paces to Justify his Right to Run', The Times (London) (November 20, 2007), available at www.timesonline.co.uk/tol/sport/more_sport/athletics/article2903673.ece (last accessed October 24, 2009).

[12] *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 703-04 (2001) (emphasis in original). Justice Thomas joined in the dissent.

However, unlike in the sex discrimination context, where, as we saw above, a separate-but-equal model still seems to represent the dominant approach, one of the key principles of anti-disability discrimination law is the concept of mainstreaming. The policy is that individuals with disabilities should be allowed to participate in programs in the least restrictive environment.[13] Thus, the main anti-disability discrimination statute in the United States – the Americans with Disabilities Act (ADA) of 1990[14] – requires that 'reasonable modifications' be made for a qualified person with a disability.[15] The relevant legislation in England and Wales is similar. Under the Disability Discrimination Act (DDA) 1995, as amended in 2005,[16] a duty exists to make reasonable adjustments to accommodate the disabled individual to whom the act may apply.[17] In fact, a positive duty to make reasonable accommodation for disabled persons exists throughout the European Union: Article 5 of Council Directive 2000/78/EC, which is binding on Member States as to the object to be achieved, provides that in order 'to guarantee … equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided … unless such measures would impose a disproportionate burden on the employer.'[18]

Once it has been determined that the relevant anti-disability discrimination provision is in principle applicable – and, as we saw above, there may be some difficulty in enforcing the legislation against private entities[19] – much will de-

[13]See, e.g., the provisions of the Americans with Disabilities Act, 42 U.S.C.A. § 12182(b)(1)(B) ('accommodations shall be afforded to an individual with a disability in the most integrated setting') and (C) ('Notwithstanding the existence of separate … programs … an individual with a disability shall not be denied the opportunity to participate in such programs … that are not separate').

[14]42 U.S.C.A. §§ 12101–213. The ADA expanded upon the provisions of the Federal Rehabilitation Act (RA) of 1973, 29 U.S.C.A. §§701–96, which was limited to the federal government, its contractors and grantees. The ADA prohibits discrimination against people with disabilities by employers (Title I), public entities (Title II), and privately owned businesses and services that provide public accommodations (Title III).

[15]42 U.S.C.A. § 12182(b)(2)(A)(ii) and (iii).

[16]Public Acts 1995 c. 50.

[17]See, e.g., Part III (Discrimination in Other Areas) s. 21.

[18]Official Journal L 303, 02/12/2000 P. 0016–0022.

[19]See section II.(a)(3) supra. The Supreme Court expressly considered the reach of the ADA in *PGA Tour, Inc.* v. *Martin*. The PGA is a private tour that does not employ professional golfers and receives no funds from the state or federal governments. It argued that it was a public accommodation only with respect to the spectators, not the competitors. The Supreme Court agreed with the lower courts that the tournaments held by the PGA were, in fact, public accommodations for the competitors as well as the spectators, making Title III of the Act applicable (532 U.S. 661, 678–80). The case sends the broader message that courts should construe the ADA's coverage liberally. It is likely that only a few events, held at legitimately private clubs that own their own facilities, will avoid ADA coverage.

pend on the reach of the statute's exempting provisions, i.e. on the recognized limits to integration. Broadly speaking, defenses to a claim of disability discrimination in the sports context can arise in two kinds of case.

a) Fundamental alterations

In *PGA Tour, Inc.* v. *Martin*, a case which continues to define the legal issues surrounding disability and mainstreaming in sports, the PGA Tour did not actually dispute that Martin had a disability for which the use of a golf cart was both a reasonable and a necessary accommodation. Rather, it defended its actions based on the language of § 12182(b)(2)(A)(ii) of the ADA, which provides an exemption from the modification requirement if 'the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities … or accommodations.' The case was then argued on the basis of whether waiving the PGA Tour rule requiring golfers to walk the course without the use of a cart in Martin's case would fundamentally alter the nature of the PGA Tour event.

The United States Supreme Court held that there were two ways in which a rule change might fundamentally alter the activity in question: by changing 'such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally', or by giving the disabled person not only equal access but 'an advantage' over other competitors.[20] As regards the first part of the inquiry, the Court concluded that allowing the use of a cart would not change an essential aspect of the game of golf because 'the essence of the game has been shot-making.'[21] The court also noted that the ban on carts is not required by golf's general rules and that carts are indeed strongly encouraged in much of golf.[22] By contrast, allowing a wheelchair user to return the ball after its second bounce in racquetball has been held to alter such an essential aspect of the game that it would be unacceptable even if the modification affected all competitors equally. The Supreme Judicial Court of Massachusetts reasoned that the essence of the game of racquetball, as expressly articulated in the official rules, was the hitting of a moving ball before the second bounce and that giving a wheelchair player two bounces and a footed player one bounce in head-to-head competition would create a new game, calling for new strategies, positioning, and movement of players.[23] The second leg of the Supreme Court's inquiry in *Martin* con-

[20] 532 U.S. 661, 682.

[21] *Ibid.* 683.

[22] *Ibid.* 685–6. Even the PGA does not ban carts in some of its tours.

[23] *Kuketz* v. *Petronelli*, 433 Mass. 355, 821 N.E.2d 473 (2005).

cerned whether the modification in question – the use of a cart – would give Martin a competitive advantage. The court held that the ADA required the PGA to make an individualized assessment of Martin's claim. Relying on the trial court's findings that Martin 'easily endures greater fatigue even with a cart than his able-bodied competitors do by walking'[24], the court found that using a cart did not give Martin an advantage and that it was the PGA's duty under the ADA to provide him with one.

While *Martin* opened the door for suits by athletes seeking accommodations or rule modifications for their disabilities, it does not make every modifications suit a winner. The more recent Pistorius controversy is illustrative in this regard. Pistorius' bid for entry into the 2008 Summer Olympic Games ran up against a March 2007 amendment to its competition rules by the IAAF.[25] The amendment banned the 'use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device'[26]. Undoubtedly, the artificial limbs used by Pistorius were technical devices, and, equally undoubtedly, they afforded Pistorius a performance advantage over and above anything he could have achieved without such limbs. The crucial question, however, was whether the artificial limbs overshot their (permissible) aim of compensating for Pistorius' lack of lower legs and instead constituted an (impermissible) enhancement – what some have called 'techno-doping'[27]. A 2007 study conducted by German professor Gert-Peter Brüggemann for the IAAF found that Pistorius' limbs used 25% less energy than able-bodied runners to run at the same speed and that they led to less vertical motion combined with 30% less mechanical work for lifting the body.[28] Brüggemann concluded that Pistorius had considerable advantages over athletes without prosthetic limbs.[29] Based on these findings, the IAAF ruled Pistorius'

[24]*Ibid.* 690 (quoting *Martin* v. *PGA Tour, Inc.*, 994 F.Supp. 1242, 1252 (D. Or. 1998)).

[25]Some have suggested that this rule was introduced specifically to deal with the threat posed by Pistorius, an allegation vehemently denied by IAAF council member Robert Hersh. *Charlish/Riley*, note 10 supra, 930.

[26]IAAF Competition Rule 144.2(e) (2008).

[27]For the term, *J. Longman*, 'An Amputee Sprinter: Is He Disabled or Too-Abled?', The New York Times (May 15, 2007), available at www.nytimes.com/2007/05/15/sports/othersports/15runner.html?_r=1&oref=slogin (last accessed October 24, 2009).

[28]For further information, *G.-P. Brüggemann, A. Arampatzis, F. Emrich*, *et al.* (2008), 'Biomechanics of Double Transtibial Amputee Sprinting Using Dedicated Sprinting Prostheses', Sports Technology 1 (2008), No. 4–5, 220, 226 et seq.; 'Blade Runner Handed Olympic Ban', BBC Sport (January 14, 2008), available at http://news.bbc.co.uk/sport2/hi/olympics/athletics/7141302.stm (last accessed October 24, 2009).

[29]'Studie beendet Olympiatraum von Pistorius', Welt Online (December 19, 2007), available at www.welt.de/welt_print/article1475643/Studie_beendet_Olympiatraum_von_Pistorius.html (last accessed October 24, 2009).

prostheses ineligible for use in competitions conducted under the IAAF rules, including the 2008 Summer Olympics.[30]

In May 2008, however, the Court of Arbitration for Sport (CAS) reversed the ban, clearing the way for Pistorius to pursue his dream, although the athlete ultimately failed to qualify for the Olympics. A major component of the court's decision was that there was insufficient evidence that the prosthetics provided an *overall* advantage to Pistorius when their disadvantages were taken into account.[31] In other words, the court held that what mattered was the whole package of benefit and detriment over the entire course of the race – the net status of performance – rather than the impact of the prosthetic limbs in isolation.[32] For instance, while Pistorius' prosthetics may return more impact energy than the human foot, as the Brüggemann study found,[33] this benefit might be offset by their also causing slower starts,[34] being ill adapted to rainy and windy conditions, and difficult to handle in navigating bends. Similarly, just as Pistorius has the advantage of suffering no fatigue in his legs below his knees, so also is he subject to the disadvantage of only being able to produce propulsive effects via muscles above his knees.[35]

Of course, the net effect of technical aids on a disabled athlete's overall performance must be difficult, if not impossible, to quantify accurately (and any attempt to do so is bound to have significant resource implications[36]). One suspects

[30]'IAAF Call Time on Oscar Pistorius' Dream', The Daily Telegraph (January 10, 2008), available at www.telegraph.co.uk/sport/othersports/athletics/2288489/IAAF-call-time-on-Oscar-Pistorius-dream.html (last accessed October 24, 2009).

[31]The evidential burden of proving the 'advantage' in terms of IAAF rule 144.2.(e) is on the sports association which imposed the suspension. The applicable standard the association must apply to prove that the user of the prosthesis has an overall net advantage over other athletes not using such devices is the 'balance of probability'; CAS 2008/A/1480, *Pistorius* v. *IAAF*, para. 92.

[32]The IAAF did not ask Professor Brüggemann to determine whether the use of the prosthesis provides an overall net advantage or disadvantage. CAS 2008/A/1480, *Pistorius* v. *IAAF*, paras. 85, 93 = Sp*u*Rt 2008, 152, 154. The only purpose of the determination was the question whether Pistorius' use of the prosthesis provided him with any kind of advantage.

[33]'Studie beendet Olympiatraum von Pistorius', Welt Online (December 19, 2007), available at www.welt.de/welt_print/article1475643/Studie_beendet_Olympiatraum_von_Pistorius.html (last accessed October 24, 2009).

[34]Observing Pistorius' run, one can see that he was slower than other able-bodied runners off the starting blocks and during the acceleration phase, but faster during the second and third 100 meter; CAS 2008/A/1480, *Pistorius* v. *IAAF*, 41= Sp*u*Rt *2008*, 152, 153.

[35]*Charlish/Riley*, note 10 supra, 936. Another advantage the use of a prosthesis may provide is the mental impact on the other athletes who have to start next to an amputee. It is an open question whether this is the case and whether a possible psychological obstacle of the able-bodied athletes may be considered given the non-discrimination rule.

[36]The tests conducted on Pistorius cost in the range of €30 000. See *Charlish/Riley*, note 10 supra,

that one reason why *Martin* has not set off a barrage of suits by disabled athletes seeking an accommodation to participate in mainstream sports[37] is that, because of the ethos of competition, most disabled athletes do not want, or accept, any actual or perceived favors. To receive or to be suspected of receiving special aid devalues the athletic achievement. As Pistorius told reporters, 'If they [the IAAF] ever found evidence that I was gaining an advantage, then I would stop running because I would not want to compete at a top level if I knew I had an unfair advantage.'[38]

What if the tests carried out on Pistorius had been conclusive that the prosthetic limbs did in fact go further than merely redressing his overall performance balance? Indeed, in some cases, it might not be possible to accommodate a disabled athlete without at the same time improving his situation beyond that of the average competitor. This need not necessarily preclude participation. One solution to the dilemma might be to impose a scoring handicap equivalent to the (illicit) advantage on the athlete concerned.[39] Sports have developed a sophisticated machinery to set various forms of handicaps: occasionally, better competitors are physically hindered;[40] in team sports, weaker teams are sometimes given special advantages;[41] and in a few sports, the actual scoring is adjusted to help inferior competitors.[42] Perhaps we should consider using these various handicapping methods to further the integration of disabled athletes into mainstream sports.

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939. If funding such tests is left to the individual athlete, challenges are unlikely to be brought. If sports governing bodies are left to pick up the tab, on the other hand, the financial burden on these might also be immense. The respective sports association should, however, regulate the process by which a disabled sportsperson who uses a prosthetic can take part in competitions for able-bodied sportspeople in a way that guarantees safety and saves money. Thus, the sports association should compile a list of all institutions to be considered in the necessary studies, enumerate all factors to be investigated, and set out the procedure to be followed in the event that a disabled sportsperson makes an administrative appeal. *A. Chappel* (2008), 'Running Down a Dream: Oscar Pistorius, Prosthetic Devices, and the Unknown Future of Athletes with Disabilities in the Olympic Games', 10 NC JOLT On line Ed. 1, 16, 26.

[37]On the limited impact of *Martin* in terms of similar cases brought, *H.T. Greely* (2004), 'Disabilities, Enhancements, and the Meanings of Sports', 15 Stan. L. & Pol'y Rev. 99, 111.

[38]'Pistorius Is No Novelty Sprinter', The Daily Telegraph (Sport) (July 11, 2007), available at www.telegraph.co.uk/sport/othersports/athletics/2316794/pistorius-is-no-novelty-sprinter.html (last accessed October 24, 2009).

[39]For a similar proposal see *Greely,* note 37 supra, 122 et seq.

[40]In most thoroughbred horseracing, e.g., weight is added to some of the horses to balance out the different weights of the jockeys.

[41]In many professional leagues in the United States, the worst teams get the first choice of players who enter the draft, presumably allowing them to equalize ability in the league over time.

[42]Amateur golf and bowling, e.g., give special scoring advantages to weaker competitors based on their previous results.

b) Risk of injury to others

Allowing a disabled individual to compete with the help of an accommodation may present substantial injury problems with other competitors. For instance, if Pistorius had qualified for the Olympics and been allowed to run in the main pack of the race, his running blades might have posed a safety hazard for fellow athletes.[43] Under the ADA, the employment qualification standards under Title I may include 'a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace'[44], while Title III declares that public accommodations are not obliged 'to permit an individual to participate … where such individual poses a direct threat to the health and safety of others … that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services'[45]. In *Badgett* v. *Alabama High School Athletic Ass'n*,[46] Mallerie Badgett, a minor wheelchair-bound track-and-field athlete with cerebral palsy, brought a claim against the Alabama High School Athletic Association (AHSAA) under the ADA because she wished to compete in the able-bodied track-and-field competition. The court denied her claim, finding that the AHSAA had made reasonable modifications by establishing a separate wheelchair division. The court held that in deciding what was reasonable both competitive and safety considerations had to be taken into account and that there were legitimate safety concerns about having able-bodied and wheelchair-bound athletes compete in mixed heats.

2. Excluding athletes because of a risk of self-injury

Quite apart from the question of whether there is a duty to ensure access for disabled individuals through special accommodations, there is the issue of whether a disabled athlete can be excluded on the (paternalistic) ground that participation carries a high risk of self-injury.[47] An example is the person who has

[43]IAAF general secretary Pierre Weiss in fact voiced this concern, expressing a wish that the South African Olympic Committee not select Pistorius for its relay team 'for reasons of safety'. See 'Relay Safety Fears Over Pistorius', BBC Sport (July 15, 2008), available at http://news-bbc.co.uk/sport2/hi/olympics/athletics/7508399.stm (last accessed October 25, 2009). The CAS did not, however, address the question whether the use of prosthetics could lead to an increased risk of stumbling, thereby creating a greater risk of injuring other athletes.

[44]42 U.S.C.A. § 12113(b).

[45]42 U.S.C.A. § 12182(b)(3).

[46]2007 WL 2461928 (N.D. Ala. May 3, 2007).

[47]For discussion, see *Paul M. Anderson*, Sports Law: A Desktop Handbook, Milwaukee, WI, USA 1999, p. 52 et seq. and *S. Zinger*, Gleichbehandlung im Sport – Unter besonderer Berücksichtigung US-amerikanischer Rechtsprechung, in: K. Vieweg (ed.), Spektrum des Sportrechts, Berlin 2003, p. 1, 13 et seq.

only one kidney but still wants to participate in a contact sport such as interscholastic wrestling.[48] In the United States, the focus of the inquiry is on whether the disabled athlete is an otherwise 'qualified individual'[49], i.e. whether he is able to meet all of the program's requirements in spite of his handicap.[50]

In *Pahulu* v. *University of Kansas*,[51] the plaintiff was injured during football practice and later diagnosed with a very narrow cervical canal, leading team doctors to believe that he was at very high risk of serious neurological injury. As a result, Pahulu was suspended from football. He sued, claiming the university discriminated against him by disqualifying him only on account of his disability. The court denied Pahulu's injunction, holding that he failed to meet the 'otherwise qualified' standard because he did not fulfill the team's medical requirements. The court found that the team doctors' risk assessment provided a reasonable and rational basis for the disqualification, precluding further judicial scrutiny.[52]

Where a disabled athlete is aware of and willing to incur the dangers involved in continued athletic participation, allowing a third party to interpose its 'benevolent paternalism'[53], as the *Pahulu* court did, requires some strong justification. Citing a sport organization's 'inherent right to protect an athlete's health'[54] – from himself (!) – should not be regarded as sufficient as this amounts to justifying paternalism for paternalism's sake. Whether protecting the organization's reputation, which might be tarnished by a competitor being severely injured or killed in competition,[55] or averting a liability risk should trump the athlete's

[48]*Poole* v. *South Plainfield Bd. of Ed.*, 490 F.Supp. 948 (D.C.N.J. 1980).

[49]Many of the cases predated the ADA and were decided under § 504 of the Rehabilitation Act of 1973 (RA), which prohibits discrimination against 'otherwise qualified' individuals, in federally funded programs, solely because of their handicap (29 U.S.C. § 794).

[50]*Southeastern Community College* v. *Davis*, 442 U.S. 397, 398 (1979).

[51]897 F.Supp. 1387 (D. Kansas 1995).

[52]*Ibid.* 1394. For a similar decision, see *Knapp* v. *Northeastern University*, 101 F.3d 473 (7th Cir. 1996) (holding that requiring medical qualification did not violate the RA, provided the school had significant medical evidence indicating a serious risk of injury). For a decision that went in the opposite direction, see *Poole* v. *South Plain Field Bd. of Ed.*, 490 F.Supp. 948 (D.C.N.J. 1980) (holding school had neither duty nor right under RA to exclude student who knew of dangers and – with parents' consent – still chose to compete).

[53]For this term, see *B.P. Tucker* (1996), 'Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students', 23 J.C. & U.L. 1, 33.

[54]For this argument, see *M.J. Mitten* (1998), Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics, 8 Marq. Sports L.J. 189, 192.

[55]*Knapp* v. *Northwestern University*, 942 F.Supp. 1191, 1199 (N.D. Ill. 1996); *Mitten*, note 54 supra, 192.

right to decide is questionable, especially where the athlete is prepared to sign a waiver that would release the organization from all liability.[56] While paternalism might be appropriate in amateur, in particular in high school and collegiate sports (where the persons protected are usually minors), it seems very hard to justify in the case of *professional* (adult) athletics. Where a competent athlete's livelihood is threatened if made to abstain from sports participation, his right to decide what is in his own best interests should be regarded as paramount.[57]

3. Participation of the able-bodied in competitions for the disabled

Another facet to the participation problem presents itself where able-bodied athletes wish to take part in competitions for the disabled. In wheelchair-basketball, for example, up to two non-disabled athletes may be included on a team. Also, an able-bodied athlete could take the view that he has no advantages in sports intended for the disabled, giving him a right to participate. Similarly, an able-bodied person might wish to take part in a marathon for persons using wheelchairs. This particular problem may be approached in the following way: the relevant association rules and their application are subject to judicial scrutiny. The facts of the individual case and the principle of proportionality are the decisive criteria. The question of whether participation may be confined to disabled persons, as intended by the association, has to be addressed by balancing the interests at stake.

4. Classifications by type and degree of disability

In disabled sports, there are various classifications to ensure equal opportunities. The need for classification arises from the existence of different types of disabilities and their varying severity. There is a distinction, for example, between physical and intellectual disability. Persons who are physically disabled are further categorized into subgroups, such as athletes with a visual impairment or athletes using wheelchairs. These groups are again subdivided according to the severity of the disability, in particular according to the individual's mobility impairment due to the disability. This classification, however, may run into difficulties. On the one hand, the various categories should not be overly strict, given that, otherwise, there would not be a sufficient starting field. On the other

[56]On the legal validity of waivers, see *T.G. Church/J.R. Neumeister* (1998), 'University Control of Student-Athletes with Disabilities under the Americans with Disabilities Act', 25 J.C. & U.L. 105, 180 et seq.

[57]For the argument that a distinction be drawn between professional and amateur sports, *Mitten*, note 54 supra, 221 et seq.

hand, they should only cover athletes who have similar physical conditions in order to comply with the principle of equal opportunities. Finding a solution to such a conflict of objectives is difficult and can lead to judicial review if an athlete feels discriminated against by the definition of the categories or by his or her classification. In discus throwing, for example, various grades of disability are united in one competition to provide a sufficient starting field. To offset this, however, a points system based on the grade of the disability is introduced: the more severe the impairment, the less the distance required in order to gain an accordant score. To ensure equal opportunities in discus throwing, it is of the utmost importance that the conversion factor which determines the score be non-discriminatory with regard to the grade of disability[58].

Up until now, these questions have not been subject to judicial review. For this reason, questions of proof which would be much more relevant in this context than in the *Martin* and *Pistorius* cases have not played a role so far.

Conclusion

'Techno-doping' is a term which is very widely used, but which is perhaps not very suitable or clear. Keeping in mind that sporting performance is the result of various factors which form a complete system, I suggest, as a first step, taking into account the seven scenarios which I have already mentioned and then, in a second step, considering the aims of equal opportunities and fairness, the health and bodily integrity of the athletes and the reputation of the sporting discipline. In the third step, it is up to the federations to stipulate what is permitted and what is forbidden. Of course, these decisions can be subject to judicial review. Two famous cases have been ruled on by courts (Casey Martin) and the Court of Arbitration for Sports (Pistorius).

[58]Marianne Bruchhagen, e.g., a paraplegic discus thrower, abandoned her career because she found the points system to be unfair. The system is based exclusively on the respective world record of one grade of disability: see Frankfurter Allgemeine Zeitung (July 7, 2008), p. 31.

CRIMINAL RESPONSIBILITY OF ATHLETES

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Introduction

Responsibility means "asked" and "required" and often means duty and assignment entrusted to somebody and he is responsible for it.

From a legal point of view, responsibility means "liability and accountability of person for his own prejudicial actions and behaviours" and the criteria for determination of this legal responsibility is external manifestation of actions and behaviours that harms others. For comprehension of real concept of responsibility from various aspects, some other factors and conditions should be taken into consideration as well as existence of obligations entrusted by authorities.

One of the emergency conditions for manifestation of responsibility is existence of a duty for performance or avoidance from an action that this duty may be resulted from legal regulations or social relationships and also information of a person from his own duty and ability in performance of an action.

Sport activities face the various accidents and happenings due to its entity and therefore various physical actions in sport activities shall influence in establishing the responsibility of the athletes.

Therefore, this responsibility is divided to civil responsibility and criminal responsibility by passing of time and development of the society. These two types of responsibilities have separated individual concepts from point of view of definition, subject, type of legal requirements and behaviour evaluation of perpetrated.

On the other hand, sometimes responsibility disappears objectively and sometimes disappears subjectively: subjective disappearance of responsibility shall be hidden in guilty person, not in legislative mandate and in this case the guilty person shall not be considered as responsible because some personal reasons such as madness or minority remove his/her responsibility, although the committed crime has a criminal title in law.

But this responsibility shall be removed objectively when the crime perpetrators (principal, abettor, and assistant) commits an action that in normal situations is a crime mentioned in punishment act but legislator removes criminal title from the action for some reasons and in this state the perpetrators shall not be subject to criminal responsibility for punishment or safeguarding measures.

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In fact in this state removing responsibility is not in guilty person but it is in viewpoint of legislator. But whereas its result returns to the doer of action and his/her responsibility removes due to special conditions, we know it as "exceptional condition in criminal responsibility) and the factors which resulted to this state are known as "crime justification factors". As mentioned, these factors remove the responsibility of the doer of an action with special conditions which predicated by the law, for example, when some person commit assault during martial competitions which is considered as crime by the penal act, legislator does not accept the responsibility of the doer with a special legal text (Paragraph 3 of Article 59 of Islamic Punishment Act of Islamic Republic of Iran) while accepting legitimacy of sport accidents and predicting some special conditions.

Criminal Responsibility in Sport

The purpose of studying criminal responsibility of the athletes is punishment of the guilty person that shall be executed for defending the society and public discipline and reforming and punishing other persons.

A behavior that creates the athlete responsibility is some risks created for personal freedom; because a responsibility is established when some persons commit some actions which are explicitly prevented or required by the rules and regulations.

Most violations of athletes, coaches, heads and referees in relation to sport shall be considered as crime due to their responsibility and in this case the guilty person may be punishable. In some cases, crime commitment shall be resulted to their deprivation of social rights. "When somebody attempt some actions which are known as crime according to the penal act, these actions were committed on criminal purposes or merged with criminal error. The guilty person is considered responsible by law and he deserves to punishment or safeguarding measures."

In general personal obligation for answering against the offensive to others shall be proposed under title of "Criminal Responsibility" whether they are committed for supporting individual rights and freedom or defending from the society.

But according to lexical and legal meanings of responsibility which necessitate obligation of somebody to compensate the damages of other persons, and for comprehension and recognition of this concept and criminal responsibility factors, it can be defined as "Criminal Responsibility is obligation of a responsible person for answering the personal and social harmful effects and results of a criminal action committed or avoided by him/her".

Therefore criminal responsibility punishes the doer of forbidden action and this responsibility is appropriate with the strength of error and violations and the

personality of the guilty person should be deeply researched from viewpoint of jurisdiction abound the behavior of the guilty.

For example, as it is agreed by Iranian legislator, violation from the sport regulations is forbidden and in case of any damages or murder shall be subject to punishment. On the other hand, according to international regulations of Sansho, hitting back of the head of the competitor is error. Now if during a race one of the competitors hits back of the head of other competitor and in result, the other competitor passes away, in this case will the murder crime be confirmed; will the guilty athlete be criminally responsible for that and will the guilty person deserved to legal punishment?

Various fields of sport, even from viewpoint of activity and regulations differ from each other. By despite these differences, all sport activities always face various accidents.

Despite the above mentioned issues a person can be considered responsible for his/her criminal action only when a cause and effect relationship finds in that action and crime. Meanwhile, the guilty person should commit the crime with some particulars and conditions such as entrusting a responsibility, maturity, wisdom, authority, knowledge and awareness for considering him/her as a responsible person.

From viewpoint of criminal law, for manifestation of a crime there should be bad intention, criminal purpose and or criminal failure in the guilty person and they are necessary for proving the criminal responsibility in all crimes including intentional ad unintentional.

For example, from viewpoint of football regulations, tripping the competitor is error. If a player trip other person during the football match and in result he falls and his hand breaks, the crime of limb breaking shall be verified and the guilty athlete shall be punished and be criminally responsible for his action according to Article 328 of Islamic Punishment Act.

But as we know there are three necessary conditions for an action to be punishable:

1. Violation and aggression to law (legal element of crime)
2. Physical Behavior of the Guilty Person (physical element of crime)
3. Intention for crime commitment (spiritual element of crime)

a) Legal Element of Crime

One of the fundamental principles of public criminal act is no actions can be judged as criminal act unless it is explicitly predicted by act. Moreover, the criminal magistrate is bound to determine some punishment in his verdict that its method and duration was predicted by the act before the crime commitment."

Therefore, without any legal texts, the imagination of crime is impossible.

For example according to law some punishments are determined for offence, beating and foul language and breaking a limb. Therefore, committing these types of actions during the sport activities shall be considered as crime and the guilty person should be responsible and shall be punished. On the contrary the damages resulted from sport accidents even if they resulted to death, are not always considered as crime and in many cases they shall not be a crime and the guilty shall not be punished.

b) Physical Element of Crime

But nobody can be punished unless he/she commits some action or avoid from some actions which are considered as crime according to the act. The guilty person should commit an action or avoid from an action which is tangible and observable and has a criminal title in act.

For a crime being exist, manifestation of a physical element is necessary. If criminal policy of the country consider some person guilty only due to his intention to crime, some non-negligible manifestations occur in depth of individual's conscience and often the people shall be punished with no danger for the society. Necessity of physical element in considering an action as crime does not mean that there should be manifestations for each crime and or merged with some positive actions, but in some conditions withholding some duties which are entrusted to somebody according to the act or regulations shall be considered as physical element of a crime. Based on the mentioned issues, external manifestation of guilty thoughts can be considered as criminal behavior and the behavior has various types:

1. Affirmative Criminal Action

Criminal behavior is often prevented by legislator on affirmative basis and some punishment is determined for it; such as murder, beating, laceration and … Affirmative criminal action means any physical operations which manifests in external world. For example, beating face of competitor with elbow in martial sports which is against the regulations of that sport and tripping competitor from bank in football resulting to fall dawn are among the affirmative actions.

2. Negative Action

Crime manifestation is not always subject to an affirmative physical action. In some cases, people are bound to perform some actions in order to public discipline. In this case, if these people do not perform their duties, they will commit to

Negative action crime. On the other word, the guilty person withholds the duties entrusted by the act.

3. Affirmative Criminal Action Resulted from Negative Criminal Action

"The crime resulted from omission of an action is similar to the crime resulted from action and it results to occurrence of a crime which always happens due to performance of that action by the human" such a life saver who does not help a swimmer who is drowning on his maliciousness due to a dispute with her/him and while he/she can save his/her life, let the swimmer to drown. In the above mentioned example it is observed that death of the swimmer is resulted from omission of action which should be performed.

"It seems that these types of actions can by subject to discussion as long as the act determines their punishment and except the cases predicted by law, it seems impossible to prosecute the guilty person."

c) Spiritual Element of Crime

Performance of a physical action which is known as crime by the law is not enough for criminality identification of the guilty person. It means that (s)he must intentionally commit that crime on spiritual viewpoint and or in commitment of that action (s)he makes some mistake without any intention that can be subject to criminal responsibility. In general, for manifestation of a spiritual element, there must be two factors: first is the intention of guilty person and second is bad intention.

1. Intention

Lexically intention means "to demand, to request, to intent and to wish". Intention is considered as a spiritual element which is necessary for occurrence of all crimes. An external action cannot attract the attention of social authorities without manifestation of human intention. Nowadays the intention is a complex and discussable issue in psychology. But in fact what we know from intention is demanding in common conditions. Therefore, if somebody pushes someone else forward during a football match and in result the hand of this person touch hit the goalkeeper's eye and hurt him, this action is not considered as intentional beating crime because there is no intention in this action principally.

2. Bad Intention

Criminal intention is often synonym of bad intention and that is an intention designed for forbidden actions in criminal law. For some jurists, "criminal inten-

tion" is a tendency and attraction to performance of an action which is forbidden by the act.

This tendency and attraction is not similar to criminal tendencies which are depth, intentional and unintentional attractions. It means demanding a criminal action which is forbidden by the legislator, whether the guilty person informs from the nature of action and omission of action as a crime or not.

As mentioned, two factors should exist in bad intention along with the factor of intention which is common in all intentional and unintentional crimes including: demanding "general bad intention" action and demanding the results of "specific bad intention".

In some crimes there should be a special bad intension as well as general bad intention. This means that in addition to "intention for commitment of a criminal action", another intention which is necessary for manifestation of crime "outcome intention" should be manifested. For example, in beating, general bad intention is beating other party and beater is not required to have intention for hitting other person, while, in murder crime, intention for killing other person should exist for considering the crime and intentional murder along with intention for commitment of the criminal action for example hitting other person (general intention).

The crimes can be divided in two groups in this point of view:

a) Intentional Crimes: the crimes of which the guilty person commits or omits an action which is forbidden by that act with intention and purpose of doing that action. "On other word, spiritual element of the crime in these crimes is criminal intention."[1]

Therefore, if somebody "wants to do some actions" and also "has intention for the outcome of the action", he will commit an intentional crime and his bad intention will be obvious. For example a football player who intentionally beats his competitor intending break his leg is committed an intentional crime of lib breaking and is deserved to punish.

b) Unintentional Crimes: In unintentional crimes, the guilty or mistake of perpetrator is enough for spiritual element manifestation and "carelessness, improvidence, unskillfullness, and inobservance of governmental disciplines" are among its obvious evidences. Therefore, if somebody has intention in doing some action but he has no intention for the action's subsequence, he commit a

[1]Of course some of jurists identify a fourth factor for manifestation of bad intention beside the mentioned three factors and that is wisdom and knowledge of the person about the reality of the committed action and its illegality. Refer to Houshang Shambiati, Public Criminal Law, 1st Volume, Pajang, Tehran, 1992, P. 370.

quasi-intentional crime in case the its subsequence is not predictable and in other word, the guilty person has no intention for action which particularly causes the crime as well as criminal intention regarding to injured party.

For example, in Karate if fighter show a blow on face of his competitor but this blow hit the competitor's face due to his unskillfulness or carelessness and broke his nose, he committed a quasi-intentional crime, although he has intention for beating, but whereas he has no intention for hitting the face of competitor and injuring him, his crime is not intentional but it is quasi-intentional crime.

Sometimes a murder or injury of defect of a limb occurs due to a certain error and in that case there is no intention in the action as well as its subsequence. On other word, the guilty person has no intention regarding to injured party and the action happened for him/her. For example a football player jumps up to kick the ball, but he comes down he falls on the referee and injures him. In this case the guilty person shall be prosecuted due to criminal "error".

First: Unintentional Violation to Physical Integrity in Spot

Unintentional deprivation of life of physical damage happens in conditions that the perpetrate person is not interested to the death of the injured party (the result).

As mentioned before, Iranian legislator explicitly exempted the athletes from impunity in all results of their operation even in case death if they observe the sport regulations, but in some the committed perpetrate is recognized as responsible by rules because (s)he does not observe the common and necessary cautions and in other word the athlete was caused to accident due to inobservance of regulation, unskillfulness, imprudence, and or neglect of precautionary principles. For example the responsibility of a football player who shoots ball to goalkeeper where some children are watching near the gate and one child dies in result of the hitting the ball with him/her, is obvious. In this suggestion, even shooting ball for goalkeeper is not a football error, but carelessness of the player to the children beside the gate is considered as his incautious and it is similar for an athlete who commits to kill his competitor by violation for rules and regulations of that sport.

On other word unintentional criminal actions of the athletes are only punishable if they are combined with error.

a) The Physical Damages

"Injury and its occurrence on physical results such as murder, beating and hurting and etc is the primary condition for crime manifestation. As long as one of these results are not occurred in outside world, the violator and guilty person cannot be prosecuted in this regard even if (s)he is guilty." But the most important and essential condition for considering an accident resulted from sport operation

as crime and punishing the guilty athlete is violation rom the regulations related to the sport. Therefore the principles for not considering accident as crime is observance of regulations of that sport and this means that every accident which is resulted from violations of the regulation in sport shall be considered as crime and the guilty athlete shall be punished based on the intensity of the accident.

1. Affirmative Physical Action

Affirmative physical action in sport damages means that somebody violates from sport regulations by sport operations which has physical and external manifestations and this violation results to happen an accident and in result injury or death of the competitor, such as trip, blocked, pressure of a limb against the regulation and so on.

There is variety of actions resulting to violation from sport regulations, but in all cases some physical and actual action must be performed by the beater resulting from violation of the regulations and in result somebody must be killed. On other word, the athletes are responsible for all physical consequence and sport operations which are resulted from violation of the regulations.

Otherwise, in some sports, a movement may have some stages and each stage is subject to special regulations and therefore, occurrence of accident in each stage shall cause criminal responsibility of athlete and trueness of each stage shall not be effective in amount of responsibility for mistakes of the next stages. For example, in javelin throw, the thrower is not authorized to go a step beyond the line. But observance of this rules, is not the termination of action, but javelin must come down in the prescribed limits and fall down to the ground according to the regulations. Therefore if thrower does not go a step beyond the line but sends the javelin to the viewers and in result the third person dies, undoubtedly (s)he shall be responsible in this regard and his/he claims about observance of the primary regulations shall not justify his/her responsibility.

2. Action Omission

As we know, punishment of persons is subject to commitment of a crime and for relating this crime to that person, her/his failure must be proved, even his failure is intentional or unintentional. Therefore, if persons commits no faults in happening of an accident, (s)he shall have no responsibility in this regard.

3. Action Resulted from Action Omission

Beside crimes resulted from an action and crimes resulted from refrain from an action, sometime a third type crime can be added in this classification and

that is a crime is resulted from performance some actions due to refrain from an action.

An instance of physical actions in violation of sport regulations, are tools, equipment and devices which are used by the athlete based on their type. These devise and facilities must be according to the regulations and for this reason using unauthorized tools is forbidden by law and in case in result of using these tools and facilities, somebody hurts, the guilty person shall be responsible in this regard, even though his sport movements are according to the regulations. For example, according to the regulations of Kung Fu, the fighters are not authorized to use tools which are dangerous for their competitor and the bound to use equipment determined by the regulations of that sport. Therefore, if a player does not use a standard footwear (ropa) and or do not use footwear (Ropa) at all and his/her competitor passed away due to impact of his foot with the face of his competitor, obviously he is considered as guilty in this accident due to incompliance of the tools with the regulations of that sport and or failure to use property safety equipment even though he has a correct foot beat according to regulation of this sport and there is no violation from movement regulations according to affirmative action.

Therefore, the action resulted from omission of an action happens when an action is omitted at first and then an action is performed which is resulted to an accident.

b) The Fault Element

There are two theory for necessity of mental element for unintentional crimes: According to the first theory which believes in lack of mental element in unintentional crimes "crime is an action or action omission or starting an action and or assisting or intentional motivating an action or action omission against the act which the human commits to in cases other than performance of duties while using its rights and according to act a punishment is determined for that action or action omission, action starting, assistance and or intentional motivation. Obviously, in the above mentioned definition, unintentional crimes that have "no spiritual element" or carelessness, imprudence or inobservance of public regulations and etc are replaced spiritual element are not considered.

As you see in this theory unintentional crimes have no mental element and carelessness, imprudence and etc are considered as replaces of mental element (and not mental element itself), but most of jurists thinks there is a mental element in unintentional crimes. As most jurists, error is mental element in unintentional crimes. Most of them explain it with no determined definition of error and only by presenting some of its evidences (carelessness, imprudence unskillful ness, inobservance of public regulations):

1. Concept of Error (Fault)

Some people consider faults or errors as a behavior lower than the level of common human behavior criteria, of course criteria for sport behavior and attempts are different in various fields based on their glaring differences. On other word, of course common and acceptable behavior for a boxer is not similar to common behavior of a table tennis player.

Therefore, "Fault" means "Performing any actions that a normal and cautious person does not attempt in similar conditions and or failure from an action which a normal and cautious person does it in the similar situation."

2. Types of Error

In direction of proving the fault existence, analysis of all probable factors in sports is necessary. This means that suability of player's error that damages other person should be proved with the existing realities. Fundamental factors in this field are as follows: Type of play, age, physical status of participants, their relative skills in play, their knowledge about regulation, customs and habits, their status from viewpoint of being amateur or professional, type of potential risks of a play and unpredictable dangers, Presence or absence of protective clothing or equipment, and other cases.

In these cases, responsibility is not only resulted from technical errors, but also resulted from imprudent or an actions that are not attempted by no athlete with a conventional wisdom. Therefore, the error can be classified to the following types:

2.1. Carelessness

Carelessness is an error that is not committed by a cautious and normal person. A cautious person predicates all subsequence and results of a work according to the existing circumstances and conditions and that result shall be commonly predictable. For determination of carelessness we should refer to custom. It is necessary to determine that if the performed action is predictable in a determined time and plane and under a special condition and if an average cautious person (not too smart and not too silly) can predict it according to the custom of the time and place. For example if some players are playing football in middle of the ground and in other half of the ground some other people are throwing disk and during the throwing, one football player runs to other half of the ground for bringing ball and the disk attack her/him, the disk thrower shall be legally responsible against the accident. Even though throwing itself is not an error according to the field and track sport regulations. In this instance, the thrower attempt to throw

with no attention to result of his action that could be predicted commonly and his/her attempt resulted to murder or limb injury of other player.

A "careless" person is somebody who never thinks about the result of his actions, and if he thinks about the results of his action, (s) he will not attempt to that action. For example a sport coach hit one of his/her student for punishing him/her and this action results to his/her death. In any case carelessness is an error which is resulted from an action.

2.2. Improvidence

Error is forgetfulness and negligence and in other word is action omission that is called improvidence. Thus it can be said that improvidence is carelessness that is used in action omission crimes. It means they are obliged to do the work there is not a danger to others.

For example in Sanshou race, the referee shall be responsible for quasi-intentional murder due to neglect for examination of athlete's helmet which resulted to death of one of them. Neglect from examination of tools and equipment of athletes can be considered as improvidence of the referee from the duties entrusted to him/her. In fact, forgiving or neglecting a necessary auction is improvidence. And it is the same for an automobile driver who participate in Rally despite the knowledge about technical defect of the automobile and in result collides with other automobile and kills its passenger.

2.3. Unskillfulness

Performance of some affairs requires a special skill and its performer is bound to have adequate skill and expertise, otherwise, lack of this ability resulted to criminal error in some cases and in case somebody attempts that action with no adequate skill and information and cannot succeed in it, (s)he is considered as guilty which in some cases can be in conformity with carelessness. For example during a practice, spinal cord of one athlete is injured intensively. Her/his inexperienced coach carries him/her out of the ground in inadequate conditions and with no stretcher and this results to his/her death. Anyway, unskillful ness in sport can be spiritual or physical:

2.3.1. Physical or Tangible Unskilful ness

Having the necessary agility and dexterity, skill capabilities and adequate training on the sport, are affairs that their good performance require special skills and abilities.

The person who attempts something without the adequate physical ability and

his/her action hurt others is considered as guilty. For example in javelin throw sport, if the thrower attempts to throw the javelin with no adequate practice and in result the throwing javelin toward the viewers, somebody hurts or dies, his/her responsibility is obvious due to unskillful ness of the athlete.

2.3.2. Spiritual unskilful ness

Spiritual unskilful ness in sport is complete or partial ignorance of a determined sport. The perpetrator is guilty because (s) he attempt that sport without adequate knowledge and information about it and in result (s)he injures or kills other person. For example an inexperienced swimmer who is not familiar with the swimming coaching principles attempts to train some youth in a pool and during the training, one of athletes drowns and the coach is not able to save his life due to his unskilful ness and inexperience.

"Although in case of unskilful ness, lake of skill or neglect from achieving skill is considered as error, but some of late comers think that whereas an unskilled person cannot observe the common cautions for prevention from probable dangers and injuries, he is guilty and in result the legislator deems essential his error and this suggestion is among the unchangeable suggestions."

The important issue in this viewpoint is connecting unskillfulness to carelessness and supposing carelessness in an unskilful attempt. Therefore, the coach who is not familiar with first aid, carry the injured athlete out of the match ground carelessly and does not use stretcher for carrying her/him and it caused to spinal cord injury and death of the injured person. (S)he is responsible due to unskillfulness and in result incaution and his unskillfulness coincides with his incaution.

2.4. Inobservance of governmental disciplines

In some cases from view point of community health and hygiene observance and social security and safety and etc, some boundaries and general polities, conduct of athletes are determined and announced by legislator or general authorities and or sport federation who are authorized to enact technical bylaws, in order to prevention from probable bad circumstances. These rules, bylaws, approvals, circulars and orders are considered as "Governmental Regulations". Obviously, when inobservance of these regulations is proved in an accident, the perpetrator is considered as guilty and shall be punished based on his crime.

Of course some of these regulations are general and all people are bound to observe them such as driving regulation. Some other belongs to special class of society such as sport regulations. Obviously, inobservance of the second type of regulations shall be enforceable only for persons who are bound to observe them.

Fully inobservance of these regulations is merely adequate for responsibility of the athlete and there is no need to prove his/her carelessness or improvidence. Also, vice versa fully observance of governmental regulations is not always adequate for acquaintance by itself. Because observance of some other cautions may be necessary and inobservance of that cautions may create responsibility.

JURISPRUDENCE ANALYSIS ON THE PARTICULAR LEGAL PROTECTION OF SPORTS RIGHT OF THE VULNERABLE GROUPS

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Abstract: *The legal protection of social vulnerable group's sports rights concerns about the value of law in the reality of life to be fully realized. The article starts with core theories of the justice and substantive equality, human rights and rights relief of the vulnerable groups, putting an abstractive jurisprudence analysis on the legal protection of sports right of the vulnerable groups and hopes that we strengthen the understanding of protection of sports right of vulnerable groups from the rational height.*

Introduction

The legal protection of social vulnerable group's sports rights concerns about the value of law in the reality of life to be fully realized. The article starts with core theories of the justice and substantive equality, human rights and rights relief of the vulnerable groups, putting an abstractive jurisprudence analysis on the legal protection of sports right of the vulnerable groups and hopes that we strengthen the understanding of protection of sports right of vulnerable groups from the rational height.

1. The theoretical basis of the legal protection of the vulnerable group's sports rights

1.1. Justice and substantive equality

Justice is the eternal values and basic code of conduct in human society. Law is a means of achieving justice, one of the law's worth is to achieving justice. In the history of legal thoughts, Aristotle developed the concept of justice and linked it with law. He believed that the real significance of law is that all the city-states people can enter in the system of justice and good moral. "For city-states, justice is deemed to be the principle". Afterwards, numerous thinkers began to regard justice as not only the purpose of law, but also the importance and only standard of measuring law.

John Rawls, the most famous philosopher and thinker in current American, begins with: "Justice is the primary value of the social system, just as truth is the primary value of the ideological system." "Everyone has a kind of inviolability

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based on justice, and such inviolability is impassable even in the name of the interests of society's interests." in his noted work named "The justice theory". That is to say, justice is the central axis and core of social construction, any other principle can not override the requirements of justice. Although, what is justice, what is unjust usually get lots of disputes in a different society, a different period of time, or the same society, the same period. There's a very clear point, "in some systems, when the allocation of fundamental rights and duties make no distinctions between individuals, and when the specification make all kinds of conflicting requirements of society interests get a proper balance, these systems are justice, which is still agreed by those who have a different concept of justice". "Law is the learning of moral and god world, the science of justice and injustice." [1] So, "Certain laws and institutions, if they are not justicial, they must be adapted and repealed, no matter how efficient and methodical they are." "Our current topic is social justice issue. For us, justice's major problem is the basic structure of society. Or, more precisely, justice is the major social system, which assigns the basic rights and duties, decides the division methods of social interests that produced from society cooperation." "The reason why the basic structure of society is justice major problem, is that it's a very profound impact from start to finish, here, the intuitive concept is that this basic structure contains different social status, people born in different positions have different life prospects, these prospects are in part determined by the political system as well as economic and social conditions. This way, social system makes people's some starting points are more favorable than others. Such kind of inequality is a particularly profound inequality. They not only cover a wide range, but also affect people's initial opportunity in their life... Justice of a social system essentially depends on how to allocate the basic rights and duties, depends on the economic opportunities and social conditions in the different society strata." "The general rules of the various uses which hide in the concept of justice, in terms of interrelation, individuals are eligible for equal or unequal status. This is borne in the changes of social life, is something that should be taken seriously when interests began to be assigned, also this is something need to be rebuilt when it is disturbed. Therefore, justice is regarded as the way of maintaining or rebuilding the balance or equilibrium customarily. Its important maxim often formatted as: 'Treat like cases alike'. Of course, we need to make up: 'Treat different cases differently'." It is required that on one hand, we should provide substantially the same development opportunities for every member of society from the general, but the only formal equality does not necessarily guarantee the fairness of the

[1] "Institutiones", aka "the institutes of Justinian", is to the east of Rome Empire Byzantine emperors (Flavius Justinianus AD 483—565) During the reign (527—565) ordered to edit law textbook.

results, on the contrary, the results may be the weak becomes weaker and the strong becomes stronger, so, the guarantee of formal equality still depends on the substantive equality; on the other hand, we should provide different levels of development opportunities for different members of society according to their natural endowments, development potential, self-cultivation, acquired efforts and so on, in order to respect the individual' s own choice, to encourage them to fully develop their potential, and to encourage members of society to maximize the use of every opportunity to realize their own value. However, from the whole society standpoint, under the conditions of market economy, If we allow the role of competition works, social resources will be accumulated in the hands of those strong groups, which lead to the weak becomes weaker and the strong becomes stronger, polarization between the rich and the poor, inevitably catalyzes the engender of inequality in reality "Matthew Effect"[2], "Although 'Treat like cases alike' and 'Treat different cases differently' are the core elements of the concept of justice, but they are not complete, and can not guide behavior definitely, when they are complemented before. So, that is because any group of people who are similar in some respects and different in other areas, and which part of the similarities and differences that yet to be determined is meaningful. 'Treat like cases alike' must reserve a space, in order to fill the spaces, we must know, in the situation of existing purposes, when the situation should be considered to be similar, what difference is meaningful. If there's no this further supplement, we will not be able to criticize the law and other adjustments is injustice. As a result, when a community in the face of the problems caused by the formal opportunity out of touch with the actual opportunity, we should ensure the equality of basic living needs to supply the equality basic rights, and give disadvantaged groups with special legal protection, in order to achieve social justice. Substantive equality is a theory which based on the amendment of formal equality. Substantive equality refers to that countries classify the substantive equality which may coursed by formal equality according to specific and actual situation, so the disadvantaged specific group of people in terms of economic, social, cultural and other differences exist de facto with other populations, by means of formal inequality, thus, we can in essence provide citizens with material and environmental which in need of equal development, narrow the gap which only coursed by formal equality. "Only to effectively guarantee the fundamental rights of the members of society, can the basic contribution of personal concluded in society be reflected from the sense of minimum bottom line and human species dignity be affirmed,

[2] Matthew Effect, Refers to the strong stronger, the weak weaker phenomenon. Its name comes from the Bible New Testament, " Matthew " in a parable: " Whoever has will be given, he made him redundant; has not, even what he has will be taken away. " " Matthew effect " and " balance" inconsistent, and "two eight laws" have similarities with them, is a very important law of nature.

can the basic purpose of achieving social development which is the basic concept of human-centered development be realized from the most essential sense, also can necessary conditions of the society functioning be established from the most practical sense." "Meet the reasonable needs and ideas of individuals, and at the same time, promote the production progress and raise the degree of social cohesion. This is necessary for the continuation of social civilization, this s the target of the justice." [3]In a word, substantive equality theory pays attention to human rights, which makes abstract people turn into the people with different natural characteristics the of real life. This turning point puts the protection of vulnerable groups' rights in a prominent position, becomes an obligation owed by the country, also becomes the theoretical premise of the protection of vulnerable groups and legal justice scale.

1.2 The theory of human rights and the rights of relief

Famous American scholar Louis Henkin pointed out: "our era is the era of rights. Human rights is the sense of our times, has been generally accepted only political and moral values." in the foreword of the book "rights era". The human rights pursuits the dignity of people as human and the equality between people. Therefore, the concept of human rights and equality is a value basis for the protection of the fundamental rights of the vulnerable groups in society. Human rights has become universal values of in today's world. Protecting human rights has become the inevitable choice of the countries' law. In Great Britain and the U.S., "Remedies Precede Rights" is their most proud legal work, "No relief is no rights" has been widely known for a popular proverbs. "The meaning of law lies both in its symbolic and its practicality. Law that can not be realized is a mere scrap of paper. " [4]The reason why rights calls rights is because it can assert their rights in accordance with the law and through a certain way, when this right has been infringed, and get legal recognition and protection. As a human, whether you are strong or weak, you can enjoy security, freedom, equality and other rights. When rights have been violated, you need to ask for legal remedies: no relief is no right. No right is also no relief. The legitimate rights is the basis of relief subsisting. "no relief lead to no right." The right can not get legal protection, is not the legal right actually, both sides of the relationship synthesis as a whole, constitute the two elements of the legal social value. "no relief is no right", no matter how big the right is , its realistic degree proportional to its protection and relief system. In practice, even though the terms of the rights and procedures is

[3]He Jianhua " economic justice ", Shanghai people press 2004 Edition

[4]Zhang Wenxian " jurisprudence ", higher education press 2003 Edition

set complete fine by law, if the lack of appropriate relief measures, the subject of rights can not effectively remove the obstacles when the realization of rights is blocked, or the realize the rights or get compensation, then statutory rights can only be non-existent. The key of rights relief is to use feasible methods and procedures to resolve the dispute of rights, in other words, if the law can not actually provides a fair, equal, real relief system, the protection and enjoyment of the legal rights have no practical utility. Which is also the reason why western proverbs thinks law not only declare rights, but also give the real possibility of the realization of rights which is more important. That is essence the "rights" become rights. Pollock, British jurist thought law can not make all men equal, but everyone is equal in front of the law. Vulnerable groups in society have the rights in pursuit of been respected and treated equally. A society governed by the rule of law should move from the ideals of human rights to the reality of the existence through the legal protection, so that vulnerable groups can get the protection of the rights.

2. The legal analysis of the particular protection of the vulnerable group's sports rights

Those who believed in "ruling by law" emphasize that everyone gets formal equality in front of the law, oppose the aims at in pursuit of equal results and the measures of limit the actual inequality, for generality and universality of the law, against special law. They think whether maintain privileged legislation or give certain social groups like disadvantaged social man to special care or rescue is the destruction to the rule of law. On the contrary, the value targets of substantive rule of law is polybasic, which contains freedom, human rights, values and order, its highest value is to ensure "human dignity and freedom." Mr. Lyons, famous contemporary British jurist believes: "a non-democratic legal system built on denying human rights, widespread poverty, apartheid, sexism and religious persecution, may follow the requirements of the rule of law a bit more than any civilized western democracy in general". In accordance with the theory of the substantive rule of law, by special legislation, giving special groups special care, is consistent with the decree of protecting human rights, is also the proper meaning of protecting human rights, because "one elements of human rights is that everyone has the right of self-seeking life and self-survival, also has the right to ask help from society when it's hard to live and survive by oneself, community must fulfill the obligations of ensuring society members' life and survival." This paper endorsed the special protection of the legislation for the vulnerable groups in society. As a member of the society, the countries have a moral obligation for specific vulnerable groups, and achieve their common needs as human equal-

ity brothers by the ways of different treatment, in accord with the principle of equality, remedying minority group members and vulnerable groups in a fair competition is disadvantage, "Social engineers" widely advocated design a set of special protection measure which is commonly referred as "preferential policies" to protect its interests.

The modern western countries generally advocate equality and freedom, make formal legal concept of equality gradually enjoys popular support, have the corresponding guarantee in terms of system, such as the private property is sacrosanct. However, this formal equality often mask substantial inequality, such as the inequality of starting point opportunity and intellect, a society governed by the rule of law is a kind of society which make the Constitution and the law as supreme authority to manage, it realize the protection of citizens' human rights and fundamental freedoms through the grant and control of public power, if we do not take special care of vulnerable groups, the real significance of inequality will certainly exist between strong groups and vulnerable groups, which lead to the substantive rights of the vulnerable groups get infringement. According to the situation, Western neo-liberals proposed some remedy, which is to acknowledge differences and recognize inequalities brought about by the "identity" differences, to require to take special measures for vulnerable groups and to give special protection. British scholar Peter Stein thinks the principle of equal treatment must have some exceptions, so we should take individual characteristics such as the differences of need, ability and personality into account and treat differently. Domestic scholars propose that in accordance with the concept of substantive justice, same treatment to same people, and different treatment to different people. We should treat vulnerable groups in principal of inclined protection, give them special protection from all aspects, which is "tilt the legislation, and protect the weak ". So the famous British legal historian Des Moines's formula "from status to contract" should be inverted, nowadays it becomes "from contract to status", the de facto inequality "identity" from some special reasons should get special protection, this is also the basic requirements of substantive justice and equality concept

The American scholar Biche Mu said that in order to reflect the true justice, we require to treat different people unequally sometimes, and achieve equality. So"we should spend more money on education of lower talented minority rather than on the education of high talented people." Comprehensive ability caused by the differences of everyone's talent, ability, character, so only formal equality may cause very unequal results, which is not a goal pursued by a rational human . This formal equality masks the de facto inequality especially in law area, if it is not corrected by the special protection, these laws would be unfair and unjust for vulnerable groups. American scholar Richard George said that "the

so-called justice refers to give each person deserves interests, give equal treatment to equivalent person or thing and give differential treatment to the person or thing can not be equated", "treating company employees equally does not necessarily mean giving all people the biggest freedom and liberation. "The treatment to a variety of differences in a company is not necessarily the same as the manner under social conditions. Vulnerable groups is made up by every person, the fundamental values of human rights requires to universal respect and protect all the people, and to take special care, respect and protect vulnerable groups; the rule of law principle of human rights requires to minimizing the gap between vulnerable groups and strong groups through the corresponding measures.

Human activities aimed at shaping the "more fair and rational" human existence. Some scholars have proposed: "social justice requires society to establish such a system, which can give the same treatment to the people belong to the same category, also give the special treatment to social disadvantaged people", and the democratization of the legislation, which is exactly the "substantial justice" at democratization scale in the concerning of legislative process. " According to Solon's theory, the law is used to "protect the both sides", its goal is not to make any one "undue improper losses" or " advantage unfair ". Professor Xia Yong said: "justice is giving the same treatment to those who seems to be equal people from a particular point, also is the people who belong to the same 'basic categories'", that is to say, giving same treatment to those who belong to the same 'basic categories' is injustice. Milne said in discussing its "proportional equality principle", In the distribution, treat different cases differently, treat like cases alike. So this is fair that greater demand people should get more and strong people should bear a heavier burden. Followed by reallocation is justifiable when allocation is unfair. So we should give special protection, rather than equal protection to vulnerable groups in society.

Conclusion

In summary, the legal protection of social vulnerable group's sports rights should follow two basic principles, which is the affirmative principles and the special protection principle. Of course, this tilt protection is not unbridled, on one hand, this protection is to make the interests of social weak been guaranteed, on the other hand, we should allow the parties to have relative autonomy rather than undermine the advantage people to ensure disadvantage people's profit. The special protection of social vulnerable group's sports rights should be based on fairness and rationality, discrimination treatment should be"reasonable, favorable and abstemious", otherwise, it will be "overkill", forming a so-called "reverse discrimination."

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DEFINITION: JUSTIFYING THE TERM OF RIGHT TO SPORTS

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Abstracts: *For Right to Sports, the theory of natural rights is not the whole story. A "want" may be treated as a "right", when it has legitimacy in history, values and system. Seen from historical documents, Right to Sports exists as early as human beings. This right is to show the value of an all-round development. The want to participate and engage in sports and exercises has been accepted by civilized nations and written in their systems. Olympic Charter and International Charter of Sport and Physical Education point out that human being has a human right or fundamental right of access to sports. Beyond the conflict between negative liberty and positive liberty, Right to Sports is a triad one. The subjects conclude ethnic groups and nations; the objects means sports benefits are inalienable and cannot be reducing; and the realization is based on the assistance of nations and society. The definition of Right to Sports shall be the right according to which people are free from harm to participate in, contribute to, and enjoy sports. It means everyone has the equal chance to sports and hence shares the fruits of sports development.*

Introduction

Right to Sports is the concept which should be justified carefully. If all of the wants has the name of right, the consequences will be the inflation of rights and thus the confusion of legal discourses. Therefore, justification is the starting point to define the concept of Right to Sports.

1. Theories to Justify Right to Sports

It is essential to review the approaches to justify and prove rights before define the concept of Right to Sports. In the view of Beth Singer, traditional theories assert or assume the following interrelated principles: Individualism, A prioriism, Essentialism, and Adversarialism. [1] These ideas proclaim some nature of rights. For example, (1) the subject of right is individual; (2) Right is inalienable, self-evident and legitimate; (3) Right is the approach to realize some purpose; and (4) Right is relevant to duty. According to Alan John Mitchell Milne, the professor of Political Theory and Institutions at the University of Durham, law, custom and morality are the sources of rights. In this regard, a certain right is announced and entitled by rules and principles of law. Positive law has moral

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duties as its premise, including freedom under the law, the supremacy of law and equality before the law. Custom requires people to abide by conventional constitutive rule and thus maintain the existence of community. [2] Other scholars such as Michael Freeden have realized that custom, emotion and statute law play an important role in rights defining. [3]

In conclusion, Legitimacy is the base that a certain want can transform to a right. (1) Historical Legitimacy. If some want exists openly for a long time and forms a part of social, cultural and national character, this want has historical legitimacy as a customary right. (2) Value Legitimacy. The concept of right has means of good, just and proper. Natural law school holds the view that moral is essential element in right. Ronald Dworkin and Lon Fuller have emphasized the wholeness among right, law and moral. [4] (3) Institutional Legitimacy. Following the moral perspective, we cannot draw an accurate picture of right, and we should find relative norms in legal system. According to the preamble of Universal Declaration of Human Rights, human rights should be protected by the rule of law.

2. Three kinds of Legitimacy of Right to Sports

Seen from historical legitimacy, Right to Sports existed in the early age of human society. In ancient time, the phrase of Right to Sports was not formed and sports were not seen as a certain right, but it is indisputable that physical exercises were parts of civil life. In ancient Greek school, sports were mixed with culture, social structure and political movements. Archaeology study finds out that gym, wrestling ground, track, and racecourse were very common and owned by city-state. The custom of sports lasts. According to the Australian Bureau of Statistics, the 2005-06 Australian participation rate for organized sport and physical activity was 29%. In the United States, 30% of adult Americans engaged in regular-time physical activities. According to the 2005 Canadian Community Health Survey, 13.8 million people, representing 51% of Canadians aged 12 and older, were involved in leisure time physical activity of some sort. [5] In China, Sports has a long history too. Rites of Zhou, one of three ancient ritual texts listed among the classics of Confucianism, records that the duty of governor of a state is enforcing law and policy, which includes holding a archery march in spring and autumn. The Survey on Sports Cognition and Participation, held by myself, shows traditional items has enjoy great popularity. Martial arts (86.5%), tug-of-war (83.7%), and kicking shuttlecock (69.3%) are the most popular items among the people. What's more, 74.5% of interviewees suggest sports are certain right, while only 7.1% don't think so. In short, sports are a kind of customary right both in China and abroad, and participation in physical movement is common and poplar.

Seen from value legitimacy, participation in sports contains or pursues the development of human being as its ultimate values. “Integrated development of people means every person develops comprehensively and fully, in body, mind and morality. Thus, everyone is able to enhance his or her quality and potential.” [6] In other words, sports become a special way to realize higher level values. Every person participates in, contributes to, and enjoys physical movement and its benefits, in order to maintain his or her existence and realize the development of society. Some scholar argues that the aspirations for democracy and liberation evoked by the banner of human rights cannot be achieved without human rights in sports. Human rights cannot be realized without all sports participants fully enjoying those rights. They also focus on Sports Act in Finland (1998). [7]

- The purpose of this Act is to promote recreational, competitive and top-level sports and associated civic activity, to promote the population’s welfare and health and to support the growth and development of children and young people through sports;
- The purpose of this Act is also to promote equality and tolerance and to support cultural diversity and sustainable development of the environment through sports.

In contemporary, the booming professional sports are linked with market economy. The masses watch games on television rather than play games by their selves. Moreover, sports contain values of equality and freedom. Fairness is the starting point and base of participating in and engaging in sports, while physical and psychological health become the final aim. The want of sports meets the need of common values.

Seen from institutional legitimacy, the want of participating in and engaging sports has been accepted by national and international system. For instance, according to Ted Stevens Olympic and Amateur Sports Act, the purposes of United State Olympic Committee are (selected):

- to promote and encourage physical fitness and public participation in amateur athletic activities;
- to encourage and provide assistance to amateur athletic activities for women; and
- to encourage and provide assistance to amateur athletes of racial and ethnic minorities for the purpose of eliciting the participation of those minorities in amateur athletic activities in which they are underrepresented.

Article 2 of National Sports Law of Taiwan says citizens should participate in proper physical movements actively in accordance with their needs. Families, schools, communities, bureau offices, groups and cooperation are the places of sports. Even if there is no concept of Right to Sports in text, from these articles, it is easy to find that the state has the duty to create opportunities for people to

engage in sports. It is an indirect way to protect Right to Sports. At international level, Article 25 of Universal Declaration of Human Rights argues that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family." This can become the source of Right to Sports. As the life and society develops, the standard of living will include sports element. In the International Covenant on Economic, Social and Cultural Rights, Article 12 (the enjoyment of the highest attainable standard of physical and mental health), Article 13 (the right to education) and Article 15 (cultural rights) formulate some parts of Right to Sports. Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women claims the same Opportunities to participate actively in sports and physical education. According to Article 31 of Convention on the Rights of the Child, States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. Moreover, Olympic Charter and International Charter of Physical Education and Sport proclaim engaging in sports is a fundamental right.

In a nutshell, Right to Sports has potential to be a customary right, moral right and legal right. Seen from China and abroad, it has been a new human right in academic sphere.

3. The Meaning of Right to Sports

To be precise, it is difficult to provide a concept on Right to Sports without any controversy. In traditional political philosophy and jurisprudence, liberty has divided into two kinds. One is free from doing something; the other is free to do something. The former is called negative liberty, which means the subject is free from interference or limit, especially free from any violation from state or power. Thus, Right to Sports means the subject of this right is free from any restraint, and rejects external harm especially from government. The later is called positive liberty. This idea asks state to adjust the resources allocation and meet the need of people fairly. The ability to enjoy sports is quite different between people. So state has the duty to support and assist the weak.

We should break through the restraint of the traditional theory between negative and positive liberty, adopt a triadic conception of rights to analyze the concept of the Right to Sports. Gerald C. MacCallum, Jr. in his famous paper Negative and Positive Freedom proposed a new format. Taking the format "x is (is not) free from y to do (not do, become, not become) z," x ranges over agents, y ranges over such "preventing conditions" as constraints, restrictions, interferences, and barriers, and z ranges over actions or conditions of character or circumstance. [8] Right to Sports can be defined as this format.

Firstly, the subject of Right to Sports has two levels. One is individual, and the other is group. According to traditional liberalism, the subject of rights is individual. Only person has the qualification to be the subject. It is quite extreme, but human being is the ultimate agent to enjoy rights. In order words, everyone has the change and right to participate in physical movements and prevent constraints, restrictions, interferences, and barriers from public power.

Besides individual, nation and state as a special group can be the subject of Right to Sports. Nation is a common concept to divide groups of people and has a long history. The historical legitimacy of peoplehood should be respected and protected by law. The sports items of minority mixed with culture, tradition, moral and life-style, so they cannot be absorbed by Olympic Games or other international matches. These items should be protected by law, and the nation should be recognized as subject of Right to Sports. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities has claimed that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life (Article 2). In international relationship, state can be the subject of Right to Sports. For example, African countries boycott Olympics in 1976, and Kenya's foreign minister James Osogo said: "The government and the people of Kenya hold the view that principles are more precious than medals." [9] In this incident, African states enforced the right in a negative way, and state as a group became the subject of Right to Sports.

Secondly, Right to Sports means the subject rejects external harm. The objects of Right to Sports include the benefits of health, social participation and cultural exchange, which should be respected by state. To be extreme, people who are under criminal punishment or whose personal freedom is deprived of or restricted enjoys Right to Sports, too. Article 67 of Prison Law of P.R.China says a prison shall organize prisoners to conduct proper sport activities and cultural recreations.

Lastly, from perspective of positive action, the realization of Right to Sports is based on the participation in, contribution to, and enjoyment of sports, and is acknowledged by law. Everyone has equal opportunities to acquire sports resources, including human resources, foundation, sports facility, leisure time and information. Every human person and all peoples are entitled to develop in physical education and sports. Nowadays, commercialization of sports including Olympic Games makes athletes into performers and makes the masses into audiences. Sports elites become goods waiting for sale, while the messes become consumers. [10] Right to Sports claims everyone leave away form television and stands, go outside, and play on the ground personally. All people have the chance to enjoy the development of sports, and no distinction shall be made on the basis

of the political, jurisdictional or international status of the country. All human beings have a responsibility for sports development.

In accordance with the three elements above, subject, being free from harm, and positive action, Right to Sports shall be defined as the right according to which people are free from harm to participate in, contribute to, and enjoy sports. It means everyone has the equal chance to sports and hence shares the fruits of sports development.

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THE SAFEGUARD AND COUNTERBALANCE OF PLAYER SALARY INTERESTS IN PROFESSIONAL SPORTS

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Abstract: *The occupation sport is actually a kind of market operation, existence of labor relations. The two parties of professional sports is a game community which is both cooperation and a combat. Athletes as labor is the basis of professional sports, professional sports athletes wages interests of the fundamental economic interests of the athletes, professional sports organizations relative monopoly that employers, athletes are belonging to vulnerable groups. Only form the group power could compete with the professional sports organizations. However, the healthy development of the professional sports requires certain restrictions on player salaries. If there is no rules of professional sports adapting to the market economy, professional sports will not be able to survive. In the context of the society based on the rule of law, it is necessary to protect the fundamental interests of the community of professional sports, and professional sports should be noted that the special behavior is different from the rest of the economy. NBA labor negotiations in the United States were playing an important role in safeguarding and counter balancing the interests of both. Thus, through collective bargaining, to reach a collective bargaining agreement, is the ways and means of professional sports on the protection of the interests of the athletes wages with checks and balances.*

Foreword

Professional sports players wages interest raised problem has always been the focus of dispute of labour issues. On July 1, 2011, the United States NBA official announced the suspension imposed on players. An unfair distribution was the focus, the employers believed that in the past few years, the Union lost a $ 1.3 billion, of which the main reason are the high player wages. The players were of the view that it was their play in exchange for prosperity and development of today's NBA success, high wages for granted. In fact, the employers and the employees have always been professional sports game which is not only cooperation but also a struggle. Breeds in the soil of the highly developed market economy out of professional sports in the West, after hundreds of years of tribulations, has now developed into a unique sport industry. Rapid development in contemporary professional sports represented by NBA, formed a situation, which rich boss and star player rolling in win-win. Nevertheless, the players has never given up fighting for wages, which establish the right to collective bargaining, for the

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benefit of athletes seeking to play a major role. NBA sports competition is actually an act of marketing, to safeguard the proper functioning of the market, only between Club and player's "responsibility, rights and benefit of" balanced, that is, "employer" and "employee" "responsibility, rights and benefit" to balance[1].

1. The safeguard of professional athlete's wage benefit

1.1. Professional sports organization's strong monopoly makes players vulnerable groups

Strong position of professional sports organizations are indisputable facts. Monopoly is necessary for sports organizations. United States professional sports has a unique characteristic due to its obvious monopoly[2]. United States professional sports leagues longest NFL established two fundamental principles when it was founded: one was the location of team members in their home privilege; the second was to maintain a reserve system with a large number of players, so that its member clubs at any time could recruit players when needed. These principles are proven to be very profitable, so all sports leagues have adopted them[3].In the United States, there are no other industry can enjoy national concession operations regulations. As early as in the 1890 of the 19th century, geluofukelifu, President of the standard oil company had paid a close attention to the economic impact, he put pressure on Congress to pass the Sherman Antitrust Act (Sherman Antitrust Act). The Act provides that any contract was illegal, in the form of trust or other form of joint and common to limit interstate trade or commerce with foreign cooperations .Although the Act does not directly for basketball, but it greatly influenced the sport. Professional Sports League mainly use the following five ways to monopoly operate: (1) The team ownership constitutes alliance, thereby to control the competition which authorized for fans, players, media revenue, merchandising and sponsors. (2) The Union work together to eliminate competition from other new alliances. (3)Use the new player selection, the team's owners forced the players can only negotiate with the selection of their team in order to bring down Player salaries. (4) New or expanded teams to join the Alliance have to afford to the other teams a large sum of money, and if a team wishes to move to another city, it must obtain the other team ownership's agreement. (5) Team owners can't sell their team merchandise by itself.

It's corresponding, for professional athletes, professional and technical formation is a long and arduous process, and there is no possibility for a individual

[1]Zhu Xinkai. Who will protect the player [J]. sports Expo, 2003 (3)

[2]Ronald B. Woods Sports Sociological Issues in [M]. Beijing: People's education press.2011:55

[3]Michael.Liz Peter.von.Almen. Sports Economics [M].Beijing: Tsinghua University press.2003:108

to be a high level playing in multiply sports events, which makes them only face a certain professional sports league when starting a career. In this way, athletes ‘ employment market has become a buyer’s monopoly, players almost have no choice[4]. Professional athletes of this property makes them relative to the employer that the employer side, evident in a vulnerable position, the athletes’ personal power is weak, and only together with the collective strength could safeguard its own interests.

1.2. Professional player’s wage benefit is its radical economic interests

For most professional athletes, wages are the main economic income. As early as 1983, NBA collective agreement introduces “salary cap” system, to prevent a celebrity’s appeal deed result from rich team boss introducing into star players. But in practice, pay almost no Cap. In the 1997-1998’s season, employers put forward that they would set top-limit in some special clause, player unions strongly resisted, but eventually got the victory for employers. United States court decided that during a halt, the NBA does not have to pay players wages. David Stern declared to cancel the whole competition season of sports game if they still had dispute. It was a no doubt a big hit to players who lived on playing basketball. However, the Union had nothing to do but compromise.

Sports organizations are too powerful, athletes is difficult to contend with, but the players Union still plays a pivotal role. In order to maintain the NBA Union rights abuses, United States legal system gives players many rights to safeguard their legitimate rights and interests. After 149 days, no less than 20 times by both parties after wage negotiations, finally shake hands and come to a preliminary agreement, which is the reflection of the Labour and Captial right counterbalance. NBA this kind of collective consultation on wages, the athlete through the formation of the players Union to negotiate with the employer, assisting with the means of striking, signed a collective agreement, which guarantees the implementation of the right to collective negotiation on wages.

1.3. The wage interests of professional athletes, often through collective bargaining to achieve

Collective labour agreements was also called collective bargaining agreement, refers to the employers (NBA executives and bosses) and employees (NBA players Union) signed agreements to established between the interests of employers, including player contracts, income distribution, player trades, draft

[4]Han Yong Sports Law: Theory and practice [M]. Beijing: Beijing Sport University press, 2009:268

picks and other provisions[5]. Collective consultation on wages is often combined with labours, negotiating with employers to secure against their legitimate rights such as wages and working conditions. Therefore, players unions and collective bargaining are particularly important.

As early as 1885, professional baseball players across the United States have established "professional brotherhood" as it tries to fight against major league baseball. In 1935, the United States <the National Labor Relations Act> was passed in the context of Roosevelt's new deal, but employer squeezed out all the way to the Supreme Court, to 5:4 votes for support, then establishing trade unions in the United States in the economic life of legal status[6]. NBA players Union was founded in 1954, because of poor working conditions, no medical insurance, no pension, paid low wages, many players have to train every day, while also relying on part-time jobs in order to bring home the bacon. Finally, in 1964, led by Union Chairman tangmu-haiyinsuoen players stroke games to threaten and NBA officials acknowledge the existence of a Trade Union. Since then, players trade unions was playing a part in protecting the interests of players and the NBA players using legal means and public effect to fight for their own interests first.

United States <National Labor Relations Act> also gives trade unions the right to collective bargaining, employers must negotiate with the players Union who was on behalf of the most player's interests. Collective bargaining is President of all the players and Union representatives of the players Union representative team boss of the whole, was consulting and talking over profit-sharing, players transfer, salary restrictions and so on. Under the protective union umbrella, the players adopted collective bargaining to fortify bargaining power and striking with employers by means of negotiation, and succeeding in fighting for their own interests.

2. The counterbalance of professional players' salary interests

2.1. Strikes and cease is an important mean of professional athletes contending with the employers

Professional athletes of high wage demands in line with market values should have been nothing wrong, but in order to prevent wild speculations of star players, particularly from the angle of professional League healthy and orderly de-

[5]Liang Shuangping. The United States occupation basketball league labor relations balanced mechanism [J]. Hezhou Sports Institute report, 2011 (3): 127-131

[6]Zhang Zhe. The United States NBA stop millionaire and billionaire hand wrist [N]. southern weekend, November 3, 2011

velopment, athletes from certain wage limit is a reasonable demand. Collective consultation on wages is a comprehensive subject, is not as simple as imagined, due to its strong operation, technical complexity, wide scope and other factors, to the negotiators through mutual consultation, in particular to the Trade Union, trade union representative's knowledge and ability should have higher requirements. Only high level negotiations will have the high quality of the collective contract[7]. As representatives of the players Union, negotiating with the Union, should not only master the relevant laws and policies, such as labour law, contract law, but also understand knowledge of psychology, sociology, economics, and so on, and mastering negotiation skills, understanding of economic trading. But to professional player who was busy training or competition, and poor in Union operations and balance of information asymmetric, he is obviously at a disadvantage. This can lead to two results: a mercy is allowing the Union, collective consultation is superficial; the second is "civilized" resistance, which adopts the law of the right to strike with employers in a protracted war.

Strikes are different from out of business, contrary to the both, the former refers to the players refused to work, the latter means the bosses prevent employees from working. United States in 1935,< the National Labor Relations Act >gives workers the right to strike, and expressly forbid unlawful interference with the right to strike. Correspond with it is that employers have the right to cease over the side, making employers and peers. In the history of the American NBA Union, sometimes the two parties stalemate, no compromise, players Union on strike or the boss out of business, are not surprising to Western market-oriented professional sports. Strike runs into a labor dispute and confrontation, is the basic ways and means workers take group action. 1997-1998 season, NBA labor failed to reach an agreement, eventually led to the players strike, which also led to a 1998-1999 season, NBA faces shrinking for the first time last season. Latest major collective bargaining agreement is signed on November 26, 2011, the parties lasted 149 days, negotiations reached a consensus and established the < labour agreement>. Reflect and clear on both sides of the collective agreements and obligations, <legal document> is agreement the two sides clearly labor relations, is the rights and obligations of both parties agree. Once established, related subjects must abide by and implement the NBA Union, shall not be violated.

2.2. Principles of collective negotiation both sides should abide by

The balance mechanism of NBA has become self-contained, which consists of external, neutral and internal balance mechanism in structure, including the

[7]Li Wei. The collective wage consultation in several key points of [J]. human resources, 2011:72-73

two categories of labor negotiations class and the corporate system class[8]. For labor negotiation, certain principles should be followed for the purpose of justice and equality and preventing the abuse of rights.

2.2.1. Principle of equality

This refers to the legal status is equal for both employers and employees, and their legitimate rights and interests should be subject to the equal protection of the law. It is the first principle of the civil subject, which fully reflects the essential demands of the market economy and the basic spirit of the modern rule of law, and is conducive to strengthening the equal protection of the property. The principle includes the followings: (1) equality of the capacity of civil rights of both parties; (2) equality of participation in civil relations and application of the same law for both parties; (3) equal consultation on production, change and elimination of civil legal relations and no imposing of will of one party on the other; (4) equal protection of rights of both parties by law. Obviously, if there is no effective legal regulation, the professional sports organization with a strong monopoly position and the vulnerable group athletes will cannot talk equally.

2.2.2. Principle of free negotiation

This refers that both parties could reach an agreement on any dispute through contracts within the range permitted, which is shown as follows: (1) freedom of choosing behavioral content and relative person; (2) freedom of choosing their behavior; (3) freedom of dealing with their own power; (4) freedom of choosing the ways for right relief; (5) freedom of engaging or not engaging in some sorts of civil activities.

In accordance with the principle of free negotiation, behaviors without being prohibited by law is free. Sports is originally a personal matter, as long as it does not violate the law, administrative regulations and international requirements of mandatory public order and good morals, the state shall not interfere.

2.3.3. Principle of fairness

Principle of fairness first requires the two parties of labor and capital sign a collective bargaining agreement with the spirit of fairness and justice. It is also the evaluation criteria of the purpose of civil activities. When it is difficult to evaluate whether the collective bargaining violates the principle of fairness from

[8]Wang Jianguo. NBA balance mechanism theory [J]. Journal of Shanghai Institute of Physical Education, 2005 (3): 26

the point of the behavior itself and behavior process, we need to do from results. If the results of the negotiations between the two sides form a great imbalance between the interests of the parties, unless the party has voluntarily accepted, otherwise appropriate adjustments should be made according to the law.

2.3.4. Principle of honesty and credit Honesty

Credit is regarded as a market economy activities of "King provision". It required subjects of civil activity should be honest , credit in civil activities, exercise their rights and fulfill their obligations. Through the: (1) the labour parties to trust and abide by the promise, honest to others; (2) both employers and employees should be exercise their right to benefits while fully respecting the interests of others and the interests of society, do not abuse the powers; (3) demonstrated their good faith in the negotiations.

Conclusion

America NBA professional sports, representing the highest level of international professional sports. NBA player wages collective negotiation, by the formation of athletes the players' Union, the salary system, salary adjustment scheme involves the vital interests of the athletes, with union collective consultation, collective bargaining, and auxiliary means to strike and reached the legal labor agreement, is as vulnerable groups' interests means and effective way. Collective bargaining is always the principle of equality, free consultation should abide by the principles, the principle of fairness and the principle of honesty and credit.

Professional sports' orderly development need professional sports organization's monopoly position, but in the market economy, the equality of the professional sports organizations and athletes to become both cooperation and struggle of the game community. Not Only fully safeguard the fundamental interests of all parties, at the same time, but also limit the abuse of rights could achieve win-win situation of benign loop.

China's professional sports is being on the rise, professional sports has a long way to succeed, draw lessons from the successful experience of the developed country contributing to the Chinese professional sports take roundabout way less and being order.

SPORTS RIGHTS LEGISLATION IN CHINA

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Abstract: *Recently it is stated that sports rights should be written into the Constitution or Sports Law as an individual clause in China. But scholars fail to reach a consensus of the content of sports rights. And rights legislation in China seems overemphasize the declaration of legal rights with lack of practicality. Therefore, the optimal choice at this stage is to incorporate sports rights into the legal purpose provision of Sports Law. Special forms of sports rights, which have been widely recognized, should be coordinated in Sports Law.*

1. Claims for sports rights in China

In recent years, widespread studies of Sports Law of the People's Republic of China (1995) state that there is neither clearly stated definition of "sports rights", nor a truly legal rights system, but only the need of administrative convenience. They believe, in the new period, sports rights need to be declared in the amendment of Sports Law, in order to provide greater protections. The sports rights legislation seems to become an inevitable trend.

Yet there is little agreement about how can we identify sports rights in legal texts: on the one hand, Dr. Huarong Chen (2012) suggests that sports rights should be defined in the Constitution of the People's Republic of China;[1] on the other hand, Prof. Siyuan Tian (2011) claims that there should be an independent clause for sports rights in Sports Law.[2] The essential difference between them lies in the understanding of legal status of sports rights: the former regards it as one of the fundamental rights of citizens; while the latter takes it into the scope of social and cultural rights.

Such understandings of sports rights do not emerge independently, but by the profound impact of rights theory in China. Since the end of 1970s, contemporary Chinese philosophy of law is going through transformation of paradigms. With breakthrough of the class-struggle paradigm, the right-oriented paradigm has become the most dazzling theory in China. Scholars have reached a consensus that

[1]Chen, Huarong, & Wang, Jiahong. (2012). Seeking sport rights in constitutions- A comparative analysis of sport clauses in the civil right chapter in the constitutions of various countries. *Journal of Physical Education,* 19(3), 24-29.

[2]Tian, Siyuan. (2011). Core of modifying sports law is to secure citizens sports rights. *Journal of Tianjin University of Sport,* 26(2), 114-117.

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rights and obligations are the core concepts of law. And rights, rather than obligations, should be taken as the starting point or the axis of acts. [3] However, several issues arise by going down this path. It is deduced that the primary goal of an act should be a clear declaration of legal rights, and legal rights should be defined as an independent clause; otherwise, it would go against the tide of history. So the scholars urge the declaration of sports rights immediately.

However, I cannot help asking the following questions: Firstly, is it the only option for legislatures to enact sports rights as independent clause? And only in that way, rights legislation could reflect the essence of the scientific development– to put people first? Secondly, will admission of sports rights to the Constitution or to Sports Law alone improve the quality of rights legislation, and provide better protection for people's sports rights?

2. Potential risks of sports rights legislation in China

In 2011, the socialist system of laws with Chinese characteristics was established. Mr. Chunying Xin, the Deputy Director of Legislative Affairs Commission of the National People's Congress (NPC) Standing Committee, pointed out: The establishment of the socialist system of laws with Chinese characteristics puts forward higher requirements for legislative technique, and there should be less declarative contents in the acts and further improvement the practicality of laws and regulations.[4] Therefore, in the revision of Sports Law, legislators have to be careful of the claim on sports rights legislation. Now it is difficult to reach a consensus about the definition and the content of sports rights. Thus, the attempt to hurry the process of generalizing sports rights in a legal clause cannot enhance the protection of human rights; on the contrary, it will once again fall into the embarrassing situation with lack of practicality.

2.1 Disagreements on sports rights in China

Even with the increased upsurge of legislation on sports rights, a problem, cannot be ignored, is that none of the scholars could convince the others of the intension and extension of sports rights. It seems that each scholar wants to abstract the definition of sports rights in order to develop legislative drafting in accordance with the logic of legal rights.

Firstly, from the nature of sports rights, some scholars, such as Prof. Yujun Feng, identify sports rights as possibilities. They believe that citizens have the

[3]Zhang, Wenxian. (2007). *Jurisprudence* (3rd ed.). Beijing: Higher Education Press.

[4]Xin, Chunying. (2011, March 11). The great historic significance of the establishment of the socialist system of laws with Chinese characteristics. *Legaldaily,* (3).

right to enjoy physical health and freedom of physical exercise, as well as the opportunity and qualification of equal competition, so as to realize the possibility of highest standards of physical and mental health, ultimately achieving the maximum of self-interest and public welfare;[5] some clarify sports rights as legal permissions and protections, for example, Prof. Xiaolong Dong regards sports rights as the legal confirmation of people's sports rights claims, the freedoms to conduct certain acts;[6] also some scholars, represented by Mr. Zhenlong Zhang, define sports rights as freedom and interests, and recognize sports rights as legal freedoms and interests that people should enjoy during the course of receiving physical education and engaging in physical exercises.[7]

Secondly, in terms of the denotation of sports rights, the conclusions among different scholars are quite different. For example, Prof. Weidong Tang divides sports rights into a part for ordinary citizen and a part for special groups, of which, the former including 8 special sports rights, such as the right to enjoy personal freedom, life safety, physical and mental health, rest and entertainment and choice for participation in sports activities, the right to receive national sports welfare and support, the right to receive sports honors, the right to express willingness of sports, the right to have equal status in sports and the right to freely join in sports organizations, and the latter including 13 special sports rights corresponding to the posts of athletes, coaches and referees;[8] Prof. Juke Liu classifies civil sports rights into 8 fields, including the right of equality, political rights, freedom of religion, personal rights, social and economic rights, cultural and educational rights, rights of supervision and claim, as well as the protection of rights of a particular subject; [9]moreover, Dr. Huarong Chen divides sports rights into the right to one' body self-determination, the right of participation and competition, the right to appropriate access to facilities, the right of first aid, the right of rules protection and the right of sport autonomy.[10]

These disagreements remind us, in the past 27 years, little substantial breakthrough has been made in the concept of sports rights, even though the academic achievements were at superficial prosperity.

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[5]Feng, Yujun, & Ji, Changlong. (2005). On protection of sports rights and perfection of China's Sport Law. *Journal of Northwest Normal University (Normal University).* (3): 115-116.

[6]Dong, Xiaolong. (2006). *Sports Law.* Beijing: Law Press.

[7]Zhenlong Zhang, Shanxu Yu, & Rui Guo. (2008). Basic issues in sports rights. *Journal of Physical Education.* 15(2): 20-23.

[8]Tang, Weidong. (2007). *Sports Law.* Nanjing: Nanjing Normal University Press.

[9]Liu, Juke. (2007). *Sports Law.* Guilin: Guangxi Normal University Press.

[10]Chen, Huarong. (2009). The definition of sport right in China: Difficulty and development. *Journal of Tianjin University of Sport.* 24 (6): 499-503.

2.2. The systemic defect of rights legislation in China

In the study of 240 current effective laws in China, the rights legislation obviously overemphasized the declaration of legal rights, taken the form of "declarative sentence structure", namely, a prescribed pattern to directly state the subject and the content of rights, which is reflected in two expressions: a) the expression of active voice, i.e. who can do what; b) the expression of passive voice, i.e. what possessed by who shall not be interfered. For the former, the example is as shown in Article 41 of the Constitution– "Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any state organ or functionary"; for the latter, as shown in Article 138 of the Securities Law– "Securities companies shall have the right to operate independently in accordance with the law, and their legitimate operations shall not be interfered". Indeed, such declarative sentence structure for legal rights has unparalleled advantages. It highlights the importance of human rights, clarifies the legal status of subjects, expresses what is ethically right, and reflects the final decisive nature of human rights. Thus, been used in the Constitution or the "general provisions" in acts to declare the citizens' fundamental rights, it has an irreplaceable special status, and gains the favor of legislators.

The declarative sentence structure for rights, however, has insurmountable difficulties in practice. Firstly, the granting of legal rights is isolated from specific legal relationships. The abstract declaration of legal rights does not yet explain in details that citizens has the freedom to do what, or how to do it, but only explains who has nominal legal rights. And there are no explicit provisions about who is obliged to do what or what shall be done to protect other's legal rights, especially without a tangible penalty in case of violation of rules. Furthermore, universality and abstractness cannot indicate the people who actually carry out the rules how to behavior. Therefore, the declarative sentence structure of granting rights is actually a "disguised use of the passive voice".[11] And as a result, the abstract rights provisions become almost meaningless.

Secondly, the abstract declaration of rights cannot be restrictions on the power of governments, but rather leaving space for corruptions. As provided in the Article 46 of Sports Law, "Public sports installations and facilities shall be open to the public and be easily accessible to them for sports activities. Students, the aged and disabled people shall be given preferential treatment in this regard, and sports installations and facilities shall be fully utilized." In addition, in "Decision on Further Strengthening the Work of School Sports, and Effectively Improving the Health Quality of Students" issued by the Ministry of Education and the State General Administration of Sports, it is explicitly indicated that "school

[11]Seidman,Ann, Seidman,Robert B., & Abeysekere, Nalin. *(2001). Legislative Drafting for Democratic Social Change: A Manual for Drafters.* London: Kluwer Law International.

stadiums shall be open to students and community residents in after-school hours and holidays". In other words, students and community residents have the right to access to school stadiums for sports activities during after-school hours and holidays. The problem is that different provincial governments and municipal governments have developed different policies for the open of these sports facilities. In most areas, users are required to pay a fee for the use of sport facilities. However, do community residents or students have to pay for these activities? There are no statutory rules. And it is absurd to charge the students of their school in after-school hours and holidays. Furthermore, are special groups, such as the seniors and disabled people, free of charge or otherwise provided with a discount, or equal treated to take standard charge? Then, who can set the rules of standard charge? How to coordinate the charge in different regions and different stadiums to avoid regional conflicts? Finally, who is entitled to collect the fees? How will the money be used? All these answers leave to the governments without information disclosure to citizens. It is obvious that, only by abstract rights provisions, without behavior constraints of the implementation, the law will turn to be the means of corruptions for the executive authorities.

3. Comparative study of rights legislations in other countries and regions

3.1. Declaration of rights is not the only way of rights protection

In other countries and regions, declaration of right is not the only approach for rights protection. For example, the Amateur Sports Act of the United States does not include sports rights as an individual clause, even doesn't use the word "sports rights". In the area of consumer rights legislation, the legislatures of United States address the regulation of duty holder's behaviors, by a large number of duty prescriptions in federal and state law. Also there is neither rights declarations, nor individual provision in the consumer rights legislation system of Hong Kong Special Administrative Region, where the consumer rights are also protected by the prescriptions of the obligations of duty bearers, such as manufacturers, importers, suppliers, etc.: Sale of Goods Ordinance (Amendment), Trade Descriptions Ordinance, Consumer Goods Safety Ordinance and Supply of Services (Implied Terms) Ordinance. In Taiwan the Consumer Protection Act and its Enforcement Rules also use obligatory provisions as the main part, and even the second chapter of "Interests of Consumers" does not use the word "consumer rights". Therefore, the protection of legal rights is not limited to the direct explanation of the right contents in legal texts, from another point of view, the effective protection of rights can be achieved through the obligation provisions for the counterpart.

3.2. Rights legislation in terms of relationships

By regulating behavior, rights and duties should be prescribed in the specific relationships, not just as abstract declarations. For example, in Article 7 of National Sports Act of Taiwan, "Sports facilities of all levels of educational institutions should open to the public and provide access to community citizens for sporting activities, under the pretext that it does not affect the teaching and life management of schools. When necessary, users can be charged for their use of the facilities, with the income being utilized as maintenance and counseling personnel fees". Compared to Sports Law of China, the drafters of this clause "address the addresses much more directly",[12] avoiding of unnecessary vagueness. Thus, we should not merely clarify an abstract concept of rights, but also consider rights in the legal relationship, make a deep analysis of the behaviors of the right holders and the duty bearers. Only thus can a statute tell people what exactly he or she is to do or refrain from doing, and influence people's behavior choices in practice.

3.3. Legal rights have certain restrictions

The social dimension of individual rights has been taken into consideration in various countries and regions. Legal rights have been limited by "the rights and freedoms of others", the "constitutional order", the "interests of the society", or the "moral code", etc. One main task of legislators is to make clear restrictions of legal rights. For instance, when approaching an intersection, drivers should yield the right of way to any pedestrians who are crossing the street. But this doesn't mean there are no obligations for pedestrians. Unless the pedestrian have given motorists a chance to stop, he or she must not to attempt to cross an intersection.[13] For the right of the public to access to stadiums, the Stadium Regulation issued in Hong Kong has clearly defined its boundary, provided in the Article 4 as "Except with the consent of the manager, no person, other than a member of the staff, shall enter or remain in any part of a stadium - (a) the exclusive use of which has been granted under section 105C of the Ordinance to any person, except in furtherance of a purpose for which such grant is made; or (b) during any period when the Director has directed that the stadium or such part thereof is closed to the public." Thus, the declaration of legal rights should be associated with reason-

[12]Boeckenfoerde, Marks. (2006). *Max Planck Manual* on. *Legislative Drafting on the* National Level in Sudan. Retrieved from http://www.mpil.de/shared/data/pdf/national_manual_legal_drafting(c).pdf

[13]SGI. (2012). *Saskatchewan Driver's Handbook 2012: A guide to safe driving.* Retrieved from http://www.sgi.sk.ca/pdf/handbook/2012_DriversHandbook_All.pdf

able restrictions; otherwise, they will turn to be "the illusion of absoluteness". [14]

4. The optimal approach of sports rights legislation in China

4.1. The declaration of sports rights should not be an individual clause

Since "The State develops physical culture and promotes mass sports activities to improve the people's physical fitness" has been written into the Constitution, it is not necessary to make additional abstract declaration of sports rights in it. In consideration of the different theories of sports rights, we should not be hurry to give an obscure definition of sports rights in Sports Law.

4.2. Sports rights are more suitable to be stated in the provision of legislative purpose

Compared to above suggestions, the more appropriate approach is to state sports rights in the provision of legislative purpose, while strengthening specific sports rights and duties in specific provisions of Sports Law. It should be noted that, the purpose of United States Amateur Sports Act includes "to recognize certain rights for United States amateur athletes". It can be taken as a reference.

4.3. Specific arrangement of sports rights

Different types of specific sports rights which have been widely recognized can be drafted in the chapters "social sports" and "athletic sports" in the Sports Law, which can be an effective declaration of specific sports rights, and also beneficial to avoid the conflict of rights. First, the sports participation right should be written at the beginning of Chapter 2 "Social Sports" to reflect the aim of improving physical fitness of the whole nation. Secondly, the drafters should coordinate the complex provisions of different special groups' sports rights– the sports rights of "the aged and disabled people" prescribed in Article 16 of Chapter 2, meanwhile, the sports rights of "children, juveniles and young people" provided in Article 5 of Chapter 1. In my opinion, both of them should be provided in Chapter 1"General Provisions". Finally, the athletes' specific rights to employment and enrollment for schools should be enacted in Chapter 4 "Athletic Sports".

[14]Glendon, Mary Ann. (1991). *Rights Talk: The Impoverishment of Political Discourse.* New York: The Free Press.

RESEARCH ON THE MOTIVATION AND PATH OF INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL CULTURE- A TRADITIONAL MARTIAL ARTS PERSPECTIVE

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Abstract: *China is rich in traditional cultural resources and particular in traditional martial arts which represent China in the international area. However, there are great obstacles in the legal protection and development of traditional martial arts. Among them, the mode of law protection is very controversy that still lack of reasonable solution. Facing with increasingly intense cultural conflict, it is urgent for China to find out the power source of protecting the traditional martial arts and show the way to develop. As a view of intellectual property, this paper explores the path of protection and development of China traditional martial arts.*

Introduction

Traditional culture is the most precious of human spiritual wealth and cultural heritage, and it is the most important feature that each nation relies on to reveal its personality. As a great country with five thousand of the development history, China's traditional culture resources are highly rich, especially the traditional martial arts, which have internationally representative position. Although in recent years, China's protection consciousness on traditional culture constantly has be improved and promulgate the "non-material cultural heritage law" and provide laws to abide, but unfortunately this method still has many insufficiencies. There are great barrier to protect legally traditional martial arts in China, and it is hard to develop the traditional martial arts.

Among them, the legal protection model is in great dispute failed to get reasonable solution. In the face of the fierce culture conflict, it is urgent to find power source to protect traditional martial and find road to develop it. The path of the protection and development Chinese martial arts should be developed based on the perspective of intellectual property.

I. Development of traditional Chinese martial arts under impaction of western culture

The culture generates on the foundation of people's life experience and living experience. The existence of cultural conflict is determined by cultural congeni-

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tal and the necessity of communication. Since the opium war, the cultural conflict increases fiercely in China. The Chinese and western culture in the extensive contacts and collision, China nearly years of cultural evolution process, in fact, is a full of the history of cultural conflict. In sports, on the one hand, is the western sports culture and the Chinese traditional sports culture conflict; On the one hand is the Chinese traditional sports the lack of deep research connotation. In this kind of impact to the traditional martial arts as the main representation of the Chinese traditional sports development walked slowly.

(i) Decline of the function of traditional martial art' attack under industrial civilization

From the origin of speaking, traditional Chinese martial arts is not the people understanding to cultivate one's morality body as the main value idea, in ancient military war, the traditional martial arts plays a considerable power, is an important means of the ancient war, especially the age of cold, warrior even become a social atmosphere, warriors in society is a popular people respect group. However, with the rise of hot weapon, the traditional martial arts of combat value weakened, adventurous function practice stage in gradually reduce. Especially the rise of industry bring the technology requirements, make unarmed melee in the military gradually lose existing space. In addition, the progress of the society brings to the pursuit of civilization, changed the bad social environment, especially the continuous improvement of the law, no longer become people to stay the survival and development of the necessary tools, the traditional martial arts in the civil action also gradually reduce.

(ii) Loss of traditional martial arts techniques under the utilitarianism

Originated in the late 18th and early 19th century, the utilitarianism of philosophy had a great impact on the modern times Chinese traditional martial arts development. At the last century 80s martial arts become our country official event, utilitarian values intensifying, and many cultural connotation and spirit gradually of the original the traditional martial arts die out, artistic expression strengthening, only has combat have no achievement method and routines combat movement have the absolute advantage, the traditional martial arts was gradually neglected in the historical development process of Chinese traditional culture contains inside and outside and repair, practice have combined with cultivators, playing with essence part, to the main according to western athletic sports mode developed into modern competitive martial arts, pay attention to "high, difficult, beautiful, the new" and so on the external performance.

(iii) Shortage of connotation of traditional martial arts culture under the scientific trend

In the western culture impact strongly, the traditional martial arts gradually away from the part of the Chinese traditional culture essence, more and more to the modern athletic sports development direction, in part, insist on the model of the traditional martial arts, but it can't face the impact of western culture, and the influence of him to beconceited, lack of scientific guidance, gradually the deification and religious. Fundamentally, the deviation of these two kinds of the traditional martial arts of the development road , are derived from the traditional martial arts culture connotation insufficiently, develop traditional Chinese martial arts, not only to conform to the trend of the development of modern science, but also to keep the traditional martial arts the cultural essence and carry forward.

II. **Legitimacy of intellectual property protection of the traditional martial arts- intellectual property of traditional martial arts**

(i) The traditional martial arts is not totally belong to the public domain

Public domain is a part of the human works and part of a reservoir of knowledge. It can include articles, art, music, science, invention, etc. For the domain knowledge property, any individual or groups do not have the rights. These fields belong to public cultural heritage, and anyone could use and process them. Restrictedly. Lacking of specific rights subject and right content, public domain could not cover by intellectual property rights protection in the intellectual property protection range. It can be seen that the traditional martial arts is not totally belong to the public domain from the connotation and the traditional martial arts development course.

The traditional martial arts have regional characteristics. As other traditional culture, the origin of traditional martial arts has regional characteristics. Taking the taijiquan as an example, each school has specific regional attributes in Chinese six taijiquan schools. For instance, young's taijiquan originated in Hebei Handan, WuShi taijiquan is in Henan Jiaozuo Chen taijiquan on the basis of the development of creating, Beijing wu type taijiquan is formed on the basis of the young's taijiquan, Hebei Baoding sun-style taijiquan originated from WuShi taijichuan. As all of humanity knowledge wealth, the public domain doesn't has obvious regional characteristic. The current western countries use Chinese traditional cultural resources frequently for economic benefits and don't pay the remuneration. It is groundless that they excuse those resources belong to the public domain.

(ii) The intellectual property rights of traditional martial arts has a specific subject

The protection of intellectual property rights which subjects is to determine more natural person, legal person or other organization, the diversification of the subjects of the right for the traditional martial arts of intellectual property protection provides a reasonable breakthrough point. Although the traditional martial arts of the emergence and development eventually to be well known and is not a single natural person complete, but it is still by specific individual development formed, and these individuals are only limited to a field. As the traditional martial arts formed, the individual characteristics more apparent, such as taijiquan have Chen, yang to distinguish. These individuals undoubtedly has the protection of intellectual property rights subject characteristics, from which produces the traditional martial arts project nature should be punished by the protection of intellectual property rights.

(ii) The traditional martial arts has the original features

As a kind of traditional culture, the traditional martial arts in its development process condensed the whole Chinese culture spirit, was several generations intelligence create result reflect. But you can't just say the traditional martial arts do not have original features.

Any intellectual property object generation is not without foundation to create, is based on the development of human civilization to produce. So do the traditional martial arts , each specific the traditional martial arts project can existence in the river of history, is the specific historical environment development results, and prompted the development of the subject produce is specific individual. It is these specific individual originality of labor, the traditional martial arts to develop and conserve. Therefore, from this Angle, the traditional martial arts with intellectual property rights originality characteristics should be punished by the protection of intellectual property rights.

III. **Motivation of the intellectual property protection of traditional martial arts in the context of globalization**

Globalization is the basic feature of future economic development for the world-wide and it tried to bring the world economy, politics, culture into the same orbit by the way of international trade. In the field of intellectual property, the basic trend is the Western developed countries will promote the legal norms of the Western world to the whole world to form international IPR protection system by value basis for western legal concepts. In this unreasonable interna-

tional intellectual property rights protection system, world intellectual property protection standard constantly convergence. This convergence causes a lot of problems, such as the imbalance of their international protection and domestic protection of intellectual property, intellectual property monopolies and abuse intensified and the intellectual property rights of the expansion of global protectionism and exclusive ideology. In the protection and development of traditional martial arts, facing traditional martial arts resource abuse crisis in western countries, at the same time, the deficiencies in the traditional martial arts of intellectual property protection in China has exacerbated generation of crisis, which is the motivation for the intellectual property protection of traditional martial arts.

(i) Differences of developed and developing countries on the advantages of traditional culture protection

Compared with the developed countries, traditional culture expression is a developing country advantage cultural resources, which should be the economic and trade game cards between developing countries and developed countries. Monopoly enterprises in developed countries, however, by virtue of their competitive advantage, the use of the favorable international intellectual property rules of the game, appropriate the traditional cultural resources of the developing countries and gain huge business profits, but traditional community did not get any substantial return. Disney, for example, in China's traditional martial arts (Mantis) material, shoot a cartoon of "Kung Fu Panda" and gain hundreds of millions of dollars in box office receipts, but did not pay compensation to any rights. The developing countries as well as non-governmental organizations expressed strong dissatisfaction to this kind of phenomenon, think that such behavior is a violation of the harsh living environment of the legitimate rights and interests of the traditional community. Europe and the United States monopoly enterprise argued traditional culture is the public resources of all humanity and anyone has the right to its reasonable development. They also claimed that the natural attributes of traditional cultural expression lead to its lack of a private right attributes. Visible, both developed and developing countries have serious differences on this issue.

(ii) The disadvantage on the protection of traditional martial arts from international intellectual property protection system

The current international intellectual property rights protection system is mainly to protect the existing knowledge of science and technology of developed countries, but without proper protection towards Traditional culture including traditional martial arts. The developing countries are all the countries with

splendid traditional culture. In order to take into account the traditional cultural industries in developing countries it is necessary to take appropriate protection to folklore and achieve the interests contend towards developed countries. At the international level, UNESCO and WIPO, issued in 1982 "on the protection of folk literature and art expression, preventing improper use and other damaging behavior of domestic law demonstration clause ". UNESCO has developed a "Declaration of Human Oral and Intangible Heritage of Humanity" and "Intangible Cultural Heritage Convention" in 1998 and 2003,respectively. WIPO General Assembly in 2000 had established a special Intergovernmental Committee (WIPO-IGC) on Intellectual Property and Genetic Resources, traditional knowledge and folklore expression. After the Doha Declaration, the WTO TRIPS Agreement Council also began to focus on the protection of traditional culture, but there is no substantive progress.

(iii) Lack of intellectual property protection in China's traditional martial arts

In reality, there is the problem of the improper use of traditional martial arts. One of the most prominent manifestations is to distort and tamper with the traditional martial arts,which give serious damage to the properties of the original nature of the traditional martial arts. And enhanced with the trend of economic globalization, the traditional martial arts have been gradually marginalized. The rapid development of economic globalization and free trade, a lot of culture with national characteristics have disappeared, or in danger of disappearing.It become particularly urgent and important to the protection of traditional martial arts. At present, the way of the protection of intellectual property of our country to the traditional martial arts is to classify the traditional martial arts, and shall incorporate it into the folk literature art works or expression for protection. The 1990 copyright law, there are the provisions on the protection of folklore; Our government since 2003 began the implementation of the scale of the national folk culture protection engineering in the nationwide, in 2004 joined the "Convention for the Safeguarding of the Intangible Cultural Heritage; In 2007, copyright protection of folklore has entered the legislative agenda of the State Council, "Intangible Cultural Heritage Act" has been passed on February 25, 2011, and start implementation on June 1, 2011. However, these laws and regulations on the protection of traditional martial arts are extremely inadequate.

IV. **Explorement of path for Intellectual property protection of traditional martial arts**

It is necessary to explore the path to protect intellectual property of traditional Chinese martial arts based on the analysis of the motives in the background of

globalization. China should actively participate in the formulation of the rules of the international protection of intellectual property rights. A road suitable for the development of traditional martial arts and will be developed.

(i) Active participation in the international cooperation on intellectual property protection traditional culture

International cooperation on intellectual property protection of traditional culture is an important measure to respond effectively the changes of international protection of intellectual property. on the one hand To expand the scope of the protection of intellectual property rights and protect the intellectual property rights of China's traditional culture; On the other hand, it is also able to increase the influence of China's traditional culture, and expand international discourse on the traditional culture of intellectual property protection through cooperation with other countries and international organizations, such as World Intellectual Property Organization(WIPO), World Trade Organization(WTO), UNESCO, the World Customs Organization(WCO), the Group of 20, the International Criminal Police Organization(ICPO), APEC, Economic Cooperation Development (OECD).

(ii) Building Traditional cultural trade mechanism

one of the important rules of TRIPS Agreement is association intellectual property and international trade. China needs to establish trade mechanism on traditional culture, because Chinese traditional culture is used internationally. Without Chinese permission, any country, organization or individual using China traditional cultural resources for profit should be face to trade sanctions.

(iii) Improving the existing legal system

1. Clear unique legal status of traditional culture

The side of Interrelation between traditional culture and intangible cultural heritage is both of these have culture attribution and is specific culture resources.

But they also have some differences. Firstly, the former focuses on the "culture", while the latter focuses on the "heritage". At this level, the traditional culture will not disappear but become even more precious because of a long history. The latter is different, the cultural heritage exists as intangible, its creators have been disappeared or will soon disappear, its heritage involves into predicament. Secondly, upper seat conception to explain traditional culture is more universal, because each culture has representative and historic can be called traditional culture.

Under the premise of existing distinction between traditional culture and the intangible cultural heritage, we can confirm it is inadequate for "the Intangible Cultural Heritage Act"to protect the traditional martial arts. It is need to clear the unique legal status of traditional martial arts (traditional culture) and recognize the existence of the legal entity of the traditional culture to strengthen the protection of intellectual property rights of traditional martial arts, providing related provisions, which includes protection of intangible works ,and distinguish general intellectual property protection in time limit ,and relax requirements on the presence of the object, and prohibit abuse of traditional culture.

2. Clarify the legal status and rights of the people of the traditional martial arts of intellectual property rights

We can learn from "the Convention for the Safeguarding of the Intangible Cultural Heritage", the subject of rights for the traditional martial arts project, which can determine the specific creators or saved, will be identified as personal. The legal rights of the subject of rights should include right of option, right of obtaining foundation, copyright, patent right, trademark right and the use of beneficial interest of the intangible cultural heritage.

(iv) Pay attention to cultivate the culture environment of Intellectual property rights protection

The environment of intellectual property protection is a great conception, which includes not only the development and implementation of intellectual property policies and regulations, but also the nurturing of intellectual property protection cultural.

We create the cultural environment of the traditional martial arts of intellectual property protection is to make the public recognized the signification of the protection of traditional arts. Basically, we create the intellectual property culture of traditional martial arts is to emphasize the moral of the intellectual property culture of traditional martial arts and enhance the respects to humans and traditional martial arts. In the base of this, we can create the traditional arts culture of sharing, inheriting, advocating the value of humanistic and all citizens but no elite.

In summary, on the one hand protection of intellectual property rights for Traditional Wushu derives from traditional Chinese martial art is gradually marginalized in the background of Western culture conflicts with Chinese culture, On the other hand it derives from the Traditional martial arts is used improperly. The latter is the main motivation to strengthen the protection of intellectual property rights of traditional martial arts, conferring the trend of the international protec-

tion of intellectual property rights. so the international discourse of Intellectual Property Rights of the traditional culture should be expanded, and Trade instruments should be taken. At the same time, It is necessary to improve the existing laws In the domestic and build system to protect the heritage of traditional martial arts. The relationship between inheritance and development of traditional cultural should be coordinated. In conclusion, the protection of intellectual property for traditional martial is not only our internal needs, but also the external pressure. It is important to face the traditional and use scientifically, and provide a good path to develop traditional cultural.

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A TENTATIVE ANALYSIS ON THE ATHLETES TRANSFER SYSTEM AND RELEVANT LEGAL ISSUES IN CHINA- THE CASE OF TRANSFER SYSTEM OF CBA

(China Basketball Association)

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Abstract: *By investigating the transfer system of CBA and comparison with the system of the international advanced league NBA (national basketball association), the author revealed that the transfer system of CBA had achieved a certain development, however, many issues still exist. Meanwhile, to analyze the transfer system of the Chinese professional basketball league from the legal aspect, the author promotes that the government should enhance the relevant legislation to push forward the development of legalization, rationalization, and professionalization of the transfer system in China.*

Introduction

With the development of the Chinese Sport, the professionalization of professional basketball league in China is furthering. In the transition period between old and new system, many legal regulations are still insufficient, which leads to the fact that some disputes occurred in the application of professionalization can not be resolved in a fair and reasonable manner. In this regard, transfer of players becomes a very prominent issue. A good solution to this problem is undoubtedly positive to the reasonable exchange of sport talents and protection of athletes' rights.

1. Transfer system in China

The transfer of athletes refers to the practice and result of the move of a professional player from one professional club to another. This is a special operational means of professional sports club, which is different from other enterprises. Transfer of athletes has been common since the birth of professional clubs, especially in European football. With the development of professional clubs, transfer of athletes has been a international tradition, all the sport associations have also gradually incorporated it into their management regulations.

The transfer system in CBA have three aspects: domestic transfer, temporary domestic transfer (Reverse Picking) international transfer.

i. Domestic transfer (refers to the transfers that last at least two years), domestic transfer regulations stipulate that:

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ii. Players under disciplinary penalty can not transfer.

iii. Players who have not completed their contracts can not transfer without permission of their employer

iv. From Sep 1st to 30th, CBA opens the transfer window. All private transfer outside of this period are not allowed, relevant players and clubs are subject to suspension and financial punishment.

2. Temporary domestic transfer

Temporary domestic transfer refers to the move of CBA registered elite players from on professional basketball club to another in a "paid, one time deal" fashion. The core element of this "xxxxx" is reflected by the fact that all temporally transferring players are gathered and handled by the Chinese Basketball Association all together. The participating CBA teams can pick a player they desire, following the order that the lower placed team (weaker team) gets to pick first. The Bayi Rocket can pick two players within the military squad given that they do not hire international players.

3. International transfer

The transfer regulations of hiring international players stipulate that:

i. The introduction of foreign players should strictly follow relevant regulations of the motherland of this palyer, Asian Basketball Association, as well as CBA, and obey the laws regarding a foreigner's entering and leaving China.

ii. All registered CBA clubs can introduce two foreign players at most in one year, but the two players can not play at the same time.

iii. The employed foreign player should complete transfer agreement and sign a contract of at least one season.

iv. According to the stipulation of FIBA, foreign players can either hold A card (player domestic games representing the club) or B card (player international games representing the club).

The Comparison between transfer systems in CBA and NBA (a more advanced league)

i. Difference in the "Reverse Picking" system

The "Reverse Picking" of NBA refers to the transfer mechanism of rookies, that is, the system designed for new players to become professional players. Each year, experts determine the place of each new player after evaluation their competence during the NBA draft, then the weaker teams pick the ownership of new players by drawing. The right of picking new talented player can be traded

within certain limits, that is, the right can not be sold in two consecutive years. However, in CBA, the "Reverse Picking "means all the players of temporary transfer are gathered together to complete the transfers. The transferring players are put on board, and the teams choose players in the order reverse to their ranks in the league. This is a mechanism to balance the competence of all CBA teams. The CBA "Reverse Picking" system is good for the standardization of the transfer market, and avoids disordered competition and transactions under the table. Also, handling the transfers all together helps to balance the gap between stronger teams and weaker ones, and avoid the phenomena of "bipolarization". However, in the operation process of the "Reverse Picking" system, the prioritized choice of clubs are preferred, whereas personal choice is neglected, which harms the stimulating of athletes' potential.

ii. Difference in the ownership of players

Ownership of NBA players is not determined by their municipal origin, all players are managed by the NBA. They are from different countries,. As long as they meet the requirement of NBA, they are able to enter a NBA club. Although the CBA has adopted the "Reverse Picking", the CBA clubs are transferred from previous clubs from different provinces and armies. The players were trained by schools, sport schools, and army; therefore, the clubs have close relationship with local government and military departments.

iii. Difference in forms of transfer

Transfers in the NBA are primarily completed in the form of exchanging players, either one for one, or one for two. No transfer fees are charged. Whereas the CBA clubs classify players into several value categories, picking players of different categories need to pay fees accordingly.

iv. Difference in Categories of Transfer

Transfers in NBA can be classified as new players draft, free player transfer, transfer in contract. In CBA, transfers include domestic transfer (permanent domestic transfer and temporary domestic transfer), international transfer, and transfer with Hong Kong, Macao, and Taiwan areas. New players draft and free player transfer are the major forms of NBA transfer, whereas CBA transfers are mostly temporary domestic transfers.

4. Legal issues relevant to transfers of professional players

In recent years, the CBA league has achieved a lot. However, it should be noted that there are a lot of issues. The transfer turmoil of Ma Jian represents a very typical case. This case last two years, Ma Jian is the major victim given time is most precious to a player. The work contract signed by the player and club is indeed a labor contract, which is subject to regulations of Chinese "Labor Law". The relationship between Ma Jian and Aoshen Club is essentially the relationship between employers and employees. Both parties should obey the contract and fulfill each one's responsibility and rights. It is Ma Jian's responsibility to play for the club, and the Aoshen club is responsible for paying Ma Jian according to the contracts. However, before the contract is over, Ma Jian's salary is suspended, obviously the Aoshen club has violated relevant rules of the "Labor Law".

The above-mentioned case of "Ma Jian's transfer" can be analyzed from a legal standpoint, there are three contract relationships the transferring athlete has a work contract with his former club, which is a labor contract; the transfer contract between his previous club and current club is a civil contract; the work contract between the player and current club is also a labor contract, details include:

i. the work contract between transferring player and previous club conform relevant terms in the "Labor Law", which stipulates in its Term 16th: the labor contract is an agreement between the labor provider and employer and defines a labor relationship, as well as rights and responsibilities between both parties. Therefore, athletes are granted the following rights: (1) freedom of transfer. After signing contract with a club, a players should work for the club according the terms of the contract. After the contract is over, if the club disallow the player's transfer and restrict his personal freedom, then it violates terms of Labor Law. Also, if a player joined another club before the contract is over, he is subject to financial penalty. (2), Rights of being paid. The Labor Law stipulates that labor providers have the right to be paid for their labor, which should be defined in the work contract. (3) other rights. The Labor Law stipulates that labors have rights to protect their work, and rest.

It should also be noted that although the contract between athletes and clubs is a labor contract, it has its own features, the Chinese laws have not set concrete rules for the specific content of such contracts. All sport associations should follow their characteristics of the particular sport, organize the players through regulations. However, as long as these rules violate current laws, the people's court should protect rights of both parties.

ii. the transfer contract of previous club and current club

The transfer contract of players is a civil contract from a legal perspective. The Chinese Sport Law do not have detailed rules regarding transfer contract. Currently, the transfer contract in China include the following content:

a. Amount of transfer

Counties that have professional sports usually stipulate that when an athlete transfer, the receiving club should pay the previous certain amount of transfer fee, given that the player has received professional training in the previous club, who has provided human labor, financial expenses. However, if the transfer fee is too high, the transfer of athletes is impeded, whereas if the fee is too low, clubs become less motivated to train players. Therefore, the calculation of transfer fees should have certain rules. Some countries abolished the charge of transfer fees, which is not appropriate in China. It is suggested that when Chinese professional law is enacted, different rules can be set.

- Payment and welfare of athletes
- Rights and responsibilities of both parties
- Effective dates of transfer
- Liability of contract violation

Transfer contract is a civil contract, the Chinese "General Principal of Public Law" have some common rules that are suitable for transfer contract as well. If the effective conditions of civil contracts are violated, then the contract is regarded as illegal.

5. The work contract signed between professional basketball players and receiving club

The work contract between a players and new club is a labor contract. From a legal standpoint, such contract should follow relevant rules of "Labor Law". However, it is different because in other work contracts, after the laborers terminate labor relationships with the previous employer, the new work contract that he signs with the new employer is no affected by the old work contract. When a player signs contract with the receiving new club, to prevent unfair competition and harms to the healthy development of sports, such contents should be restricted.

From the analysis of the above three contract relationships, the CBA may encounter disputes while handling transfers of players, they should resolve problems following these three legal relationships, handle and judge following the Labor Law and "General Principal Of Public Law", so that cases like "Ma Jian transfer turmoil" can be avoided.

Conclusions

In summary, the transfer system of CBA have been positive to the development of CBA, however, there are certain issues. The system should be based

on China's current situation, learn from more advanced transfer system in the world, and develop gradually. The legislation of the CBA transfer system should be strengthened, so that relevant laws are available and can be truly followed, and the operation and management of Chinese professional basketball are more legal, professional, and standard.

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III. SPORTS EVENTS AND POLICY

- Legal Environment of Sports Industry, Events and Liability of Organizers
- Major Sport Event, Sports Marketing and Management
- Gambling and Betting in Sports, Fraud and Match Fixing in Sports
- Sponsoring, Broadcasting in Sports
- Europe and in the World of Sports Activities Legal Situation and Policy

SPORTS BETTING IN THE EUROPEAN UNION

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Abstract: *In general Sports Betting constitutes a significant global industry which presents legal problems. It is vulnerable to improper influence and corruption. The tendency in the European Union is not to forbid the Sports Betting but rather to monitor its availability to the general public. It is however not always easy to combine this approach with the principles of European Union law, in particular with the free movement of services, as well as with the principle of proportionality. In order to show the described phenomena the abstract looks at the law and policy developments on betting and sport in the European Union, showing the position of the European Institutions and the jurisprudence of the European Court of Justice. It also offers and overview of the legal situation in some member states of the European Union.*

Introduction

Sports betting, especially online betting constitutes a significant global industry[1] which presents legal problems of high complexity. It is vulnerable to improper influence and corruption. It also raises ethical issues, considering the fact that betting, as a form of gambling, may promote and encourage these phenomena and consequently contribute to health problems. For this reason legislations in some countries, like China or Malaysia formulate legal bans on betting. The research and practice, however, have shown that exactly in such a situation the scale of crime and fraud in this area is above average.

The tendency in the European Union is not to forbid Sports betting, but rather to monitor its availability to the general public.[2] As the jurisprudence of the Court of Justice of the European Union (CJEU) shows, it is, however, not easy to combine this approach with the principles of European Union law, in particular with the free movement of services, as well as with the principle of proportionality.

The chapter depicts the law and policy developments on betting on sport in the European Union, showing the position of the European Institutions and

[1]The European online gambling industry amounted in 2008 to 45% of the world market, which makes over 6 billion Euro. In general the annual revenues generated by the gambling sector generated in 2008 amounted to Euro 75,9 billion in the EU 27. The online market is the fastest growing segment and in 2008 it was expected to double in size by 2012. Moreover, betting on sports amounts to 32% of all gambling services offered online in the EU 27, see Green Paper on online gambling in the Internal Market, European Commission Brussels, 24.3.2011, COM (2011) 128 final, p. 3-10, http://ec.europa.eu/internal_market/consultations/docs/2011/online gambling/com2011 _128_pl.pdf, 13.09.2012.

[2]Schindler (1994), Case 275/92, Judgment of 24 March 1994.

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

the recent jurisprudence of the Court of Justice of the European Union. It also contains an overview of the legal situation in Poland, as a member state of the European Union, showing changes which the national legislator has recently introduced. The analysis shows that they are in line with the premises of EU law.

Definitions and problem statement

According to *Siekmann*,[3] sports betting is nothing else but sport-related betting. It must be generally understood, as a form of gambling, the essence of which is making a wager on the outcome of the sporting result. The outcome determines who wins and who loses the bet. For the subject taking bets (third party), the most desirable situation is when the least number of persons succeeds in predicting the sporting result. Therefore, it is obvious that interference in the sporting result automatically influences the outcome of the bet. For the parties to the bet a desire may emerge, which indeed often in fact happens, to influence the outcome of the game.

Consequently, there are a few reasons for the popularity of betting which may be indicated in this context. It comes forward to meet three personal needs: the interest in sport in general, the inclination for gambling as well as the willingness to profit. Since the essence of betting concerns ethical issues, European countries have introduced detailed legal regulations on betting, including online betting.[4] Interestingly, sports betting as opposed to other forms of betting in certain national regulatory regimes is subject to relatively lighter licensing regimes.

The manner and the scope of legal regulation of sports betting has been in European countries, e.g. in Germany or in Poland, subject to numerous debates and court decisions.[5] National legislators, acting in favor of the financial interest of the state and protecting consumers, have tended to place restrictions on the betting industry.[6] The main doubts articulated in relation to such restrictions have been addressed to the conformity with the European Union law.[7]

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[3]R. C.R. Siekmann, Sports betting in the Jurisprudence of the European Court of Justice: A study into the Application of the Stare Decis Principle, or: The Application of the "Reversal Method" of Content Analysis and the Essence of the ECJ Case Law on Sports Betting. (in:) Sports Betting: Law and Policy, Anderson P.M., Blackshaw I.S., Siekmann R.C.S., Soek J.W. (eds.), T.M.C. Asser Press Springer, The Hague 2012, p. 160. The author claims that sports betting is part of sports law, in particular international (European) sports law.

[4]See Sports Betting: Law and Policy, op. cit., p. 175-854.

[5]See an example of Germany, M. Nolte, Reorganization of Sports Betting Market in German, (in:) Sports Betting: Law and Policy…, op. cit., pp. 410-420.

[6]Among European countries there are however such with more liberal regulations on betting like Great Britain, and those with more strict approach like France or Germany.

[7]A study by a European Commission in 2006 listed almost 600 cases before national, mainly German courts, demonstrating the significant legal uncertainty affecting the EU market for such services.

The development of the internet[8] and the increased supply of online gambling services have made it more difficult for the different national models to coexist. Enforcement of national rules is facing many challenges, raising the issue of the need for enhanced administrative cooperation between competent national authorities.

Principles of EU law referring to sports betting

The current legal source of EU law has been the Treaty of Lisbon (TFUE – Treaty of the Functioning of the EU) since its entry into force on the 1st December 2009. As regards betting in sport, particular attention should be paid to the general principles of this legal order, as well as the treaty provisions concerning free movement of services and the freedom of establishment.

The EU legal order is determined by a number of general principles, some of which are clearly defined in the treaty, while others have been formulated in the jurisprudence of the CJEU or have simply been incorporated from public international law.

Equality and non-discrimination belong are parts of the foundation on which the EU is based. Since the creation of the European Community, the emphasis was placed on preventing discrimination on the grounds of nationality (esp. art. 18 TFUE, art. 10 TFUE – horizontal effect of antidiscrimination policy) or gender (esp. art. 19 TFUE). Another fundamental principle, being expressly defined in the treaty, is the principle of subsidiarity, laid down in art. 3b par. 3 TFUE, and in art. 5 Treaty on European Union. It determines when the EU is competent to legislate, and contributes to decisions being taken as close as possible to the citizens. It appears alongside two other principles that are also considered to be essential to the European decision making: the principle of conferral and the principle of proportionality. Subsidiarity aims at determining the level of intervention that is most relevant in the areas of competencies shared between the EU and the Member states. This may refer to actions at European, national or local level. In any event the EU shall intervene only if it is able to act more effectively than the Member states. The desirability of intervention at the European level may be assessed, when the following criteria are met: certain action must have transnational aspects that cannot be resolved by Member states, the national action or the absence of such would be contrary to the Treaty, the action on the European level must have clear advantages.[9]

The freedom of establishment is provided in art. 49 TFUE and it applies to nationals and companies of a Member State which set up agencies, branches or

[8]Out of 14,823 active internet gambling sites in Europe, more than 85% operated in July 2006 without any license. See Green Paper on online gambling, op. cit., p. 3.

[9]See A. Kaburakis, European Union Law, Gambling and Sport Betting: European Court of Justice Jurisprudence, Member states Case Law, and Policy, (in:) Sports Betting: Law and Policy…, op. cit., pp. 31 et sqq.

subsidiaries in other Member states, which are to be considered as economic activities (traditional form of betting). The CJEU in *Gambelli* case stated that the provision applies in the event that restrictions are imposed on the activities of a company pursuing gaming activities established or wishing to establish in one Member State. It refers to non-temporary activity exercised within the economic structure of another Member State. This is, for instance the case for agencies which establish themselves in other Member states with the aim of collecting bets as intermediaries.[10]

Article 56 of the TFEU prohibits restrictions on the freedom to provide or receive services to recipients in other member states. It can be invoked by both, the provider and the receiver of a service. The provisions are only applicable in case of cross-border activity. Therefore, either the provider or the receiver or the service itself (online gambling) must cross the border. Contrary to art, 49 TFUE, which refers to permanent activity, article 56 applies when a person or a company providing a service temporarily pursues an activity in another Member State.

In Schindler, the CJEU confirmed for the first time that the provision and use of cross-border gambling offers is an economic activity that falls within the scope of the Treaty. According to the Court, games of chance must be deemed an economic activity, which falls within the scope of the treaty, since they fulfill the two criteria laid down by the Court: the provision of a particular service for remuneration and the intention to make a profit.[11] The Court, furthermore, held in *Gambelli*[12] that services offered by electronic means were covered and that national legislation which prohibits operators established in a member state from offering on-line gambling services to consumers in another member state, or hampers the freedom to receive or to benefit as a recipient from the services offered by a supplier established in another Member State, constitutes a restriction on the freedom to provide services.

Furthermore, as *Kaburakis* quite rightly indicates, TFUE provisions on competition (Art. 101-109), especially those on restriction or distortion of competition (art. 101) and abuse of dominant position (art.102), may apply to Member states gambling and sports betting monopolization practices.[13]

Principles justifying the restrictions on sports betting

The treaty provisions and the jurisprudence of the CJEU have identified several reasons that may justify the restrictions on betting services and their

[10]See Study on gambling services in the internal market of the European Union, Final Report, 14 June 2006, Swiss Institute of Comparative Law, Report prepared for the European Commission, ec.europa.eu/internal_market/services/docs/gambling/study3_en.pdf, also Kaburakis, op. cit., p. 31.

[11]Anomar (2003), Case 6/01, Judgment of 11 September 2003, para. 47 - 48.

[12]Gambelli (2003), Case 243/01, Judgment of 6 November 2003, para. 46 - 48.

[13]Kaburakis, op. cit., p. 32.

control by the state. The Court developed its case-law primarily on the basis of references for preliminary rulings from national courts. At the same time, however, the Commission launched a series of infringement proceedings against member states in order to verify, on the basis of the jurisprudence of the Court, the proportionality of restrictions implemented in member states.

Both Articles, 49 and 56 TFEU prohibit discriminatory measures based upon nationality. The procedure for the grant of a license is therefore bound to comply with the principles of equal treatment and non-discrimination and with the consequent obligation of transparency. The restrictions provided by a member State should therefore be imposed indiscriminately, in the sense that they should apply in the same manner and with the same criteria to operators established in one country and to those who come from other member states.[14] Article 52 stipulates furthermore that restrictions are only acceptable as exceptional measures (expressly provided for in Articles 51 and 52 TFEU, that is justified by public policy, public security or public health).

Restrictions are also admissible, in accordance with the case-law of the Court, for reasons of overriding general interest. That implies moral, cultural and religious aspects which prohibit making gambling a source of private profit. Moreover, such objectives as consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order have been recognized by the Court.[15] The recognized societal issues can all serve to justify the need for national authorities to have a sufficient margin of discretion to determine what consumer protection and the preservation of public order require in terms of the type of service provision offered in this field. It is, according to *Papaloukas*, for those authorities to assess whether it is necessary to, in the context of the aim pursued, totally or partially, to prohibit activities of that kind or merely to restrict them and to establish control mechanisms that may be more or less strict. Those mechanisms shall be assessed solely with reference to the objectives pursued by the national authorities of the Member State concerned.[16]

The case-law also requires that such service provision and the cross-border restrictions that may result from the regulatory approach must bring about a genuine reduction of gambling opportunities and be applied in a consistent and systematic manner to all service offers in the area.[17] In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the

[14]Gambelli, op. cit., para. 70.

[15]On the other hand gambling can make a significant contribution to the financing of bevolvment or public interest activities, such as social work, charity work, sport or culture. See M. Papaloukas, Sports Betting and European Law, (in:) Sports Betting: Law and Policy, op. cit., p. 100 et sqq.

[16]Papaloukas, op. cit., p. 101.

[17]Green Paper on online gambling in the Internal Market, op. cit.

need to reduce opportunities for betting in order to justify restrictions. The latter must be applied without discrimination and be proportionate, i.e. they must be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it.[18]

According to the CJEU judgment in the *Gambelli*[19] case, restrictions on gambling imposed by the member states should be justified by the imperative requirements in the general interest, be suitable for achieving those objectives and not go beyond what is necessary in order to achieve this. Restrictions should also serve to limit gambling activities in a consistent and systematic manner.

Of particular interest is the Court's view on gambling services offered via the internet. They have several specific characteristics which enable the Member states to adopt measures restricting or otherwise regulating the provision of such services, in order to combat gambling addiction and protect consumers against the risks of fraud and crime.[20]

European Union's institutions position on Sports Betting

Despite the original proposals[21] gambling has been excluded from the European service directive[22], as well as from the E-Commerce directive, adopted in 2000.[23]

The first directive requires the member states to simplify procedures and

[18]Ibidem.

[19]Gambelli, op. cit., para. 65.

[20]Those specificities are the following: (1) In the sector of on-line gambling, authorities of the Member State of establishment encounter specific difficulties to assess the professional qualities and integrity of operators. These difficulties justify that a Member State takes the view that the mere fact that an operator lawfully offers on-line gambling services in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the authorities of that Member State, cannot be regarded as amounting to a sufficient assurance that its own consumers will be protected against the risks of fraud and crime; (2) The lack of direct contact between the consumer and the on-line gambling operator gives rise to different and more substantial risks of fraud by operators against consumers compared to the traditional gambling market; and (3) The particular ease and the permanent access to on-line gambling services and the potentially high volume and frequency of such an international offer, in an environment which is characterized by isolation of the player, anonymity and an absence of social control are factors likely to develop gambling addiction and lead to other negative consequences (The Court also states that the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young people and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games) See Green Paper on online gambling, op. cit.

[21]See Advocates General conclusions in case Placanica (2007), joint cases C-338/04, C-359/04 and C-360/04, Judgment of the Court of 6 March 2007.

[22]Adopted by the Eurpean Parliament and the Council on 12 December 2006.

[23]Directive 2000/31/EC of 8 June 2000, OJ of 17.7.2000, L 178 /1.

formalities that service providers need to comply with. In particular it requires Member states to remove unjustified and disproportionate burdens and to substantially facilitate the establishment of business and the cross border provision of services. According to par. 25 of the directive, "Gambling activities, including lotteries and betting transactions, should be excluded from the scope of the directive in view of the specific nature of these activities, which entail implementation by Member states of policies relating to public policy and consumer protection".

The E-Commerce directive 2000/31/EC "sets up an internal market framework for electronic commerce, which provides legal certainty for business and consumers alike. It establishes harmonized rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of the intermediary service providers." Services covered by the directive include e.g. online information services (such as online newspapers), online selling of products and services (books, travel services etc.), professional services (lawyers), online advertising, entertainment services and basic intermediary services (access to the internet and transmission and hosting of information). In art. 1 sec. 5 d it stresses, however, the exclusion of gambling activities such as games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value, from the scope of the directive.[24]

The White paper on sport[25] issued by the European Commission in July 2007 didn't bring much clearance as regards the application of EU law to sport. Though the Commission stated that "Competition law and internal Market provisions apply to sport in so far as it constitutes an economic activity", it accepted in the same time the special characteristics of the sport, which have to be taken into account. The Commission stressed that whether a particular sporting rule is compatible with EU law can only be made on a case by case basis and in a proportionate manner.

Already in the EP's resolution from 10 March 2009 on the integrity of online gambling, it was noted that the growth[26] of online gambling provides increased opportunities for corrupt practices, such as illegal betting cartels and money laundering, as online games can be set up and dismantled very rapidly and as a result of the proliferation of offshore operators. The EP stressed that the integrity of sport events and competitions requires cooperation between sport right owners,

[24]This situation has been assessed negatively by the Remote Gambling Association. See www.rga.eu.com/data/files/Pressrelease/sports_betting_web.pdf, 13.09.2012, p.40.

[25]Commission of the European Communities, White Paper on Sport, Com (2007) 391 final, www.ec.europa.eu/sport/documents/wp_on_sport_en.pdf, 12.9.2012.

[26]In 2004 online gambling was worth Euro 2-3 billion in gross gaming revenues. See the preamble of the European Parliament Resolution of 15 November 2011 on online gambling in the Internal Market, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0492+0+DOC+XML+V0//EN, 12.9.2012.

online betting operators and public authorities at the national, European and international level. Moreover, it was highlighted, that sports bets are a form of the commercial exploitation of sporting competitions, and recommended that member states protect sporting competitions from any unauthorized commercial use.

The declared objective of the European Commission's Green paper of 24 March 2010 was to contribute to the emergence, in the member states, of a legal framework for online gambling providing for greater legal certainty. The European Commission pointed out the characteristics of the gambling services offered via the internet, which enable the Member states to adopt measures restricting the provision of such services. The Economic and Social Committee in its opinion of 3 October 2011[27] stressed under point 1.3 that the EU should create an EU framework in the form of EU consumer protection legislation binding on all operators licensed in the EU. In this way a minimum set of consumer protection would be created. This minimum level of protection shall include: the need to prevent problem gambling, the setting of age limits for access to any games of chance or gambling activities, a ban on the use of credit, and the prohibition of any form of advertising aimed at minors or including minors or persons who appear to be under the age limit (3.5). National governments must, however, still have the right to set higher standards of consumer protection for their national markets should they wish so. In particular, one of the objectives of the national law should be the prevention of compulsive gambling. Moreover, EESC considers that a system of infringements and penalties needs to be designed and introduced to guarantee effective compliance with the rules. This could entail blocking activities, shutting down the media and even seizing and destroying any element used in conducting such activities. The EESC called on the EU institutions, in particular the European Commission, to urgently address the crucial challenge arising from the distortions of competition due to unauthorized undertakings not established in the country of residence of the consumers for whom they provide online gambling services, which benefit in their country of establishment from low tax and social contribution rates.

Given the particular nature of online gambling, due to the social, public order and health aspects linked to it, the EESC pointed to the fact that, in the absence of Community harmonization, member states have a margin of appreciation to regulate and control their gambling markets in accordance with their traditions and cultures. However, the restrictive measures that they impose must satisfy the conditions laid down in the case law of the court as regards their proportionality. The EESC stressed that EU institutions should create a European framework.

Interestingly, EP in the resolution on online gambling of 15 November 2011 announced its respect for the member states' discretion on how the gambling market is organized, in observance of the basic EU Treaty principles of non-discrimination and proportionality. Moreover, the European Parliament respects

[27]Opinion of the European Economic and Social Committee on the „Green Paper on online gambling in the Internal Market" COM (2011) 128 Final, 2012/C 24/20.

the decision by a number of member states to ban all or certain types of gambling or to maintain government monopolies on that sector, in accordance with the jurisprudence of the CJEU, as long as they adopt a coherent approach. The EP further points out that online gambling is a special form of economic activity, to which internal market rules, namely freedom of establishment and freedom to provide services, cannot fully apply; recognizes however, the consistent jurisprudence of the CJEU which emphasizes that national controls should be enacted and applied in a consistent, non-discriminatory and proportionate manner. Under point 13 the EP stresses that providers of online gambling should in all cases respect the national laws of the countries in which those games operate, and that a member state should retain the right to impose measures to address illegal online gambling in order to implement national legislation and exclude illegal providers from market access.

In relation to the licensing system, the European Parliament is of the opinion that the principle of mutual recognition on licenses in the gambling sector does not apply, but nevertheless insists that member states which open up the online gambling sector to competition for all or certain types of online gambling must ensure transparency and make non discriminatory competition possible. Member states should introduce a licensing model which makes it possible to apply for a license: license application procedures could be set up in those member states that have implemented a licensing system, while ensuring the preeminent role of the regulator in the member states in which the application has been submitted.

The European Commission was called on to explore all possible measures at the EU level designed to protect consumers, prevent addiction and illegal operators, including formalized cooperation between national regulator, common standards for operators or a framework directive, in doing so a common code of conduct could be a first step. The EP stressed its respect for the right of the member states to draw on a wide variety of repressive measures against illegal online gambling offers and its support in order to increase the efficiency of the fight against illegal online gambling offers, the introduction of a regulatory principle whereby a gambling company can only operate or bid for the required national license in one member state if it does not operate in contravention of the law in any other EU member state. This resolution may be useful in order to observe the tendency in which CJEU will probably move in the future.

Legal situation in the Republic of Poland

In relation to the developments on the European level it is interesting to observe changes being introduced in national legislations of the member states of the EU. As an example some major, recent changes in a Polish legal system in the realm of betting on sports will be depicted.

According to the EC statement in Green Paper on Sport, there are currently two models of the national regulation framework applied in the field of gambling: one based on licensed operators providing services within a strictly regulated

framework and the other on a strictly controlled monopoly[28] (state owned or otherwise). Poland belongs to the group of countries which have a mixed model of the regulation of gambling. This means that a states' monopoly is exercised within the organization of certain games (number games, money lotteries and telebingo). For the organization of betting on sports a license from a finance minister is necessary.[29] This has been regulated already by the Act on gambling of 29 July 1992. Under this legal Act the provision of betting on sports was allowed exclusively in an established agency (ex art. 7 of the Act on gambling from 29 July 1992). This regulation was maintained also after the new Act on gambling of 19 November 2009 entered into force. Though, in spite of the lack of legal regulation, betting on sports has been offered online especially by foreign companies having their seat outside of Poland. This legal gap has been removed by an amendment of the Gambling Act of 26 May 2011.[30] Unlike other gambling services via Internet, sports betting online has been legalized since then.

However, a number of provisions of the Gambling Act of 19 November 2009 may seem *prima facie* to be contrary to the European law provisions. According to art. 15 d. sec. 2 the provider of betting services via Internet may use only the domestic (here: Polish) domain of the highest level for the provision purposes. The web page address shall be indicated in the license issued by the finance minister. It is worth stressing, that foreign providers of sports betting who already posses a license to exercise their activities in another country of the EU have been obliged to apply for a license before the Polish Ministry of Finance.

Moreover, pursuant to art.15 d sec. 3, all data exchanged between the provider and the consumer at the given time, and allowing the identification of the consumer, concerning the betting on sport shall be saved on a provider based in the territory of the Republic of Poland. The time of data storage shall amount to five years (art. 15 d sec.7).

A provider of online betting services is, pursuant to art. 15 e, obliged to use for the purpose of betting transactions the bank account run by banking institution (national bank, subsidiary of a foreign bank, credit institution) acting on the specific meaning of a Polish Bank Law Act. Only adults, who are more than 18 years old, may participate (art. 27 sec. 2) in online betting services.

In the explanatory statement[31] to the amendment of the Gambling Act of 26 May 2011 following reasoning for the above mentioned restrictions can be found: 1. Consumer protection against compulsive gambling (age verification), 2. Fight against money laundering and legal limbo (transactions via bancs established in the territory of Poland, installation of technical equipment in the territory of Po-

[28]See example of Germany, M. Nolte, Reorganization…, op. cit., pp. 410-420.

[29]Issued on the basis of art. 32 sec. 2 Gambling Act of 19 November 2009 after amendment. OJ 2011.134.779.

[30]The provision of another gambling services via internet has still remained forbidden.

[31]http://www.mf.gov.pl/_files_/bip/bip_projekty_aktow_prawnych/oc/2010/gry/uzasadnienie_3_.pdf, p 15, 4.10.2010.

land), 3. Protection against fraud and crime (internet domains must be attributed to the polish web sites).

Pursuant to art, 89.1 Gambling Act, both the provider and the customer to the sports bet, which is organized without the due license, are subject to a monetary penalty. Moreover, according to art, 107 par. 1 Penal and Fiscal Code (Chapter 9), a subject providing sports betting services contrary to the license or in violation of law and the customer thereof, may be imposed the penalty of imprisonment up to three years, in addition to a fine. This concerns also participants of foreign sport betting services in the territory of Poland (Art. 107 par. 2).

In order to assess whether the approach taken by the Polish legislator does not violate EU provisions, and is in line with the jurisprudence of the CJEU the analysis of the recent rulings of the Court might be helpful.

Recent Jurisprudence of the CJEU

In its first decisions[32] involving sport CJEU stated clearly that the Treaty provisions on the freedom to provide services do not preclude national legislations, reserving for certain bodies the right to take bets on sporting events, if the legislation can be justified by the social policy objectives in order to reduce the harmful consequences of such activities, and also if the restrictions imposed are not disproportionate in light of these objectives. Consequently, as *Papaloukas* rightly stresses, apart from proving that public interest does exist, it should also be considered whether the same amount of public interest could be achieved if fewer restrictions were imposed on the freedom to provide gambling services.[33] In defining the principle of proportionality in the *Gambelli*[34] case the CJEU stated that restrictions on gambling imposed by a Member State should: be justified by the imperative requirements of the general interest, be suitable for achieving those objectives, not go beyond what is necessary in order to achieve this.[35]

Due to the growth of the phenomena and the legal complexity hereof most of the rulings issued by the CJEU in recent years concerned online betting.
In the *Betfair*[36] case the CJEU pointed out that the internet gaming industry has not been the subject of harmonization within the European Union. Members states are therefore entitled to take the view that the mere fact that an operator lawfully offers services in that sector via the internet in another member state, in which it is established and where it is in principle subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be

[32]See especially *Zenatti* (1999), Case 67/98, Judgment of the Court of 21 October 1999.

[33]Papaloukas, Sports Betting …,op. cit., p. 101.

[34]Gambelli, (2003), Case 243/01, op. cit.

[35]Papaloukas, Sports Betting …,op. cit., p. 102.

[36]Betfair (Sporting Exchange Ltd.) (2010). Case 203/08, Judgment of the Court of 3 June 2010.

protected against the risks of fraud and crime (…).[37] What is more, restrictions on the freedom to provide services, which arise specifically from the procedures for the grant of a license to a single operator or for the renewal thereof, may be regarded as being justified, if a member state decides to grant a license to, or renew the license of a public operator whose management is subject to direct state supervision or a private operator whose management is subject to strict control by the public authorities.[38]

This jurisprudential line has been continued in the *Ladbrokes* case[39]. The CJEU stressed very clearly that the legislation of a Member State under which exclusive rights to organize and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another member state from offering via the Internet services within the scope of that regime in the territory of the first member state, constitutes a restriction on the freedom to provide services. However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by art. 45 EC (now art. 51 TFUE) and 46 EC (now art. 52 TFUE), applicable in this area by virtue of art. 55 EC (now art. 62 TFUE), or justified, in accordance with the case law of the Court, by overriding reasons in the public interest.[40] It is for the national courts to determine whether a member states' legislation actually serves the objectives which might justify the restrictions, and whether the limitation it imposes does not appear disproportionate in the light of those objectives.[41]

In the *Carmen Media*[42] case, CJEU pointed out once more that the internet is simply a channel for offering games of chance with sophisticated technologies that can be used to protect consumers and to maintain public order, although member states discretion in determining their own approach to the regulation of online gambling is unaffected herby and they can still restrict or prohibit the provision of certain services to the consumers. Moreover, authorities from one member state may require from a sports betting provider acting in another member state to comply with restrictions laid down in its legislation, provided those restrictions comply with the requirements of EU law, particularly that they be non-discriminatory and proportionate. In the same judgment the Court held that, authorities in member states cannot invoke public order concerns relating to the need to reduce opportunities for gambling in order to justify restrictive measures to betting services if at the same time the member states incite and encourage consumers to participate in lotteries, games of chance or betting to the

[37]Betfair, op. cit., para 33.

[38]Betfair, op. cit., para 59.

[39]Landbrokes (2010). Case 258/08, Judgment of the Court of 3 June 2010.

[40]Ibidem, para. 17.

[41]Ibidem, para. 22.

[42]Carmen Media (2010), Case 46/08, Judgment of the Court of 8 September 2010.

financial benefit for the public purpose.[43] The Court held furthermore, if a prior administrative authorization scheme is to be justified, even though it derogates from the fundamental freedom, it must be based on objective, non discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, as the Court stressed,[44] that any person affected by a restrictive measure based on such derogation must have an effective judicial remedy available to them.

Conclusions

The deliberations on the common, European approach to the problem of betting in sports prove that for now no binding instrument has been proposed or issued by the European Institutions, notwithstanding the political efforts described under point 3.[45] What is more, in its resolution of 15 March 2011 the EP underscored that any regulation on gambling must be underpinned by the subsidiarity principle, given the different traditions and cultures in the Member states. This entails cooperation among national administrations and implies compliance with the rules of the internal market, in so far as applicable, in accordance with the ruling by the CJEU concerning gambling.

The main principles which can be derived from the recent jurisprudence of the CJEU (see e.g. *Carmen Media*) confirm that, in the area of sports betting, especially online betting one has to do with derogation from general principles of the common market. The member states are indeed granted a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. All restrictive measures must, however, be proportional and have to be applied without discrimination.

Having indentified these rules, it must be stated, that the changes introduced by the polish legislator: legalization of online betting with the restrictive regulation of these services in the same time, are generally in line with the jurisprudence of the Court of Justice of the EU. Nevertheless, some doubts may emerge as regards proportionality of obligations imposed on the sports betting providers aimed at preventing fraud and crime. This must be namely treated as a purely preventive measure, as for now, in Polish sport hardly any cases of match fixing, via sports betting have been revealed.

[43]Ibidem, para. 44.

[44]Ibidem, para. 87.

[45]In its resolution on online gambling of 15 November 2011 European Parliament rejected expressly any European legislative act uniformly regulating the entire gambling sector. In the same time it has been admitted unter point 9. that in some areas that there would be clear added value from a coordinated European approach, in addition to national regulation, given the cross border nature of online gambling services. Cons. European Parliament Resolution of 15 November 2011 on online gambling in the Internal Market, op. cit.

PREVENTING SPORTS CORRUPTION: CONSIDERATION OF A GOVERNANCE APPROACH TO PREVENTING MATCH-FIXING

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Abstract: *The problem of sports corruption in match-fixing has become a serious international issue in the world of sports and threatens the integrity of sports competitions. Much focus has been given to the criminal laws that address the issue of sports fraud or sports corruption, particularly in betting, doping, money laundering and match-fixing. Although there is some activity by national sports organizations to provide education and information to players, coaches and management about the dangers and impacts of match-fixing, much more can and should be done to ensure a proper governance structure and sufficient oversight is in place to help prevent match-fixing. This paper will review the concept of taking a governance approach to prevent match-fixing and whether such an approach might be beneficial in the fight against sports corruption*.

Introduction

Anyone who has dealt with corruption in any form would admit that where people and money and power exist, you will always find corruption. Sports corruption is not new, but trying to identify effective ways to deal with the problem of sports corruption has been challenging. Other types of organizations have dealt with the issue of corruption. Defining sport as an organization might lend itself to utilizing certain organizational governance mechanisms that may help facilitate in the management, mitigation or prevention of sports corruption. The purpose of this paper is to consider the idea of a governance approach to preventing sports corruption, specifically match-fixing and determine whether or not governance can offer a viable solution to the problem.

I. Existence of Sports Corruption

"With billions of dollars involved and more importantly the very reputation of sport itself at stake, it is vital that law enforcement presents a united front in not

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only fighting this type of crime but to ensure that everyone involved from the rank and file official to the star player is given the resources and training to counter the corrupt influences of transnational organized crime." INTERPOL Secretary General Ronald K. Noble

There are several fundamentals to be addressed to better understand the issue of sports corruption. First, *what is sport?* Sport is defined as, "Physical activity that is governed by a set of rules or customs and often engaged in competitively."[2] The second point of inquiry is a bit more complex. The question of "*What is Sports Law?"* has been addressed quite a bit by practitioners and academics.[3] In the early dialogues around this topic that involved the distinctions between *lex ludica*[4] and *lex sportiva*[5], there was very little documentation supporting the advancement of this area of law. However, over the past few decades, the area of sports law or laws that are applicable to sports has increased. Whether this area that may be referred to as sports law is categorized under or in association with entertainment law, or simply subsumed by more traditional areas of law (e.g. contracts, constitutional law, torts, etc.), over the past decade, the arena of sports related case law, regulations and debate has continued to increase. Whether it is due to the increase in *lex sportiva* primarily developed by the Court of Arbitration for Sport (CAS)[6] and significant rulings from the European Court of Justice in sports related cases, or the laws that have been developed in many countries under national law that recognize the "specificity of sport," today many people would acknowledge that a distinguishable area of law, referred to as sports law,

[2]www.thefreedictionary.com/sport.

[3]See, Davis, Timothy, *What is Sports Law?*, 11 Marquette Sports Law Review, Spring 2001.

[4]Sometimes associated with the rules of the game. *See, AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA)* (CAS 98/200); 'Sports law has developed and consolidated along the years, particularly through the arbitration settlement of disputes, a set of unwritten legal principles -a sort of lex mercatoria for sports or, so to speak, a lex ludica -to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law' (98/200; Digest, Vol. 2 p.38; para 156, at p.102).

[5]*See, Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)* (CAS 2002/O/372); *'CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed as part of an emerging 'lex sportiva'. Since CAS jurisprudence is largely based on a variety of sports regulations, the parties' reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations' (CAS 2002/O/372; para 65 at fn.15).*

[6]*See,* AEK Athens & SK Slavia Prague v. UEFA

does exist[7], however, this issue *for some* remains unsettled.

It is important to move past the academic debate of whether or not "sports law" exists, to address the more important practical issues that have resulted from the convergence of sports and law. This is necessary because a common understanding of the fundamental principles of "sport" and "law" and "sports law" is a premise (and the one that I will use in this paper) upon which to begin a discussion and analysis of sports corruption. This label of "sports law" is highly utilitarian in that, once defined, it provides an easier way in which to refer to the body of laws and activities relative to it and by which comparison can be drawn. The ability to make such reference is important when addressing this subset of issues that we have come to refer to as sports fraud or sports corruption. The occurrence of "sports corruption" is dependent upon the existence of sports since in the absence of sports, sports corruption would not exist. One issue to be addressed in this type of research is whether or not this distinction is important in addressing the issue of corruption in sport, or stated another way, in the absence of the distinction, would sports corruption simply be corruption and addressed under the existing laws of corruption just as any other form?[8]

The focus of this paper is to consider whether or not *governance* can provide a necessary means for addressing the issue of sports corruption.

Integrity of the game

With the prevalence of sports corruption being so high, it is somewhat surprising that in its Communication of 18 January 2011, The European Commission states: "Match-fixing violates the ethics and integrity of sport."[9] When we are watching a match or sporting event there is an automatic trust and belief that is inherent in the idea of sport, that those engaging in the activities are doing so using their own physical, mental and strategic (non-enhanced) abilities to perform leading to either their victory or defeat. When fraud or corruption enters into sport and the outcome is somehow pre-determined or an athlete's abilities are artificially enhanced, that tends to remove the event from the sanctity of sport and into the realm of entertainment at best. *Would people be willing to pay to see their favorite sports team in a competition that everyone knows is*

[7]Foster would refer to the body of information coming from the CAS as a "global sports law"or lex sportive. See, Foster, Ken, "Lex Sportiva and Lex Ludica: the Court Of Arbitration for Sport's Jurisprudence", Entertainment and Sports Law Journal, ISSN 1748-944X, January 2006, http://go.warwick.ac.uk/eslj/issues/volume3/number2/foster/.

[8]*See*, Jones, K., Applicability of UN Convention against Corruption on Sports Corruption, ISLJ 2012 3-4, pp 55-57.

[9]*Ibid*. at p12.

pre-determined or even if there is a high likelihood that the integrity of the sport event has been somehow compromised? There is no doubt that sports corruption puts a dark cloud over the entire industry of sports. Perhaps more specifically, it is a direct attack on the integrity of the game. If the sport is determined not by skill, strategies and physical abilities of the players but instead on who was able to "pay-off" the referee, official, team or player to "buy" the win, then it is questionable whether or not it is really sport at all. The whole concept of sports competition and the basis for our Olympic Games today began with the early games in Olympia, Greece in 776 BC. Public competition and individual achievement reflected the ancient Greek idea of *arête*, representing the Greek ideal of excellence. Even in ancient times there were those who were caught cheating.[10] Anyone caught cheating was fined and the money raised was used for a statue erected in the name of Zeus bearing inscriptions of the offenses committed and warning others not to cheat by skill or money and reinforcing the importance of piety, the Olympic Spirit, and fair competition.

Although there is a degree of public shame associated with being charged with sports corruption, thus far the possibility of public shame has done little to deter those would be cheaters. It is likely that the solution to sports corruption will require more than charging a fine or keeping a public account of the wrongdoings.

European Union

Because there is an area of discernible law that can be referred to as sports law within the European Union ("EU") it is appropriate to use the EU as a microcosm for this type of research, with the goal that it might ultimately have application to the international issues around sports corruption. The growth of sports as a business in a relatively short amount of time within the EU has been somewhat remarkable. Globally, about 2% of the gross domestic product (GDP) is generated by the sports sector.[11] Recent research indicates that global sports revenue will grow by an annual rate of 3.7% to about $148.3 billion by 2015.[12] In Europe alone, revenues generated from sports are estimated to increase by

[10]Some of the earliest sports corruptions included Eupolus of Thessaly who bribed boxers in the 98th Olympiad; Callippus of Athens bought off his competitors to secure a win in the pentathalon during the 112th Olympic festival; during the 226th Olympics two Egyptian boxers, Didas and Sarrapammon, were fined for fixing the match. *See,* Pausanius' 2nd Century A.D. Guidebook to Greece.

[11]European Commission, Developing the European Dimension in Sport, Brussels 18.1.2011.

[12]Changing the Game – Outlook for the global sports market in 2015, PricewaterhouseCoopers, December 2011, p. 11

35.3% or about $42.8 billion across EMEA by 2015.[13] With sports being such a big business in Europe the European Commission clearly recognizes the threat posed by corruption. The European Union Treaty, article 29, specifically identifies the goal of the European Union in preventing and combating corruption in all forms.[14] Issues faced by the European Union relative to corruption are not unique to the European Union, however, the multi-national and transnational aspects of the European Union, among other things, makes resolution of the problem of corruption challenging. These same challenges, when looked at in a much broader sense are representative of those issues faced at an international level. Issues relative to culture, society, economics, politics and even religion can impact sports corruption in various countries. The EU with its vast array of countries helps to provide insight into how some of those issues might be addressed.

II. **Governance of the Organization of Sport**

This discussion of sport as an organization should not be confused with the European Union attempts to identify the organization of sports in the European Union. These two are distinct in that the European Commission sets out what they have determined to be the organization of sports in the European Union in the White Paper on Sports.[15] In this important document that sets out the way sports are organized in the European Union, the importance of promoting certain traditions and values associated with sports is stressed.[16] However, even within the document itself limitations are confessed. They decline to identify a specific European Sport Model" stating that at present such a determination is unrealistic given the emergence of "new challenges[17]" that are impacting the member states and thus any realistic attempt at defining a discernible sports model for Europe. Interestingly, the report further states:

"The emergence of new stakeholders (participants outside the organized disciplines, professional sports clubs, etc.) is posing new questions as regards governance, democracy and representation of interests within the sport movement."[18]

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[13]*Ibid.* at p.12; these numbers are attributable to all of Europe, Middle East and Africa (EMEA).

[14]EU Treaty, Article 29

[15]White Paper on Sports

[16]Id at Section 4. The Organization Of Sport, p. 12.

[17]Id at Section 4, The Organization of Sport, the document points out that there are "…economic and social developments that are common to the majority of the Member States (increasing commercialization, challenges to public spending, increasing numbers of participants and stagnation in the number of voluntary workers) have resulted in new challenges for the organization of sport in Europe." p.12.

[18]Id at Section 4, The Organization of Sport, p. 12.

As evidenced by the statement above, the European Commission, within the White Paper on Sport, seem to acknowledge the impact that transnationalism has on the ability to define a European sports model. However, even further to the impacts of transnationalism on the creation of a European sports model, is the concept of looking at the formulation of sport as an entity.[19] An entity refers to something that is "separate and distinct". The most common types of entities are governmental units, organizations or businesses. It is those separate and distinct characteristics that establish the existence of an entity.

Despite the fact that the European Commission felt unable to define a European Sports Model in the original White Paper on Sport, it does not negate the fact that in some ways sports in the European Union has characteristics that might be compared with those of a multi-national organization; sporting events being the product that is produced and sports (as an entity) being the organization which governs them. Therefore, an understanding of sports corruption and identification of effective governance goes beyond simply defining the terms. Analysis of the structure of sport, or understanding the organization of sport and how sports are governed, is also important to add clarity to the terms. An organization can be defined as:

"A social unit of people, systematically structured and managed to meet a need or to pursue collective goals on a continuing basis. All organizations have a management structure that determines relationships between functions and positions, and subdivides and delegates roles, responsibilities, and authority to carry out defined tasks. Organizations are open systems in that they affect and are affected by the environment beyond their boundaries."[20]

Sport can be described as a "social unit of people" comprised of players, owners, referees and fans. The rules of the game and more importantly the way sports are organized at the local, national and international levels with its guideline requirements and rules and regulations all "…systematically structured and managed to meet a need or to pursue collective goals…"[21] The "need" or "goal" of this collective pursuit can be winning a game or match, pursuit of excellence, satisfying fans, or being paid for skills and abilities. Professional sports, and to a large degree amateur sports, are organized in such a way that there is an intrinsic structure of management that not only oversees the games, but also dictates the

[19]An entity can be described as: 1 a: being, existence; especially: independent, separate, or self-contained existence; b: the existence of a thing as contrasted with its attributes. 2: something that has separate and distinct existence and objective or conceptual reality. 3: an organization (as a business or governmental unit) that has an identity separate from those of its members, Merriam-Webster, http://www.merriam-webster.com/dictionary/entity.

[20]*See,* http://www.businessdictionary.com/definition/organization.html#ixzz1lt5JYlLi.

[21]*Ibid.*

roles and responsibilities of those who participate in the operation of a sports team, club or league. They also make decisions that impact the way the sport is played, and activities and relationships impacting sports, in a manner that carries with it a great degree of responsibility and authority. "All organizations have a management structure that determines relationships between functions and positions, and subdivides and delegates roles, responsibilities, and authority to carry out defined tasks."[22] Finally, although the White Paper on Sport talks about the autonomy of sporting organizations and representative structures"[23], sports are not autonomous in that they are impacted by and they impact the world around them making them "open systems"; autonomous structures perhaps, but open systems nonetheless.

Even if the whole of sport is not conceived in terms of an organization, certainly the entities that comprise the arena of sports such as sports federations, associations, clubs, etc., can be looked at independently as organisms that are part of a larger complex body of related entities. Another way to view sports as an organization is to look at the larger international entities that perform some degree of governance or oversight (FIFA, FIFPro, UEFA, etc.) as multi-national organizations or multi-national entities. These are non-governmental organizations that often perform almost a pseudo governmental role. Because they are non-governmental, they do not adhere to any particular *governmental* structure or requirements.

Nonetheless, for these reasons, sport – or at least these international sports entities - can be looked at as an organization[24] and as such should have a governance structure and a regulatory framework[25] for effectuating rules, providing oversight and administering discipline. The White Paper on Sports would put this "governance" responsibility in the hands of what it refers to as "sports governing bodies"[26] further recognizing that this responsibility is, to some extent, shared with the Member States and social partners.[27] Nonetheless, within (and perhaps because of) this organization, distinct behaviors often exist within the framework of regulation and governance. Two key sports entities are an intricate

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[22]*Ibid.*

[23]The White Paper on Sport, Section 4. The Organization of Sport, p. 13.

[24]Organization is defined as, "The act or process of organizing or being organized." See, http://www.merriam-webster.com/dictionary/organization. Another definition goes further and includes in the definition for Organization, "A number of individuals systematically united for some end or work…" Funk & Wagnalls New International Dictionary of the English Language, Comprehensive Edition, 1987.

[25]This *regulatory framework* can be a self-regulating framework. *See,*

[26]*Id.*

[27]*Id.*

part of the European (and international) sports organization. Federation Internationale de Football Association (FIFA) and Union de European Football Association (UEFA) both play important roles not only in the administrative aspects of the functioning of the sport of football and the regulation of players, but more recently in the regulation and discipline of those who might engage in certain activities that harm players or corrupt the sport. Looking at the structure of these organizations and assessing their role in the governance activities relative to the sport of football may provide some insightful information as to the benefit or harm such involvement by these types of governing entities can provide.

Regardless of whether the activities and behaviors of these organizations are considered beneficial or harmful they are often a product of the larger organization from which they've grown. A point of discussion and perhaps even debate is whether or not sports fraud or corruption is a product (or by-product) of the organization in which it exists or whether it is a separate and independent phenomenon. Future research should address the organization of sport as a platform from which corruption in sport has grown and to some degree has been allowed to flourish in spite of the efforts and activity developed to address the same.[28] Further, a consideration of an organizational methodology as a possible approach to address some of the governance issues around corruption in sport would also be beneficial in addressing the larger issue of sports corruption.

Organizational Governance

Organizational governance is also referred to as corporate governance. The terms *corporate* or *organization* are used to represent any type of *entity* whether it is given legal identity or not.

Corporate (or organizational) governance has been defined in many ways. Some of those definitions include the following:

- "A generic term which describes the ways in which rights and responsibilities are shared between the various corporate participants, especially the management and shareholders."[29]
- "Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objec-

[28]Defining sport as an organization does not exclude nor preclude consideration of sports as a corporation.

[29]Investorwords.Com. Search term used, Corporate Governance.

tives are set, and the means of attaining those objectives and monitoring performance." [30]

- "Corporate governance is about promoting corporate fairness, transparency and accountability." [31]
- "In its barest form, corporate governance is the *system* by which companies are directed and controlled principally by a board of directors."[32]

Despite which definition of corporate (or organizational) governance is used, common themes and characteristics of, such as responsibility and accountability, begin to emerge.

Therefore, a very basic definition of organizational governance is:

"The framework of rules and practices by which a board of directors ensures accountability, fairness, and transparency in a company's relationship with its stakeholders…."[33]

Within the context of the idea of organizational governance is a framework that can be described as follows:

"The corporate governance framework consists of (1) explicit and implicit contracts between the company and the stakeholders for distribution of responsibilities, rights, and rewards, (2) procedures for reconciling the sometimes conflicting interests of stakeholders in accordance with their duties, privileges, and roles, and (3) procedures for proper supervision, control, and information-flows to serve as a system of checks-and-balances."[34]

So a framework of corporate or organizational governance would include important elements as identified in the definition above. As relative to sports organizations, the elements of a governance framework should include:

- Explicit and implicit contracts between the sports organizations and stakeholders, which clearly identifies a distribution of responsibilities, rights and rewards;

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[30]OECD April 1999. OECD's definition is consistent with the one presented by Cadbury [1992, page 15].

[31]J. Wolfensohn, president of the Word bank, as quoted by an article in *Financial Times*, June 21, 1999.

[32](Cadbury Report). It relates to the internal means by which corporations are operated and controlled (OECD Principles). In an expanded version, it is the process and structure used to direct and manage the affairs of the company towards enhancing business prosperity and corporate accountability with the ultimate objective of realizing long-term shareholder value whilst taking into account the interests of other stakeholders, (Finance Committee on Corporate Governance, Malaysia).

[33]www.BusinessDictionary.com/definition/corporate-governance.html

[34]*Id.*

- A dispute resolution process to help reconcile conflicting interests that might arise; and
- Procedures for proper supervision, control, and flows of information – serving as a checks-and-balances system.

The formula for a governance framework as stated above seems clear. However, part of the challenge in the current *organization* of sports is that although some contracts exist between sports organizations and certain stakeholders, there are other stakeholders where contracts, either explicit or implicit do not exist. Some contracts might exist in the European Union Social Dialogue on sports,[35] however, the benefactor of the outcome of these measures may leave out some key stakeholders such as some specific community interests.[36] A lack of certain contracts that impact the environment in which sports corruption exists may contribute to the proliferation of this problem.[37]

Several sports organizations have established internal means of addressing disputes. For example, the FIFA Dispute Resolution Chamber (DRC).[38] The effectiveness of the DRC and similar dispute processes are still being determined especially in the case of sports corruption as many cases require lengthy investigation periods.

Finally, the third point in the governance framework requires procedures for proper supervision and a system of checks-and-balances. This perhaps is an area where there are significant limitations in the current system. Each sports organization is highly autonomous and therefore have limited checks-and-balances.

Arthur Levitt, the former SEC Chairman described corporate governance as processes indispensable to effective market discipline."[39] When we consider all of the stakeholders within the larger organization of sports, including the market participants and influences, especially those that influence or impact sports corruption and match-fixing, there are a lot of opportunities for creating a more effective system of checks-and-balances. For instance stronger controls around

[35]*See,* European Commission, White Paper on Sport, 5.3 Social dialogue, COM (2007) 391 Final, Brussels, 11.7.2007

[36]*Id.*

[37]For example, stakeholders such as betting affiliates and other market participants should be contractually obligated, explicitly or implicitly, as part of the larger organization of sport, to safeguard against the influence and activities of sports corruption and match-fixing.

[38]FIFA Dispute Resolution Chamber, Official Documents, FIFA.Com; Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC) (2005)/ (2008); Regulations Status and Transfer (2012), http://www.fifa.com/aboutfifa/officialdocuments/doclists/disputeresolutionchamber.html.

[39]Levitt, A., An Essential Next Step in the Evolution of Corporate Governance. Speech to the Audit Committee Symposium, June 29, 1999.

sports betting, which are currently being considered[40], but also stronger limitations or controls on the type of involvement sports managers, officials, players and others directly involved in the game can have in the sports marketplace.[41]

III. **A concept of Good Governance**

"Corruption destroys opportunities and creates rampant inequalities. It undermines human rights and good governance, stifles economic growth and distorts markets." UN Secretary-General Ban Ki-moon, The Kooza, December 7, 2012.

The idea of governance is a basic principle for any type of organization. What constitutes "good governance" is a bit more subjective. There are many opinions with regard to what good governance actually looks like and how to appropriately measure it. One model of good governance that seems to capture most (if not all) of the elements commonly associated with the ideal of good governance is the United Nations 8 Characteristics of Good Governance. These eight characteristics are considered to be core for establishing a foundation of good governance for any organization. The fact that these characteristics have been developed within an international multi-national entity like the United Nations further suggests that at minimum these characteristics should be looked at and perhaps even considered when trying to create an environment of good governance within an international, multi-national or complex organization. The United Nations 8 characteristics are: 1. Accountable; 2. Transparent; 3. Responsive; 4. Equitable and Inclusive; 5. Consensus Oriented; 6. Participatory; 7. Rule of Law; and 8. Effective and Efficient. These characteristics are not necessarily surprising. Over the past year or so, much of the activity relative to preventing sports corruption and match-fixing specifically, has focused on governance-type programs and initiatives.

Governance is very complex especially applied to non-governmental organizations and often involving self-governance. However, in its broadest sense, governance can be looked at as a system of oversight and the approach used to achieve specified goals. Because governance can occur in various contexts, it is important to identify the circumstances around the application of governance to better understand the specific requirements and components.

Good governance operates in such a way as to realize the goals of the organization and society. If sport is considered the "organization" and the goal is to pre-

[40] *See,* Sports betting and corruption: How to preserve the integrity of sport, IRIS, University of Salford (Manchester), Cabinet Praxes-Avocats, CCLS (Universite de Pekin) (2011).

[41] One consideration might be to restrict all those involved in sports from betting on any sports game, not just the ones in which they are involved. Severity of the limitation will require a balancing of individual rights.

vent sports corruption, then there should be a process of governance of sport to achieve the goal that would then be applied across the organization of sport. The idea of sport as an organization is important to the application of governance. To apply governance to sport there must be a structure in place that can support the governance initiatives. What is meant by this is that in order to effectuate governance, especially good governance, there must be an identifiable organization associated with it. When that specific organization is identified and the governance goals applied, then there can also be an expectation of accountability.

"Good governance in sport is a condition for the autonomy and self-regulation of sport organizations."[42]

Several organizations have engaged in efforts to address the issue of combating and preventing sports corruption. In many cases sports organizations have teamed up to work towards a solution to the problem or at least to raise awareness amongst stakeholders. For example, the Deutsche Fusaballiga[43] joined forces with Transparency International to offer education and awareness to players and coaches in an effort to prevent match-fixing. Another pairing up occurred when FIFA donated 20 million dollars to INTERPOL to help prevent match-fixing.[44] This has resulted in initiatives around the world by INTERPOL to provide education and awareness as well as link institutional organizations to engage in match-fixing efforts.[45] These efforts can be beneficial. There seems to be an effort to increase the accountability of sports organizations by these *pairings*. However, effectiveness of a true governance framework will require accountability within the sports organization itself.

There are many significant efforts that are occurring primarily in the area of education and awareness initiatives around match-fixing. Another area gaining some attention is that of transparency and how the organizations might more effectively share information regarding match-fixing that would be beneficial in supporting investigative efforts of law enforcement officials and sports organizations. These types of collaborations and concerted efforts are necessary to make any type of governance framework effective. Therefore, a *pairing* with organizations that increase the transparency of information that will aid in the effective

[42]European Union, European dimension of sport (January 18, 2011, 4.1 Promotion of good governance in sport).

[43]German professional football leagues I and II

[44]FIFA's historic contribution to INTERPOL in the fight against match-fixing, FIFA.com, Monday 9 May 2011.

[45]Id.

investigation and enforcement of corruption laws is beneficial in the support of an effective governance structure.

Conclusion

The solution for addressing sports corruption in its various forms is not clear and will likely require a multi-approach solution. The European Union has made some progress in developing an approach to certain aspects of sports corruption and less in others. In this research, I will review the current European Union regulations that have been developed to address sports corruption as well as some of the current discussions that are taking place around an approach to the problem. An analysis of the present body of information will reveal areas where the current approach falls short. Reviewing governance measures engaged by the sports governing bodies aimed at addressing this problem will offer further insights into the problem and/or the solution. By engaging in a deep analysis of the regulatory and governance aspects of the issue and seeing what opportunities there are for addressing the issue from this bifurcated approach, one might then be able to develop a workable framework to apply to a specific area of corruption and test its effectiveness.

The development of governance initiatives and the creation of a workable governance framework should not be confused. We have seen quite a bit of activity relative to the creation of governance-type initiatives, but have yet to see the true development of a good workable governance framework for sport. That is in part due to the fact that sport is not viewed as an organization. Currently, there are many independent autonomous actors that are addressing the problem from a very monolithic approach. A coordinated effort across the organization of sport will be required in order to achieve good governance.

Sports corruption not only affects the rules of the game but also the market within which sports operates. Much focus has been given to the criminal laws that address the issue of sports fraud or corruption, particularly in betting, doping, money laundering and match-fixing. Although there is some activity by national sports organizations to provide education and information to players about the dangers and impacts of match-fixing, much more can and should be done to ensure a proper governance structure and sufficient oversight is in place to help prevent match-fixing. Reviewing the legal framework is important as this provides the guidelines or box within which governance operates. Identifying the organizational governance approach is critical in an effort to identify mechanisms that can and should be used to help prevent match-fixing in football and contribute to a solution to the problem.

ONLINE SPORT BETTING DEVELOPMENTS AND ATHLETIC ACTIVITY FUNDING

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Abstract: *On the 24th of March 2011 the European Commission issued the so called Green Paper on online gambling in the Internal Market. The European Commission purpose is to tackle the problems resulting from the rapid development of on-line gambling in the EU. As long as sport betting services providers were operating at a national level, member states could easily regulate on the matter providing also funding of athletic activities. This was done by implementing either a system of licensed operators or a strictly controlled monopoly (state owned or otherwise). These two regulatory models co-existed within the internal market up until the day when the development of internet and the increased supply of online gambling services have made it more difficult for the different national regulatory models to co-exist.*

The harmonization at EU level of all national legal provisions on betting as a whole should be considered as an opportunity for the athletic establishment to exploit the fact that there is a broad consensus that sport events, on which gambling relies, should receive a fair return from the sports related gambling activity.

I. **Gambling and Betting**[1]

Gambling and betting include many different games. They have grown to become a major economic factor in the EU market but on the other hand they also give rise to serious social risks and this is why they are regulated restrictively by all Member States. The growth and expansion of the betting business can be largely attributed to the technological evolution of new means of communication and in particular the internet.

Sport betting includes games where the players wager a stake with valuables or money based on the result of a competition, the occurrence of an event or the existence of something. They appear to be very ancient and common to many societies. Sport betting was very common in ancient Greece and Rome. In the course of history games of chance and gambling have often been condemned on moral and religious grounds, but in the end they were society has accepted them as an inevitable situation.

The best known and oldest form of betting is on horse races. For thousands

[1]See Opinion by Adv. General Bot delivered on the 14th October 2008 concerning the Case C-42/07, Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa,paras. 15-40.

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

of years, horse racing flourished as the sport of kings and nobility – always maintaining an air of superiority. It has been said that today football may be the king of sports but horse racing is the sport of kings. However, that is no longer true of modern horse racing as the popularity now spans all classes, primarily due to the sport's legalized gambling.[2] Consumers are invited to bet on the result of a race in which those taking part, horses and jockeys, are known in advance. Consequently they can place their bets in reliance on luck and also on their knowledge of the characteristics and the performance of the horses and jockeys. Sport betting nowadays is not limited to horse races, but it covers almost all sporting events.

In the era of globalization sport betting has increased significantly. It is usually refered to as "a considerable economic factor". This is because it generates a large amount of jobs in EU's Member States and very high turnover for its operators (public or private).

On the other hand this economic activity involves also serious social risks to society in relation to the players and to the operators that organise them. The attractiveness of the game is such that sometimes players forget that it should be viewed as a hobby or a recreational activity and never as a job and may end up wagering the family budget. Also there is the risk of addiction that jeopardises not only the player's financial situation but even their health as it is comparable to addiction caused by drugs or alcohol.

The root of the problem lies to the fact that betting allows by necessity only a very small number of players to win. This is the only way that these businesses can insure viability and profit. In the great majority of cases, therefore, players lose more than they gain. However, the excitement of the game and the prospect of winning, sometimes very large amounts, may lead players to spend on gambling more than the share of their budget available for leisure pursuits.

Another key factor in the risks involved is the fact that the set up of the betting organization from the odds to the actual result of the games is outside the control of the players and therefore the player has no really effective means of verifying the conditions in which betting takes place. In addition to that and because of the considerable stakes involved, the betting game is likely to be manipulated by the organiser.

Finally, in the betting business large sums of money change hands instantly and continuously, these enterprises therefore in the hands of a criminal mind may be a means of 'laundering' money obtained illegally and converted into legal profit.

Nowadays sport betting operations are subject to restrictive regulation in most Member States of the European Union. The regulations adopted vary from

[2]http://www.finden.gr/asp/JOCKEYS_HISTORY_OF_HORSE_RACING.pdf

total prohibition to strict regulation and a proportion of the betting revenue is financing causes of public interest.

II. **Modern Technology and Betting**[3]

Until recently sport betting was accessible only in specific places. Prospective players had to make a journey and it could only be done during the operating times of the premises in question. The appearance of electronic means of communication in the 1990s, such as mobile phones and the internet, changed the situation radically. Thanks to these new means of communication, players could now bet without leaving their home. Smart phones facilitated players even more. The betting operator is proposing wagers to the player 24 hours a day 7 days a week. The transaction is completed in a split second and there are many seconds in a day.

This situation has increased the number of players and the amounts played. It has also instantly abolished all previously existing barriers thus rendering obsolete tax authorities and internal market regulations. This made possible to operators established in other Member States or even non-member countries to reach consumers that could not be reached before.

III. **The Green Paper on Online Gambling**

The above mentioned situation has resulted in the development of a huge unauthorised cross-border market in the EU. This market contains firstly a black market with unlicensed clandestine betting and secondly a so-called "grey" market. This grey market consists of operators duly licensed in one or more Member States providing gambling services to citizens in other Member States without having obtained a specific authorisation in those countries. This unauthorised cross-border market remains accessible to consumers, due either to de facto tolerance or lack of effective enforcement and operates in addition to the legal national offers that are available to consumers.[4]

Under EU law, betting services fall under Article 56 TFEU. These services are covered by the general rules on the provision of services according to which in principle, operators authorised in one Member State are allowed to provide their services to consumers in other Member States. However Member States may impose restrictions justified by overriding reasons in the public interest,

[3]See Opinion by Adv. General Bot delivered on the 14th October 2008 concerning the Case C-42/07, Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, paras. 41-45.

[4]See Green Paper On on-line gambling in the Internal Market, Chapter 1. Art.1.1.

such as consumer protection or the general need to preserve public order provided that their overall policy concerning the matter is proportionate and applied in a consistent and systematic manner.[5]

In 2006 following a unanimous demand of the Council and the European Parliament, the Commission excluded gambling services altogether from the scope of the Services directive. They have also been excluded from the scope of the E-commerce directive. Failing to adopt secondary law in this sector, the focus turned to the application of primary law.[6] As the CJEU has now ruled on many betting cases and developed a number of guiding principles, a significant proportion of the Member States against which the Commission opened infringement cases have since adopted national legislative measures regulating betting services.[7]

IV. **The Financing of Benevolent and Public Interest Activities**

The restrictive legislative measures adopted by Member States on betting services are justified by policy reasons such as consumer protection and financing of benevolent or public interest activities. The CJEU has time and time again ruled that the funding of such social activities does not constitute the substantive justification for the restrictive policy but only an ancillary beneficial consequence. The most common public interest activities that currently benefit from the above mentioned direct funding are mainly sports but also the arts and culture sector.[8]

Sport events are used by on-line betting operators in order to present an attractive selection of gambling services to their potential customers. It is often argued that sport events benefit from such gambling activities in that they create additional public interest and possibly also increase the event's media exposure. According to the Green Paper on Online Gambling "There is a broad consensus that sport events, on which gambling relies, should receive a fair return from the associated gambling activity."[9]. Also according to the Commission's Communication document "Calls to ensure sustainable funding for sport from private and public sources and financial stability of the sport sector should be taken

[5]See Green Paper On on-line gambling in the Internal Market, Chapter 1. Art.1.1.

[6]It should be noted however that gambling are nevertheless subject to a number of EU acts such as The Audiovisual Media Services Directive, The Unfair Commercial Practices Directive, The Distance Selling Directive, The Anti-Money Laundering Directive, The Data Protection Directive, The Directive on privacy and electronic communication and The Directive on the common system of value added tax.

[7]See Green Paper On on-line gambling in the Internal Market, Chapter 1. Art.1.2.

[8]See Green Paper On on-line gambling in the Internal Market, Chapter 2. Art.2.3.3.

[9]See Green Paper On on-line gambling in the Internal Market, Chapter 2. Art.2.3.3.

into account when further addressing the provision of gambling services in the Internal Market."[10]

When one examines sport betting horse racing comes into play more than any other sport. This is because the horse racing's primary attraction is for gamblers. Therefore more than to any other sport, its viability will depend on sufficient proportions of gambling revenues being reinvested into the activity. In the difficult times of a global financial crisis all sports may come to depend more and more on the betting revenue.

Apart from this specific case, gambling services are offered on all organised sport competition. It is obvious that without the use of their events the gambling services would not be viable. One wonders whether the organisers (sport organisations, teams etc.) should be receiving some profit through such exploitation of their images or events by gambling service providers. Already most Member State legislation obliges sport betting operators to channel revenues back into sports.[11] [12]

V. **Sports Funding and State Aid**

State aid control is an essential part of the EU's competition policy. Its objective is to ensure that government interventions do not distort competition and trade in the Internal Market. In the sports sector, state aid mainly finances infrastructure or activities of individual sport clubs.[13] In principle State Aid is incompatible with EU law, unless one of the derogations in Article 107 TFEU is applicable. Although State aid to sport is not covered as such by the General Block Exemption Regulation, it might fall under certain provisions of this Regulation, in which case it can be considered compatible without any need for prior notification to the Commission. Otherwise, a new aid needs to be notified in advance to the Commission pursuant to Article 108(3) TFEU and can only be awarded after the Commission has issued a favorable decision.[14] There have been few decisions so far where the Commission has applied EU state aid provisions to the sports sector. Most sports infrastructure is local in nature with minimal effect on trade between EU Member States. Therefore State aid in sports usually does not have state aid relevance. Amateur sports clubs are

[10]Commission Communication Document COM(2011) 12, Developing the European Dimension of Sports, Brussels, 18.1.2011. Page 9.

[11]The Commission has launched an EU study on the funding of grassroots sports.

[12]See Green Paper On on-line gambling in the Internal Market, Chapter 2. Art.2.3.3.

[13]See http://ec.europa.eu/sport/what-we-do/state-aid-control_en.htm

[14]Commission Communication Document COM(2011) 12, Developing the European Dimension of Sports, Brussels, 18.1.2011. Page 9.

generally not considered as undertakings within the meaning of the Treaty, so that subsidies granted to these entities are generally not covered by the state aid rules. On the other hand, professional sports clubs engage in economic activities, and these are covered by State Aid rules to ensure that subsidies do not disrupt fair competition.[15] Therefore amounts deriving from betting revenues and channeled to professional sports could be considered as State Aids when imposed by national legislation and fall under the scope of Article 107(1) TFEU, apart from very small amounts of aid falling under the de minimis Regulation.[16] [17]

Conclusion

It has been argued that betting on sports events is "*as great a risk to the integrity of sport as doping*".[18] This is not only due to fraud risks and match fixing. Sport betting brings sports to a new era with new sports ethics. In the old days spectators were only sports fans. Nowadays most spectators and sports fans are sports gamblers. Sports fans enjoy the bond, the connection, the relation to the team and its players, the life lasting loyalty. Sports gamblers do not care about the team nor its players, they do not enjoy the feeling of loyalty. They will remain fans of the team they gamble for, for as long as the match lasts. Being a sports fan is a social activity that promotes integration and participation of the individual in a social community. Being a sports gambler fan is an antisocial activity. The gamblers are loners with no sentimental attachments to the team nor sports whatsoever. Given the opportunity they easily change their interest from sports to politics. This volatility is not merely a theoretical problem or one of morals. Its consequences affect even the value of the sports show product as a whole. The high value of the sports product is based on the fans loyalty. [19]

As much harmful as sport betting can be for sports it can also be very beneficial. Not every sport is like professional football. Amateur sports struggle to survive in difficult financial times. Betting on sports events that are not widely known can assist a whole market to stand on its feet. Betting operators promote events attracting spectators and prospective players. During the embryonic phase

[15]See http://ec.europa.eu/sport/what-we-do/state-aid-control_en.htm

[16]See Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

[17]Commission Communication Document COM(2011) 12, Developing the European Dimension of Sports, Brussels, 18.1.2011. Page 9.

[18]http://www.independent.co.uk/sport/general/others/exclusive-gambling-is-bigger-threat-to-sport-than-doping-1638487.html

[19]See Delany, T., " Basic Concepts of Sports Gambling: An Exploratory Review." http://newyork-sociologist.org/delany.pdf

of a certain sport the support coming from the betting operator's promotion is of vital importance and overshadows most gambling risks. Also during this phase the relationship between the sport and betting operators is mutually beneficial. However when a sport is already established there seems to be only profit for the betting operators and no profits for the sport. When the sport is emancipated and able to stand on its feet, the gambling risks appear like a childhood disease that should be either strictly regulated or eradicated.

The present system according to which the State regulates the sport betting market awarding licenses to private operators and imposing on them the obligation to subsidize sports entities thus risking a breach of State Aid rules is absurd. Instead, by making use of the principle of subsidiarity, Member States could assign this regulating competence to sports authorities directly. Established professional sports with a good governance policy have the means and resources to best organize sport betting services. They also have the know-how to best operate them. Finally they are the stakeholder having the most to gain by applying strict responsible gambling policies to control and regulate sport betting services.

DRUG TESTING IN THE UNITED STATES

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Abstract: *In June, 2012, Robert Kraft the owner of the New England Patriots, an American Football Team said that he would rather donate $100 million to charity than invest in a top European soccer club because the economics of European football make no business sense. In particular, Kraft noted that the lack of a salary cap combined with other clubs' decisions to run up significant levels of debt ensured that there was not a level playing field in English football. For example, Manchester City which won English Premier League (EPL) last year revealed that it lost £194.9m for the last financial year (the highest figure in English football history). The purpose of this presentation is to examine the English Premier League (EPL) and compare it to Major League Soccer (MLS) in the United States. In particular, the presentation will examine whether MLS's salary cap, which limits the amount of money a team can spend on players' wages, promotes a more balanced and level playing field.*

The presentation will begin by comparing the final standings of the EPL to MLS. Next, the presentation will examine what the EPL might look like under the American sports model. In particular, the presentation will look at some of the benefits and shortcomings of both the English and American league models, such as the system of promotion and relegation, market allocations, player development and revenue distribution. Next, the presentation shows that instead of promoting a more balanced and competitive league the EPL's system of promotion and relegation, with teams fighting up until the last game to prevent relegation out of the Premier League, actually decreases the competitive balanced of the league. In particular, the presentation shows that the EPL's system of promotion and relegation actually tilts the competitive balance of the league in favor of the bigger clubs by negatively impacting smaller teams with limited resources and less stability. The presentation concludes by giving an example of what English Football would look like under an American sports model with fixed salary caps and whether it would promote more competitive balance in the EPL.

Introduction

On January 17 and 18, 2013, Lance Armstrong confessed on American television that during his cycling career, including during all of his seven Tour de France victories, he used performance enhancing drugs, including testosterone, cortisone, human growth hormone and the blood booster EPO.[1] The confession, which came after over a decade of denials by Armstrong, however, failed to give any of the details of his doping. For example, he failed to provide any names of

[1]Alessandra Stanley, *Dispassionate End to a Crumbled Romance*, N.Y. Times, Jan. 18, 2013 at B14.

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

the people who helped him dope, or explain how he evaded testing positive.[2]

The confession, which started the general public, if not the racing world, was an attempt by Armstrong to reduce his lifetime ban imposed by World Anti-Doping Agency (WADA) and United States Anti-Doping Association (USADA). The ban was imposed after a United State District Court in Texas refused to stop USADA, the agency in United States responsible for managing the testing and adjudication process of the athletes in the US Olympic and Paralympic Movement, investigation into Armstrong's alleged use of illegal drugs based on due process grounds. When the court refused to stop USADA, Armstrong dropped his legal challenge and USADA released its report, partly based on the testimony of 11 of his former teammates and fellow cyclists, accusing Armstrong him of being at the center of probably the most sophisticated and successful doping program the sport has ever seen.[3] As a result of USADA's findings, Armstrong was stripped of his seven Tour de France titles and barred for life from competing in all Olympic sports.[4]

While the Armstrong cases showed that the use of illegal performance-enhancing drugs is debatably the single greatest threat to the integrity of sports, there are some people who have complained that in their zeal, the sports world may be overstepping their legal authority and violating the privacy rights of the very athletes they are trying to protect. For example, Armstrong claims that USADA's investigation and procedures in building its' case against him was unconstitutional. The purpose of this paper, therefore, is to examine the various legal protections available to American athletes under United States law. The paper will begin by examining the main legal protection available to athletes in the United States: the United States Constitution. Next, the paper examines the legal protections available to professional athletes under labor law and the internal grievance systems set up within the league's collective bargaining agreement (CBA). Finally, the paper examines the impact of the WADA and USADA on American athletes.

I. **Constitutional Law**

Every citizen in the United States, including those who participate in athletics is free under the U.S. Constitution from unreasonable searches, which according to the United States Supreme Court's decision in *Skinner v. Railway Labor Executives' Association*, includes the collection and testing of urine and blood.[5] The Fourth Amendment's prohibition against unreasonable searches, however,

[2]Juliet Macur, *As Armstrong Decides Next Move, Agencies Are Watching*, N.Y. Times, Jan. 20, 2013 at SP4.

[3]Juliet Macur, *Why a Confession by Armstrong Could Benefit Both Sides*, N.Y. Times, Jan. 6, 2013 at SP4.

[4]Juliet Macur, *Say Goodbye to 7 Yellow Jerseys*, N.Y. Times, Oct. 23, 2012 at B13.

[5]Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, at 617 (1989).

only applies when state action is present.[6] Therefore, before an athlete can claim that a drug-testing program violated his or her constitutional rights, the entity being challenged must be shown to be acting as a governmental entity.[7] The Fourth Amendment's prohibition against unreasonable searches, can only be applied to the actions of private organizations it its' conduct can be attributable to the state using one of the following test: (1) the public function theory;[8] (2) the nexus or entanglement theory;[9] and (3) the state compulsion test.[10]

Currently, in the United States, private athletic entities, such as the National Collegiate Athletic Association (NCAA) and professional sports teams are not deemed states actors for constitutional purposes. For example, in *Long v. National Football League*,[11] a NFL player sued the league after he tested positive for anabolic steroids and was suspended pursuant to the league's drug-testing policy. In dismissing his claim, the court held that Long failed to show a sufficiently close nexus between the actions of the city and city officials and the decision of the NFL to establish state action based on his suspension.[12] The court concluded that Long was suspended based on independent medical conclusions and the NFL's drug testing policy over which the state had no influence.[13]

Even when the state is involved in the drug testing of professional athletes, the courts have afforded wide latitude to such programs. For example, in *Shoemaker v. Handell*,[14] five jockeys challenged the New Jersey Racing Commission's regulations requiring drug testing of jockeys. The jockeys claimed that this constituted an illegal search and seizure and was a violation of their Fourth Amendment rights. The Court of Appeals, in upholding the regulations, held that the commission's concern for racing integrity warranted the tests and that as long as the commission kept the results confidential, there was no violation of the jockeys' rights.[15]

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[6]State action is defined as any action taken directly or indirectly by a state, municipal, or federal government or the actions of a private association which are attributable to the state.

[7]John T. Wolohan, *Drug Testing*, in Law for Recreation and Sport Managers (6th Ed.). (Doyice J. Cotton & John T. Wolohan eds., 2012).

[8]Smith v. Allwright, 321 U.S. 649 (1944).

[9]Marsh v. Alabama, 326 U.S. 501 (1946). *See also*: Jackson v. Metropolitan Edison, Co., 419 U.S. 345 (1974).

[10]Shelley v. Kraemer, 334 U.S. 1 (1948). *See also*: Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); and Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442 (10th Cir. 1995).

[11]Long v. National Football League, 870 F. Supp. 101 (1994).

[12]*Id.*

[13]*Id.*

[14]Shoemaker v. Handell, 795 F.2d 1136 (1986).

[15]*Id.*

a. The Fourth Amendment

If an athlete is able to demonstrate that the athletic association is a state action, the organization must meet the safeguards of the Fourth Amendment before it can implement a drug-testing program. The Fourth Amendment provides that:

[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[16]

Based on the language of the Fourth Amendment before any drug testing program can be ruled constitutional, the "search" or test must be reasonable.[17] To determine whether a drug test satisfies the reasonableness requirement, the court has developed a 3 part test that balances the intrusion of the test on an individual's Fourth Amendment interests against its promotion of legitimate governmental interests.[18]

The first factor the court considers is whether the individual has a legitimate privacy expectation on which the search intrudes. What expectations of privacy are legitimate varies depending on whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In the area of sports, however, because it is normal for athletes to shower and change together before and after each practice or game, the courts have found that their expectation of privacy is small. As the Supreme Court noted in *Vernonia School District v. Acton*, "sports are not for the bashful."[19]

The second factor to be considered is the character of the intrusion. In determining the character of the intrusion, the court examines both the manner in which the samples are collected and monitored and the type of information being collected by the test and how it is used. For example, is the individual required to give a blood test, which courts would find invasive and therefore require the state to show that it has an important interest in conducting the test, or a simple urine sample, which is far less invasive. As the Supreme Court noted in *Vernonia School District v. Acton,*[20] the school district's testing program which required male students to produce samples while fully clothed and only observed from behind, and female students in an enclosed stall, with a female monitor standing

[16]U.S. Const. amend. IV.

[17]Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, at 617 (1989).

[18]Wolohan, *supra* note 7.

[19]Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

[20]*Id.*

outside listening only for sounds of tampering, were conditions nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily.[21] Under such conditions, the Supreme Court held that the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.[22]

In addition to the manner in which the samples are collected, when considering the character of the intrusion, the court will also consider the type of information being collected by the test and who receives the test results and how the information is used. The test information should only be disclosed to those limited individuals who have a need to know. For example, in *Vernonia School District v. Acton*, the Supreme Court in approving the drug testing program noted that the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.[23]

The final factor to be considered is the nature and immediacy of the governmental concern and the efficacy of the drug test in meeting those concerns. In other words, the court must determine whether the state's interest in conducting the drug test is important enough to justify intruding on an individual's expectation of privacy. In evaluating the nature and immediacy of the governmental concern, it is important to note that the state's authority to test is not unchecked. For example, in *Gruenke v. Seip*,[24] the court ruled that a high school swimming coach who suspected that a member on the team was pregnant could not require the athlete to take a pregnancy test.[25] In ruling that the coach's actions constitute an unreasonable search under the Fourth Amendment, the Third Circuit Court ruled that a school cannot require a student to submit to this intrusion merely to satisfy the coach's curiosity.[26] Even though student athletes have a very limited expectation of privacy, the Third Circuit Court ruled that in order to compel a student to take a pregnancy test, the school must show a legitimate health concern.[27]

b. State Constitutions

In addition to the protections against illegal searches guaranteed under the

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000).

[25] *Id.*

[26] *Id.*

[27] *Id.*

Federal Constitution, it is important to note that each state has its' own state constitutions, which may afford more liberal protections to citizens.[28] For example, in *York v. Wahkiakum School District No. 200*,[29] the Supreme Court of Washington was asked to determine whether the school's policy, which required all student athletes to be randomly drug tested as a condition of playing extracurricular sports, violated the Washington State Constitution. The drug testing was done by urinalysis, with the student in an enclosed bathroom stall and a health department employee outside. If the results indicate illegal drug use, then the student would be suspended from extracurricular athletic activities; the length of suspension depends on the number of infractions and whether the student tested positive for illegal drugs or alcohol. The school district would also provide any student who tested positive with drug and alcohol counseling resources.[30] In ruling that the school district's policy is unconstitutional and violates student athletes' rights under article I, section 7 of the Washington State Constitution the Supreme Court of Washington held that warrantless drug testing student athletes cannot countenance random searches of public school student athletes with our article I, section 7 jurisprudence.[31] In particular, the court stated, it requires a warrant except for rare occasions, which it jealously and narrowly guards.[32]

c. Due Process

In addition to the Fourth Amendment, another theory used by athletes to challenge the constitutionality of drug-testing programs is Due Process. For example, in challenging USADA's investigation into his past, Lance Armstrong claimed that the process violated his Due Process rights under the US Constitution.[33] In reporting on Armstrong's legal challenge, one reporter called WADA and USADA "the most thoroughly one-sided and dishonest legal regime anywhere in the world"[34] and the Court of Arbitration for Sport (CAS) arbitration process "a system deliberately designed to place almost insurmountable hurdles in the way of athletes defending themselves or appealing adverse findings."[35]

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[28]Wolohan, *supra* note 7.

[29]York v. Wahkiakum School District No. 200 et al., 163 Wn.2d 297; 178 P.3d 995 (WA. 2008).

[30]*Id.*

[31]*Id.*

[32]*Id.*

[33]Michael Hiltzik, *Anti-duping Officials aren't playing fair*, L.A. Times, Aug 26, 2012 at B1.

[34]*Id.*

[35]*Id.*

The Due Process Clauses are found in both the Fifth Amendment[36] and the Fourteenth Amendment[37] of the Constitution and provide two basic types of due process protection: Procedural Due Process and Substantive Due Process. Procedural Due Process requires that before a governmental entity deprives an individual of his or her "life, liberty or property" interests, that he or she be provided with the proper procedural due process or procedural fairness.[38] The amount of "due process" required, generally depends on the rights being deprived. For example, the more important the right, the more procedural due process that the state is required to provide. Substantive Due Process, on the other hand is designed to provide individuals with a level of protection against state interference with certain fundamental rights and liberty interests not specifically protected under the constitution, and ensures that these rights cannot be taken without appropriate governmental justification, regardless of the procedures used to do the taking.[39]

In order to establish a violation of due process under the constitution, an individual must establish that he or she has some type of property or liberty interest that has been adversely affected. Unfortunately, for most athletes, it is clear from past court decisions that participation in athletics is not a property right, but is a privilege not protected by Constitutional due process safeguards. For example, in *Brennan v. Board of Trustees*,[40] John Brennan, a student-athlete at the University of Southwestern Louisiana, challenged a positive drug test for anabolic steroids on due process grounds. In the case, Brennan requested and received two administrative appeals in which he contended that the positive test results were "false" due to a combination of factors, including heavy drinking and sexual activity the night before the test and his use of nutritional supplements. Following the unsuccessful appeals, USL complied with the NCAA regulations and suspended Brennan from intercollegiate athletic competition for one year. In rejecting his claim, the court held that Brennan had no liberty or property interest in participating in intercollegiate athletics.

It is important to note that like the Fourth Amendment's prohibition against unreasonable searches, the Due Process protections found in both the Fifth Amendment and the Fourteenth Amendment only applies when state action is present. In addition, since athletes like Armstrong, and others who compete in

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[36]U.S. Const. amend. V

[37]U.S. Const. amend. XIV.

[38]Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law: Substance and Procedure, (3rd ed. 1999).

[39]*Id.*

[40]Brennan v. Board of Trustees, 691 So.2d 324 (1997).

athletic competitions that voluntarily follow WADA's rules, sign away their right to challenge any findings in the US courts the Due Process protections are of little help. As Federal Judge Sam Sparks of Austin, Texas ruled in the Armstrong case, even though he had "serious constitutional concern" with the way USADA pursued its case against Armstrong, by competing in the Tour, Armstrong implicitly agreed to arbitrate any doping charges against him. Therefore, Sparks ruled that the court could not and would not interfere.[41]

II. **Labor Law**

Another legal area governing the drug testing of some athletes in the United States is labor law. Under American labor law, the leagues, which represent the owners, and the players' association, which represents the players, must negotiate the terms and conditions of the players' employment. One of the mandatory terms of this contract or Collective Bargaining Agreement (CBA) must be any drug-testing program the league would like to implement. Therefore, without the players approval, the owners cannot unilaterally adopt a drug testing program. The first professional sports league to subject its players to drug tests was the National Basketball Association (NBA).[42] The program, which only covered street drugs, was adopted in 1983. The NBA did not add steroids to the list of banned substances until 1999.[43] The first league to test players for steroid use was the NFL in 1987.[44] Currently, all the professional sports in the United States test for both steroids and street drugs.

Because of the inherent conflict of interest both the unions, whose job is to protect the players from anything that prevent them from working, and teams, who want their best players in the games, not banned for drug use, it should not be surprising that the current drug testing programs have done little to reduce drug use by professional athletes.

III. **World Anti-Doping Agency**

In 1998, the sport world was rocked when a masseur for one of the Tour de France teams was stopped and his car was found to contain more than 400 doping products, including EPO, a drug that increases oxygen in red blood cells.[45] During the race,

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[41]Hiltzik, *supra* note 33.

[42]John Hawkins, *Drugs: Biggest Issue of the 80s*, Washington Times, Dec. 27, 1989, at D5.

[43]Mike Wise, *Union Alert Players to Treat the New NBA Drug Policy Seriously*, N.Y. Times, July 11, 1999 at B9.

[44]Duff Wilson, *Congressional Committee Extends Inquiry of Sports*, N.Y. Times, April 1, 2005 at D5.

[45]Christopher Clarey and Samuel Abt, *The Tainted Tour: A Special Report – Drug Scandals Dampen Cycling's Top Event*, N.Y. Times, July 3, 1999 at A1.

things got even more outlandish when police raided a number of the hotel rooms of team members, forcing five teams drop out of the race along with some individuals, including former world champion Luc Leblanc.[46] In addition to the Tour, 1998 also saw four members of the Chinese national swim team test positive before the 1998 world championships and vials of human growth hormone were found in the team's luggage while traveling to the event.[47] Finally, three time gold medal winner, Michelle Smith de Bruin was banned from competition for four years by the International Swimming Federation (FINA) after finding that she had manipulated a drug test by spiking her urine sample with alcohol.[48]

Worried about the impact the scandals might have on the future of the Olympic Games, the International Olympic Committee (IOC) held the First World Conference on Doping in Sport in February 1999 in Lausanne, Switzerland. As a result of the conference, the IOC and the international sport governing bodies created the Lausanne Declaration on Doping in Sport, which called for the creation of a global anti-doping agency. In November 1999, the World Anti-Doping Agency (WADA) was established to fill this role.[49]

In March 2003, the WADA announced a consolidated drug-control program for all international sports. The World Anti-Doping Code (the Code) was signed by sixty-five sports federations and over fifty nations, including the United States, covers all Olympic sports, the federations that govern them, and all their athletes. In developing the Code, WADA sought to create a single list of banned drugs, a uniform system for testing for them, and penalties for violators. Up until the development of the Code, each Olympic sport operated under its own drug program. The Code, which went into force on January 1 2004, has brought about a uniformed system where previously rules had varied, and in some cases did not exist.[50] The Code was revised on January 1, 2009.[51]

a. WADA and American Athletes

An example of the impact the Code has had on American athletes is the Floyd Landis case. During the 2006 Tour de France, Floyd Landis tested positive for the presence of exogenous testosterone. Landis, who won the race, would eventually

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[46]*Id.*

[47]*Chinese Swimmer's Bags Held Banned Hormone*, N.Y. Times, Jan. 10, 1998, at C2.

[48]Ira Berkow, *Suspect Samples, but FINA's Testing Marred*, N.Y. Times, Aug. 9, 1998 at B4.

[49]WADA HISTORY, http://www.wada-ama.org/en/About-WADA/History/WADA-History/ (Last Visited Feb. 16, 2013).

[50]WORLD ANTI DUPING CODE, http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/ (Last Visited Feb. 16, 2013).

[51]For more information on the 2009 WADA Code, see: http://www.wada-ama.org/).

be stripped of his victory and declared ineligible to compete for two years[52] by USADA. Although Landis challenged the findings, in *Landis v. USADA*,[53] CAS upheld USADA penalty and also required Landis to pay the $100,000 in legal expenses USADA incurred in the arbitration.

Athletes have also been able to use the Code to gain entry to competitions. For example, disappointed that the two year ban on competition under the Code did not also ban athletes from competing in the next Olympic Games, the IOC enacted Rule 45 which barred any athlete who had received a doping suspension of more than six months from competing in the next Olympic Games. The IOC therefore attempted to impose a longer ban on athletes than allowed under the Code. For example, when the IOC ruled that 2008 Olympic 400-meter champion, LaShawn Merritt, who tested positive for a banned substance was ineligible to compete in the 2012 London Olympic Games under IOC Rule 45, even though he would complete his suspension in 2011, the rule was challenged by the United States Olympic Committee in *USOC v. IOC*.[54] In overturning Rule 45, CAS held that the rule was "invalid and unenforceable" because it amounted to a second penalty.[55] The ruling cleared the way for Merritt and dozens of other athletes around the world to compete in London.

Conclusion

Although there have been calls by some in the sport community, both inside and outside the United States, especially former WADA chief Dick Pound,[56] to apply the WADA Code more broadly to America's sports, the leagues and athletes, especially the players' unions, have resisted those calls. However, before professional and amateur athletes in the United States are forced to give up the various legal protections found in the American law in the fight to stop the illegal use of performance-enhancing drugs, the sports community needs to ensure the fairness of the process. If athletes view WADA and USADA as "the most thoroughly one-sided and dishonest

[52]Under the WADA Code, for a first offense, athletes are suspended for two years. The ban can be reduced if "an athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility … shall be replaced with the following: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility" (WADA Code 10.4).

[53]Landis v. USADA, CAS 2007/A/1394

[54]USOC v. IOC, CAS 2011/0/2422

[55]*Id.*

[56]Lynn Zinser, *Pound Builds and Badgers in his Battle Against Doping,* N.Y. Times, Aug. 8, 2006 at D1.

legal regime anywhere in the world"[57] and the CAS arbitration process as "a system deliberately designed to place almost insurmountable hurdles in the way of athletes defending themselves or appealing adverse findings,"[58] there seem to be very few safeguards in place to ensure that these organizations are not overstepping their legal authority and violating the human rights of the athletes.

[57] *Id.*

[58] *Id.*

KEEPING AN EYE ON COPYRIGHT LAW DEVELOPMENTS AFFECTING SPORTS EVENTS IN AUSTRALIA

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Abstract: *The relationship between sports events and intellectual property law protection, including copyright, is multifaceted. The key stakeholders, the sports organisations, media and communications companies and the general public, have very different views about where the value of the sports event lies, who should contribute to its costs and how ownership rights provided by various categories of intellectual property law should be exercised. Meanwhile, new communications technologies are rapidly expanding the ways in which sports events are experienced away from the sports arena controlled by the event organiser. Commercial interests and the public interest are both at stake Copyright law has been reticent about offering protection for the sports event itself but its protection of the broadcast signal has been critical in attracting value to the event for the benefit of the organiser. However, this framework has come under stress on two fronts. The first front is the changing nature of sports news reporting and the second front relates to the services that capture the free-to-air broadcast signal, record it in the 'cloud' and then subsequently transmit it to the various communication devices of subscribers. This paper explores these two controversial copyright issues as they have been faced in the Australian context. One controversy has been resolved, at least temporarily, by the adoption of a voluntary code of practice for reporting sports news but a new review of copyright exceptions may be used to revisit the issue. The other controversy is still being fought over in the courts and it reflects in part the Australian Government's struggle over the question of extending the current broadcasting regulatory regime to communications over the internet.*

**The Chinese version of this abstract is translated by a colleague of the author; and the English edition of the abstract shall prevail.*

Introduction

The relationship between sports events and intellectual property law protection, including copyright, is multifaceted. Copyright law has been reticent about offering protection for the sports event itself but its protection of the broadcast signal has been critical in attracting value to the event for the benefit of the organiser. However, this framework has come under stress on two fronts. The first front is the changing nature of sports news reporting and the second front relates to developing services that capture the free-to-air broadcast signal, record it in the 'cloud' and then transmit the recorded broadcast programmes to the various communication devices of their subscribers.

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This paper explores these two controversies as they have been faced in the Australian context. One controversy has been resolved in part, at least temporarily, by the adoption of a voluntary code of practice for reporting sports news. The other controversy reflects a wider struggle over the issue of extending the current broadcasting regulatory regime to communications over the internet. The paper notes a range of reform proposals signalling possible new directions in the regulation of the communications industry, which will have an impact on the licensing of rights relating to sport and a review of copyright exceptions whose scope will encompass matters raised by these controversies.

Sports Events: Stakeholders and Copyright Law

Among the key stakeholders in sports events (ie the sports organisations, athletes, news media, communications companies, advertisers and the general public), there are different views about where the value of the sports event lies, who should contribute to its costs and how ownership rights provided by various categories of intellectual property law should be exercised. Meanwhile, new communications technologies are rapidly expanding the ways in which sports events are experienced away from the sports arena controlled by the event organiser. Commercial interests and the public interest are both at stake.

Modern sports organisations need to generate considerable funds to stage their events. At present, much of the funding for popular sporting events is raised from exclusive broadcast rights granted by the event organisers. More recently sports organisations have been developing relationships with communications intermediaries such as mobile phone operators and internet service providers, who are looking for content to supply to their subscribers.

Commercial broadcasting organisations (free-to-air television and subscription services) understandably wish to obtain exclusive rights in order to attract advertising, an essential part of the financial support of sports events, to their broadcasts. The goal of advertisers is to obtain access to the widest possible audiences, both at the sports venue and among those viewing the event on an increasingly varied range of communications devices. But the commercial broadcasting organisations are now competing with others for content to be supplied to much the same kinds of audiences. These other parties include mobile phone operators and internet service providers, who want to provide content to subscribers who are now more mobile and demand more up to date material as part of their consumption of sports news. Advertisers are aware of the predicted significant growth in advertising on the mobile phone platform.[1]

[1]Cunnington B and Baird J 'We Must Change to Meet Mobile Behaviour' *The Australian* 27 August 2012, 28, referring to the PricewaterhouseCoopers *Australian Entertainment and Media Outlook 2012-16* report.

The established news media (television, radio, newspapers and magazines) regard sports news reporting as a crucial element in their overall news coverage. They report not only on the event itself but also about particular human interest aspects of the event and issues of more general importance, such as health issues and drugs or violence in sport. Some reporting is conducted on behalf of third parties who cannot afford to send representatives to the event. News journalists regard themselves as independent of the sports organisations staging the events and therefore providing a more objective report.

The traditional news media are subject to increasing competition from online sources, both professional and amateur. In response they have been developing their own online services, building an online readership through social networks such as Facebook and Twitter, providing access to constantly updated material as well as online photograph and video galleries capturing highlights of the sports events. Sports news that was once regarded as having a relatively short shelf life, is now a valuable online archive with the potential to be further developed to meet the increasing demands of audiences for a more interactive consumption experience.

In earlier times sports organisations had been highly dependent on news services to generate interest in their events. However the sports organisations are now able to directly communicate with their audiences through online means.[2] At the same time, the news media's growing online presence is seen by sports organisations as going beyond merely reporting the news and in fact competing with the services offered by the sports organisations.

Crucially, sports organisations usually own or control access to the venue where the sports event is taking place and so they are able to impose contract terms on entrants such as news journalists who require access to the venue. These terms may limit what entrants to the venue may do with the material they create about the sports event.

A significant segment of the general public is keen to attend or watch the broadcast of sports events both domestic and international and to read reports of them in the news media. However, information about a sports event, like the consumption of news generally, is now less likely to be obtained through a newspaper and increasingly likely to be sought online or through a mobile phone or tablet device. It is also now more likely to take the form of constantly updated information and include at least some audio-visual material. There is an expectation that sports reporting will also take place using the online social networks being tapped into on a regular basis by their users.

[2]See for example reports on the Australian Football League's expansion of its media unit and the operation of its website discussed in the context of the TV Now Case examined below: Masters R 'Decision Renders TV Deals Worthless' *Sydney Morning Herald* 2 February 2012, 24.

With the significant commercial value of sports events, the ownership and licensing of rights in the events is crucial. Various aspects of sports events are protectable under a number of different categories of intellectual property.[3] For instance sports marketing relies heavily on enforcement of rights relating to registered and unregistered trade marks (trade reputation) and some equipment used in sport may be the subject of patent or registered design protection.[4]

Copyright law is relied upon to protect a range of copyright material generated around the sports event. Copyright works include photographs and billboard advertising (as artistic works), live and recorded music (as musical works and sound recordings), choreographed dance (as dramatic works), written descriptions of the event (as literary works), audio recordings (as sound recordings), audio-visual recordings (as film) and radio and television broadcasts.[5] However, under Australian copyright law there is no copyright in the sports event as such.[6] A 'performance of a sporting activity' is taken not to be a performance for the purposes of performers' protection rights under copyright law.[7]

The existence of more extensive forms of intellectual property style protection for special events such as the Olympic Games, reflects the limits of existing intellectual property law categories. They generally do not extend to non-confusing associations, such as the more subtle associations drawn by non-sponsor

[3]Some have criticised the extent of this protection. See for example Hylton JG 'The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere' (2011) 21(1) *Journal of Legal Aspects of Sport* 43-72. For a discussion of sports marketing in China see for example, Ordish R 'Sports Marketing in China: an IP Perspective' (2007) *Sports Law eJournal*, http://epublications.bond.edu.au/slej/3 (Bond University) and Levine JF 'Meeting the Challenges of International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China Through Treaties, Chinese Law and Cultural Mechanisms' (2007) 9 *Texas Review of Entertainment & Sports Law* 203-229.

[4]For example, Kieff FS, Kramer RG and Kunstadt RM 'It's Your Turn, but its my Move: Intellectual Property Protection for Sports "Moves"' (2008-2009) 25 *Santa Clara Computer and High Tech Law Journal* 765-785.

[5]*Copyright Act 1968* (Cth), Parts III and IV.

[6]*Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479: where an observation tower was constructed on land adjacent to a fenced race track and from which details of the races and other race information taken from notice boards on the race course (eg starters, scratching, barrier positions) were telephoned to a radio station and broadcast. The High Court rejected the claim based on intellectual property, finding no property in a 'spectacle'. The Association for the Protection of Copyright in Sports, formed by a number of British sports organisations in 1944, was unsuccessful in its push for the introduction of copyright in sports events: Blais J-P 'The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada' (1992) 18(3) *Melbourne University Law Review* 503-539, 515.

[7]*Copyright Act 1968* (Cth) s 248A(2)(c).

traders as part of attempts to free ride on big events (ambush marketing) and hence the need for more extensive protection provided for a limited time around these key events.[8]

Reporting of Sports News

The changing nature of sports news reporting is reflected in a controversy in Australia about the contract terms used by some sports organisations to accredit journalists to attend their events.

In 2009 an Australian Parliament Senate committee was asked to inquire into the issue of the reporting of sports news and the emergence of digital media reporting.[9] The inquiry was prompted by disputes between sports organisations (the Australian Football League (AFL) and Cricket Australia (CA)) and media organisations about the content of contracts for accreditation of journalists. In 2007 the AFL had granted the Slattery Media Group exclusive rights to manage AFL photography and in the 2008 accreditation agreement between the AFL and journalists, the AFL sought to limit the supply of photographs by journalists from news agencies (for example the Associated Press) to non-news reporting third parties. In 2007, prior to the cricket test between Australia and Sri Lanka, CA offered some news organisations accreditation terms that included provisions to the effect that all intellectual property rights in images taken at the match venues would be owned by CA and limiting the frequency of website updates from the venues. Its 2008 terms included further limitations.

The attempt by Australian sports organisations to limit, through contract terms, the use of material generated at sports events, reflected similar developments overseas, including in relation to the Federation Internationale de Football Association (FIFA) World Cup 2006, the Rugby World Cup 2007[10] and the Indian Premier League 2008. The potential for Australian decisions made about

[8]For example, in relation to the London Olympics and Paralympic Games see Horsey V, Montagnon R and Smith J 'The London Olympics 2012 – restrictions, restrictions, restrictions' (2012) 7(10) *Journal of Intellectual Property Law and Practice* 715-727.

[9]Senate Standing Committee on Environment, Communications and the Arts, *The Reporting of Sports News and the Emergence of Digital Media*, 2009. See Wyburn M 'Copyright and Ethical Issues in Emerging Models for the Digital Media Reporting of Sports News in Australia' in Quigley M (ed) *ICT Ethics and Security in the 21st Century: New Developments and Applications*, Information Science Reference, IGI Global, 2011, Chapter 4, 66-85.

[10]At the Rugby World Cup 2011 held in New Zealand, Fairfax Media and News Ltd, key Australian news organisations, refused to agree to the limiting terms (particularly in relation to limits on video footage) and reported the news of the matches from other sources: Canning S 'News, Fairfax to Dodge Cup Bans' *The Australian* 5 September 2011, 32; Young D 'Rugby World Cup Coverage Kicked into Touch' *The Australian* 31 October 2011, 33.

these issues to set precedents that could be followed internationally, resulted in the Senate committee receiving submissions from a number of international media organisations and industry coalitions.

The controversy raised issues of copyright and contract law. To meet any potential claims the sports organisations might have to copyright in aspects of the sports events, the news organisations argued that they could rely on the fair dealing for reporting news exception (ss, 42, 103B) under the *Copyright Act 1968* (Cth).[11] The sports organisations argued the defence did not apply where a news organisation was commercialising the sports event for its own benefit and without any share of the commercialisation proceeds going to the event organiser.

However, where the event organisers were using contract terms to limit the subsequent use of copyright material generated at the event, they were not in fact exercising any intellectual property rights as such but were using their control of access to the venue to impose the contractual limitations.[12] In response to the stance taken by the sports organisations, the news media argued that the sports organisations were using contract terms to impose inappropriate limits on the use of images and other material generated at the sports event and this was detrimental to the public interest. They argued before the Senate committee that the Copyright Act should be amended so as to invalidate any attempted contracting out of the fair dealing defences or alternatively, that a guaranteed right of access for news media be introduced.

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[11]Australian copyright law provides a defence where there is a fair dealing for a limited list of purposes (eg for research or study, criticism or review, reporting news: *Copyright Act 1968* (Cth) ss 40-42, 103A-103C) rather than an open-ended fair use exception such as that in US copyright legislation (17 U.S.C. § 107). The use of the fair dealing for reporting news defence in relation to current practices of news reporting is contentious, for example in relation to the difference between 'news' and 'entertainment' and the length of time after which an item might cease to amount to 'news'. These issues have been raised in interlocutory applications in relation to horse racing (*Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2005] FCA 1527) and National Rugby League football matches (*Telstra Corporation Pty Ltd v Premier Media Group Pty Ltd* [2007] FCA 568). It is not clear how the reporting news defence operates alongside conventions that have developed in the television industry around the use in news programming of excerpts from the broadcasts of other stations ('3 x 3 x 3 television protocol' under which broadcasters re-broadcast within the limits of 'three minutes' at 'three hourly intervals' not more than 'three times in a twenty four hour period': Wyburn, above n 9, 78) or how the conventions developed for television might affect use of broadcast material on online and mobile phone platforms.

[12]A method recognised in the early case of *Sports and General Press Agency Ltd v 'Our Dogs' Publishing Co Ltd* [1917] 2 KB 125: The organisers of the Ladies' Kennel Association Show granted sole photographic rights to one photographer but they were unable to prevent photographs taken at the show from being published in the defendant's journal, *Our Dogs*, as they had placed no limits on photography in the terms of the admission tickets for the show. There are some exceptions to copyright infringement where the legislation prohibits contracting out (eg reproducing computer programs to correct errors or for security testing: *Copyright Act 1968* (Cth) ss 47E, 47F, 47H) but this is not the case for the fair dealing exceptions.

In the end, the Senate committee did not see the issues as primarily to do with copyright and instead focused their attention on the matter of freedom of the press to report on sports news, in particular on issues of access and journalist accreditation.[13] The committee considered the best solution was for the parties to negotiate guidelines for journalist accreditation based on the principle that 'all bona fide journalists, including photojournalists and news agencies, should be able to access sporting events regardless of their technological platform.'[14] However, the report recommended that if industry participants were unable to agree on a voluntary code, the relevant Minister should consider the introduction of a mandatory code under the competition and consumer legislation.[15]

In the same year as the Senate report, the report of the Independent Sports Panel, *The Future of Sport in Australia*, also recognised the need for there to be a 'balance' between the commercial interests of the sports organisations and both reasonable access to sports events for the news media and 'the public's right to access alternative sources of information using new types of digital media.'[16] Like the Senate committee, the Panel preferred that the industry participants work towards agreed arrangements rather than have a solution imposed on them by government.[17]

A voluntary code of practice was agreed between key sports and media organisations after a series of roundtables, chaired by the then Chairman of the Australian Competition and Consumer Commission.[18] It was launched on 30 March 2010.[19] A year later there were twenty five signatories to the code.[20] Matters under the code are managed by a Code Administration Committee.

The code provides for sports organisation signatories to grant media organisations access to sporting venues so they can gather news content for news

[13]Senate Standing Committee on Environment, Communications and the Arts, *The Reporting of Sports News and the Emergence of Digital Media*, 2009, 48, 50.

[14]Senate Standing Committee on Environment, Communications and the Arts, *The Reporting of Sports News and the Emergence of Digital Media*, 2009, 52.

[15]At the time, the *Trade Practices Act 1974* (Cth) but now the *Competition and Consumer Act 2010* (Cth). Remedies for breach of a prescribed (voluntary or mandatory) industry code are available at the instigation of the Australian Competition and Consumer Commission or code participants: *Competition and Consumer Act 2010* (Cth) Part IVB.

[16]Independent Sport Panel, *The Future of Sport in Australia*, Australian Government, 2009, 137.

[17]Independent Sport Panel, above n 16.

[18]Australian Government, *Response to the Senate Committee on Environment, Communications and the Arts Inquiry into the Reporting of Sports News and the Emergence of Digital Media*, January 2011, 9.

[19]*Code of Practice for Sports News Reporting (Text, photography and data)*, 2010.

[20]*Annual Report, The Code of Practice for Sports News Reporting*, 30 March 2011.

reporting. It covers text (for example articles, editorial, blogs and tweets), photography and data (for example scores, team lists, basic statistics) but there is no mention of audio-visual material, so it is a partial solution only. Among the responsibilities of the news organisations are obligations not to use photographic material to 'simulate video' of the sports event and to ensure updates of information from the sports venues do not 'approximate live or continuous coverage for the duration or a substantial period' of the sports event (cl. 5.1, b and c). Sports organisations agree under the code to the principle that they 'will not discriminate between Media Organisations on the basis of their distribution platform' (cl 6.1b). News content used by relying on the provisions of the Copyright Act (for example under the fair dealing defence) does not fall within the operation of the code (cl 4.3). The code's first annual report indicates that it 'has had a positive impact in terms of reducing issues of concern raised by news organizations.'[21]

Free-to-Air Broadcasts of Sports Events Viewed Using Cloud Services

A second Australian controversy about copyright and sports events involves new communications services using 'the cloud' ie servers remote from a subscriber's location. When it was launched, Optus' cloud based service TV Now, appeared to immediately put at risk established agreements for the broadcasting of sports events.

The AFL and the National Rugby League (NRL) own copyright in the films of their football games and the broadcasts of those games. Telstra Ltd is the exclusive licensee for coverage of the games on the internet and on mobile phones. Optus, a rival communications company, commenced its TV Now service. The service enabled a subscriber, before a televised programme had commenced, to click the 'record' button for the programme in the electronic programme guide (EPG). Where this occurred, Optus recorded the programme from the broadcaster's free-to-air signal. Optus made four copies of the free-to-air broadcast for each subscriber who had pressed the record button, one in each of four formats (personal computer (PC), Apple iPhone or iPad, Android mobile device, most 3G mobile phones). All the copies were stored on servers in its data centre in Sydney. The subscriber could then 'play' the programme in their chosen format, by way of streaming (not downloading) to the subscriber's device, for thirty days following the original broadcast. For one format (Apple iOS) device users could watch the programme within two minutes of the start of the broadcast ('almost live'[22]) but for the other formats subscribers could only watch after the broadcast

[21] *Annual Report*, above n 20.

[22] *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34 at [26].

had finished. Prices for the service varied according to the amount of recording space used.

The TV Now service was obviously structured in a way to maximise its chances of falling within the free exception for time shifting of broadcasts available under the Copyright Act.[23] Four differently formatted copies were made for each subscriber who had selected a programme on the EPG. Subscribers could only record programmes broadcast in their home address broadcast region on the free-to-air channels in one of the five capital cities where the service was operating. In the service's terms and conditions of use subscribers were warned that it would be a breach of copyright to make a copy of a broadcast other than to record it for private and domestic use and statements that Optus accepted no responsibility for copyright infringement. The terms and conditions of use emphasised that it was the subscriber who was recording and storing the television programme for their personal viewing and the content was not to be reproduced or communicated or transmitted. Subscribers indemnified Optus against copyright infringement claims.

When the AFL and NRL threaten to sue for copyright infringement, Optus took the initiative and commenced action claiming their threats amounted to groundless threats of legal proceedings within s 202 of the *Copyright Act 1968* (Cth). Telstra joined the action.

In the proceedings the AFL and NRL claimed that Optus infringed the copyright in the AFL and NRL films and broadcasts by making copies (four copies for each subscriber) and also by communicating (electronically transmitting; making available online) the copies to the public by streaming the football games to Optus' subscribers.

Optus responded by arguing the copies were made by its subscribers when they selected the record function on the EPG, the time shift defence (s 111) applied and any communication was made by the subscriber to themself and therefore was not a communication to the public in breach of copyright. The time shift defence in s 111 protects against a claim of copyright infringement in the broadcast and any underlying copyright material included in the broadcast when a copy (film or sound recording) of a broadcast is 'made solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made'. Under s 10, 'private and domestic use' is defined to mean 'private and domestic use on or off domestic premises'.

The court at first instance[24] found there was no infringement of copyright. The judge agreed with Optus that the copies of the broadcast were 'made' by the

[23] *Copyright Act 1968* (Cth) s 111.

[24] *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34.

subscriber (by selecting the record button on the EPG) and the subscriber could rely on the s 111 defence. In his view the TV Now service was 'substantively no different from a VCR or DVR'.[25] The term 'make' in s 111, according to its natural and ordinary meaning, meant to 'create' by 'initiating a process utilising technology or equipment that records the broadcast'.[26] The communication of the broadcast (electronically transmit; make available) was also made by the subscriber and was not a communication to the public. The subscriber was the person responsible for determining the content of the communication (within s 22(6)) when they requested 'play' in relation to the programme they had selected earlier for recording. It was as if they had inserted a video cassette or DVD into a VCR or DVD player and pressed the 'play' function. Optus did not communicate the copy because it did nothing to determine the content of the communication; it did not determine what the subscriber decided to record and later play. It was not a communication to the public, rather it was a communication made by the subscriber to himself or herself and there was no infringement as s 111 applied to the recording.[27]

The decision at first instance put at risk current and future exclusive licensing arrangements in relation to mobile phone and online communication of sports events screened on free-to-air television.[28] In 2011 Telstra had agreed to pay $153 million for the exclusive right to stream AFL matches on mobile phone devices over five seasons[29] and at the time of the litigation the NRL was entering negotiations for the future televising of its games[30] but what was the value of these rights when their exclusivity could no longer be enforced against cloud services such as Optus' TV Now?[31]

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[25]*Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 at [63].

[26]*Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 at [64].

[27]*Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34 at [105].

[28]Jackson S 'Sports Deals at Risk from TV Ruling' *The Australian* 2 February 2012, 5.

[29]Bingemann, M 'Telstra in Line to Secure NRL Mobile Rights' *The Australian*, 22 August, 2012, 22.

[30]A deal for the televising of NRL games was announced on 21 August 2012. Press reports indicated Telstra was 'considered a favourite' to secure exclusive rights in relation to communicating the NRL games to mobile phones: Bingemann, above n 29.

[31]The heated nature of the atmosphere after the first instance decision is reflected in an application for injunctive relief brought by Optus against the AFL and its chief executive for statements made by the chief executive. The statements were to the effect that what Optus was doing was 'akin to stealing' and amounted to 'lifting' content owned by the AFL. Optus claimed that in light of the first instance decision, the statements amounted to conduct that was misleading or deceptive

Fortunately for the two football organisations and their exclusive licensee, on appeal to the Full Federal Court the three judges found Optus liable for copyright infringement.[32] The appeal court found Optus was the maker of the four copies made of the free-to-air broadcasts and films of the broadcasts, the copyright in which was owned by the NRL and AFL, or alternatively, Optus acting in concert with the subscriber made the copies. The appeal court's preferred view was that both Optus and the subscriber acted in concert and were jointly and severally responsible for the copying but it did not need to finally determine the issue as Optus' conduct did not fall within the time shift exception and so it was not shielded from the action for copyright infringement.

The appeal court found that although the Optus service was automated, it was designed to respond to the subscriber's request. Optus captured the broadcast, recorded the images and sounds on its servers and retained 'possession, ownership and control' of the copies on the servers until they were deleted at the end of the thirty day period.[33] Its role was 'so pervasive' that even though the system was automated, Optus could not be disregarded as the party who undertook the act of copying[34]; it 'captures, copies, stores and makes available for reward, a programme for later viewing by another'.[35] The court found the maker of the copies was not the subscriber acting alone. Optus made the copies or Optus and the subscriber acted in concert to produce the 'commonly desired outcome' ie a selected programme transmitted to the subscriber and as a result both were jointly and severally responsible for the making of the copies.[36]

The time shift defence in s 111 did not to apply to Optus. The court found nothing in the language of the section or its provenance to suggest that it was intended to cover 'commercial copying on behalf of individuals'.[37] According to

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or likely to mislead or deceive within s 18 of the *Australian Consumer Law*. The interlocutory application was rejected: *Singtel Optus Pty Ltd v Australian Football League* [2012] FCA 138. The statements were found not to have been made in trade or commerce; they were matters of opinion made as part of 'an on-going narrative about media rights to sporting events in the context of ongoing technological change' [at 15]. They were not misleading deceptive or likely to mislead or deceive; they were matters of opinion 'honestly held' and not statements of fact [at 18] or alternatively, they 'could be understood as nothing more than, a vernacular or shorthand description of what Optus is incontrovertibly doing' [at 19].

[32] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59.

[33] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [52].

[34] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [67].

[35] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [68].

[36] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [76-79].

[37] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [89].

the court, 'the natural meaning of the section'[38] is that the copier has the purpose of private and domestic use for time shifting and Optus did not have this purpose. Its purpose was to obtain a 'market advantage in the digital TV industry'.[39] Comments made by the court indicate the judges' unease at being asked to go beyond the ordinary words of s 111. The appeal judges considered it was not up to the court to interpret the section with regard to any assumed legislative intention in favour of technological neutrality (referred to in the 2006 amending legislation).[40] In the court's view, any decision to 'extend or otherwise modify' the scope of the time shift defence was for the legislature and not the court.[41]

While for the time being the case has settled the issues around this particular cloud service and AFL and NRL broadcasts,[42] the burgeoning of cloud services is inevitable[43] and they will continue to raise important copyright issues around the protection of valuable copyright content such as the broadcast of sports events.

Optus' attempted use of the time shift defence to excuse the streaming of free-to-air broadcast programming without the approval of the copyright content owners is not the first time communications companies have sought to rely on provisions in the Copyright Act for purposes not originally intended. When pay television operators, without the consent of the owners of copyright content carried in television broadcasts, first began to retransmit free-to-air broadcasts, they relied upon a free compulsory licence in the Copyright Act originally introduced to allow remote communities to enhance the free-to-air signal and retransmit it unchanged, to the community.[44] The legislature responded by introducing into the Copyright Act a retransmission regime providing for remuneration to be paid to the owners of copyright in the content carried in the broadcast[45] but no remu-

[38] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [89].

[39] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [89].

[40] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [96].

[41] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [99].

[42] Optus applied for special leave to appeal the decision to the High Court: Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 31 but its application was rejected: *SingTel Optus Pty Ltd v Australian Rugby Football League Ltd* [2012] HCATrans 214.

[43] When the Full Federal Court found against Optus in the TV Now Case, Optus suspended the service. Two other similar cloud based services, Beem and MyTVR, also suspended their operations: Taylor J 'Cloud TVRs Stop in Wake of TV Now Ruling' ZDNet.com.au 24 May 2012.

[44] *Amalgamated Television Services v Foxtel Digital Cable Television Pty Ltd* [1996] FCA 1424: *Copyright Act 1968* (Cth) s 199.

[45] *Copyright Act 1968* (Cth) Part VD.

neration is payable to the free-to-air broadcaster.[46] The retransmission scheme does not apply to a retransmission of a free-to-air broadcast over the internet.[47]

Communications and Copyright Reform Agendas Affecting Sports Events

The recognition of the commercial value of sports events and the Australian public's interest in sports events is understandably heightened at this time, with the Olympic Games just completed, the Paralympic Games about to commence and the various Australian football codes nearing the final games that will decide this season's winning teams.

It is also a time when there is under discussion a number of reform proposals relating to various aspects of the communications sector, initiated in response to developing communications technologies. These issues include the future role of the anti-siphoning regime[48] and the possible extension of broadcasting style regulation to some as yet unregulated online communications.[49] The licensing of rights in sports events will be impacted directly by these various reform agendas.

Copyright law will also be impacted, although more indirectly, by these communications sector reform agendas. This is because of the connection between communications legislation and copyright legislation. This connection has been highlighted in recent years in the amendments to copyright law intended to ensure that it extends to developing online technologies. So, for instance, copyright legislation has been updated by extending its reach from traditional wireless broadcasting to include acts of online communication such as making available online and electronically transmitting copyright material. The key definitions used in this area of copyright are linked to the definitions in the *Broadcasting Services Act 1992* (Cth) (BSA). Importantly, the definition of broadcasting ser-

[46]Convergence Review Committee, *Convergence Review Final Report*, 2012, 33. The copyright collecting society acting for the rights holders in the copyright material carried in the broadcasts, the Audio-Visual Copyright Collecting Society Ltd (Screenrights), sought leave to make submissions in relation to the operation of the time-shift exception in light of the re-transmission provisions, in the TV Now appeal case. Its application was allowed, although in the end the court found it unnecessary to consider the matter: *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCFCA 59 at [8].

[47]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 58 referring to *Copyright Act 1968* (Cth) s 135ZZJA. There appears to be some uncertainty as to precisely what services are encompassed by this exclusion: Brennan D 'Is IPTV an Internet Broadcasting Service under Australian Broadcasting and Copyright Law?' (2010) 60(2) *Telecommunications Journal of Australia* 26.1- 26.11.

[48]A regime introduced in 1994 to ensure subscription television services do not lock up events of national importance or key cultural events (including some sporting events) that traditionally have been available on free-to-air television. See Department of Broadband, Communications and the Digital Economy, *Sport on Television: A Review of the Anti-Siphoning Scheme in the Contemporary Digital Environment*, Discussion Paper, August 2009 and the *Broadcasting Services Amendment (Anti-siphoning) Bill 2012*.

[49]Convergence Review Committee, *Convergence Review Final Report*, 2012.

vice in the BSA excludes (through the Minister's determination of September 2000) 'a service that makes available television and radio programs using the Internet.'[50] Therefore a change in the BSA's coverage of online communications services will have an impact on the way copyright law operates.

Developing communications technologies are straining the limits of established legislative definitions and creating some uncertainly about the scope of commercial rights encompassed by the terms of current licence agreements.[51] Possible reforms in copyright law currently being considered also have the potential to significantly affect the protection of sports events.

The latest copyright reform agenda is that being considered by the Australian Law Reform Commission (ALRC). Prompted by a number of issues, including those thrown up by the Optus TV Now litigation, the ALRC has been asked to inquire into 'whether the exceptions and statutory licences in the *Copyright Act 1968*, are adequate and appropriate in the digital environment'.[52] It has been asked to consider, among other matters, 'whether existing exceptions are appropriate and whether further exceptions should: recognise fair use of copyright material; allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes'.[53] The ALRC has been directed to take into account the recommendations of related reviews such as the Convergence Review and not to duplicate work already being undertaken in relation to copyright matters such as unauthorised copyright material on peer to peer file sharing networks and the use by internet service providers of the safe harbour regime. In August 2012 the ALRC released an issues paper with a submission due date of

[50]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 30 citing Determination under paragraph (c) of the definition of 'broadcasting service' (No 1 of 2000), Commonwealth of Australia Government Gazette No GN 38, 27 September 2000. There appears to be some uncertainty as to precisely what services are encompassed by this exclusion: Brennan, above n 47.

[51]For example press reports describe a dispute involving the NRL media rights licensees, Telstra and the Nine Television Network, over an iPad app (State of Origin iPad app) developed by the Nine Network, the licensee for free-to-air broadcasts, as a 'live game companion' for one of the key NRL games in the State of Origin series. The app featured 'real-time statistics, highlights and on-demand video replays after the game.' Telstra was claiming the replays conflicted with its licensing rights for online and mobile phones: Chessell J 'Blurred Lines Lead to Telstra - Nine Dispute' *The Australian* 22 June 2011, 33. The Nine Network decided not to go ahead with its app plans: Chessell J 'Optus TV Ignites Row over Copyright' *The Australian* 27 July 2011, 23.

[52]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 3.

[53]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 3.

16 November 2012. Its final report to government is due by 30 November 2013.

The operation of the exceptions to copyright infringement is at the heart of the ALRC review. One question being asked is whether specific defences such as fair dealing for reporting news or the time shift exception, should be replaced by a more generally worded fair use exception.[54] An open-ended fair use defence, even if it provided some legislative guidance, would ultimately leave it to the courts to determine the full scope of its operation. An associated issue is whether contract terms can be used to impose more limiting conditions on the use of copyright material than would otherwise be available under defences such as fair dealing or fair use.[55] The operation of cloud services[56] and the retransmission of free-to-air broadcasts are other important issues among the many being considered by the ALRC.[57] These matters being considered by the ALRC are at the centre of the controversies examined in this paper.

Conclusion

Copyright has played and will continue to play an important role alongside the other categories of intellectual property law in protecting particular aspects of commercially valuable sports events. This paper has examined two controversies involving sports events and copyright law in the Australian context.

The controversies reflect the changing points of view of rights owners and other stakeholders in the face of developing communications technologies extending the range of ways in which audiences experience sports events. These technologies are having a critical impact on established practices for the licensing of rights for sports events. Meanwhile, various reform agendas in the communications and copyright law areas now being considered, have the potential to significantly impact the current operation of sports licensing. Those with a stake in the protection of sports events will need to maintain a close watch on these developments and be prepared to engage with reform bodies to ensure they are made aware of the important commercial implications any proposed changes will have on the sports industry.

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[54]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 10. For a discussion of whether China should move from its closed set of exceptions in Article 22 of the *PRC Copyright Law* to an open-ended fair use exception see Song SH 'Reevaluating Fair Use in China – A Comparative Copyright Analysis of Chinese Fair Use Legislation, the US Fair Use Doctrine, and the European Fair Dealing Model' (2011) 51(3) *IDEA* 453-489.

[55]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 10.

[56]The TV Now Case is referred to: Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 26, 31.

[57]Australian Law Reform Commission, *Copyright and the Digital Economy*, Issues Paper 42, August 2012, 5, 8.

ILLEGAL GAMBLING AND ITS INFLUENCE ON THE INTEGRITY OF SPORT – LEGAL ASPECTS AND PROBLEMS

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Abstract: *The basic idea of modern sport – especially the Olympic movement – is the integrity of sport. This integrity has to be secured by autonomous rules of sport, by the state legislature, by international legal standards, defined in international treaties and conventions and by sports ethics. As in all the fields of social life, we have also in sports individuals, groups and even the organizations which are breaking the rules and do not follow the basic ethical principles. That is why there is a need for a more comprehensive international regulation and effective solutions.*

What we need is an efficient international regulation – like in case of doping – and that has to be done very soon. We need a generally accepted set of rules, stipulated in a basic international convention and establishment of an efficient international agency to fight illegal betting.

Introduction

Illegal betting and mach fixing is currently one of the most often debated issues in the international sport; and not surprisingly so, since it is endangering the integrity of sport. Let me quote Michel Platini – the Chairman of UEFA, who said, that the match fixing in the greatest threat to the integrity of sport. It is still not clear what the dimensions of the problem are due to the fact that we know only the data about discovered cases. However, there is a general assumption that the number of still undiscovered illegal practices of illegal gambling and match fixing is much higher, indeed. Recently published numbers and reports are confirming this assumption.

Rules are common to both: sports and law. In my lecture I am going to argue that in the field of illegal betting and match fixing we need more rules: the present regulations are insufficient in the international and national legal systems and in the autonomous law of the sport organizations.

I

In modern times gambling and betting, especially sport betting, is a worldwide activity, or better to say phenomenon with millions of participants and with its turnover exceeding several billions. In Europe only the turnover of horse bet-

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

ting companies represents 14 billion Euros. European lotteries have a turnover of more than 70 billion Euros. Online gambling is a fast growing service activity in the EU, with annual growth rates of almost 15 %. Annual revenues in 2015 are expected to be in the region of € 13 billion, compared to € 9,3 billion in 2011.[1]

Gambling and betting are also the phenomenons at the edge of social acceptability. They do not only give pleasure and excitement to the participants, but often have very serious negative social consequences. Such an activity can lead to addiction, it can destroy individuals, families, and it is very dangerous for the minors and can create immense social problems.

Prohibited or not, there will always be gambling and betting. Unfortunately, this activity seems to be too close to (almost intrinsic to) human nature. On the basis of historical experience in most of the modern countries the legislative bodies (parliaments) came to the conclusion that gambling and betting (and in this framework also the sports betting) should be allowed but have to be strictly regulated. The mayor part of their income or the profits have to be used for the so-called "good purpose", i.e. to finance sports, disabled and humanitarian activities. A very important part, 18% of the money, i.e. of the budgets of the national Olympic committees in Europe, comes from the so-called "lottery" money, that is from the money produced by gambling and sports betting activities.[2]

This problem has legal, ethical and sociological dimensions. Here, I would like to focus only on the legal aspects of the illegal sports betting and match manipulation as specific but extremely dangerous arts of sports fraud.

Sport betting is at least several hundred years old. In its excessive form it is endangering the integrity of sports. Let us first ask ourselves the question: what is the integrity of sports. Sport as a healthy and reasonable social activity has to be honest and the results of the sport competition should be uncertain. If sport meant just a physical activity without ethics, sport would no longer be sport in the modern understanding of the word. Ethical behavior in sports means fair play, playing by the rules, prohibition of cheating (doping, mach fixing), recognition and respect of the adversary, non-violence, etc. as it is stipulated also in the IOC Code of Ethics.[3]

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[1]Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions »Towards a comprehensive European framework for online gambling – Strasbourg 23 October 2012

[2]White paper on sport COM 2007 391final – page 12: "In many Members of States sport is partly financed through a tax or levy on state-run or state-licensed gambling or lottery services. The Commission invites Member of States to reflect upon how best to maintain and develop a sustainable financing model for giving long-term support to sports organizations."

[3]Adopted by IOC Executive Board on 26 October 2010 in Acapulco

The fight against doping represents currently the most elaborated common approach of international community and of the International Olympic committee whose final aim is the affirmation of the integrity of sports. The basic orientation of this fight is "zero tolerance against doping". In this field the international community has a valid international treaty[4] and there is an international agency, WADA[5] with large competences regarding monitoring and sanctions. Consequently, in the last years international community has become more and more in control of the problem of doping, which is also reflected in the fact that the doping offences are diminishing.

In the field of gambling and betting, especially sports betting, there is no such international order, there are no conventions and no institutions or special agencies. It is clear that in such a situation it is impossible to expect any convincing and immediate results or positive developments.

II

Nearly all existing regulations of betting and sports betting are national. There are no international regulations, except some reports and resolutions like in European Union[6] which are, however, not binding, or same decisions of the international courts of law, like the Court of European Union early cases Schindler 91[7], Lääte 97[8], (until October 2012 27 cases). In European Union the regulation of gambling and betting is in the principle the national competence, therefore gambling and betting services are not regulated by sector specific rules at EU level. So, the EU has only the task to help the Member states to effectively regulate gambling and betting in accordance with their own national tradition and in the compliance with the Treaty of EU.

Societies of the twenty first century embrace supranational information technology which can easily cross borders between the sovereign countries by means of electronic media. Therefore the electronic gambling and sports betting know nearly no borders. Some international companies and group of individuals successfully use this legal black hole and avail themselves of these opportunities.

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[4]UNESCO convention against doping in sport – Paris 19 October 2005

[5]World anti-doping agency

[6]Reports of members of European parliament Christel Schaldemose 2003 and Jürgen Creutzman 2011, The Nicosia declaration on the fight against match-fixing - 20 September 2012

[7]Judgment of the court C-275/92, Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler dated 24th of March 1994

[8]Judgment of the court C-124/97, Markku Juhani Läära, Costwold Microsystems Ltd in Oy Transatlantic Softwarde Ltd. V. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finladn) dated 21st of September 1999

And here we come to the main, basic problem – to the contradiction between the national regulations and international, or better global, essence of today's gambling and sports betting.

Let me first focus to the illegal sports betting. A sport bet is considered to be legal if the sports betting operator or the organizer has an explicit authorization of the relevant authority in the jurisdiction of the consumer (license, concession, permit, state monopoly). Due to the mentioned fact that in the times of electronic betting there are practically no borders, the offshore international companies easily enter different countries. If such activities do not have explicit authorization in every state or territory where they develop their activities, such an operation has to be considered as illegal. In addition to that, the activities of domestic companies or individuals without the valid permit or legal status should also be understood as illegal. There are no precise data available, but the estimates are that that over 80% of sports betting is organized illegally.

In Europe, especially in 27 countries of European Union, the enormous dimension of this problem is known and understood. What is missing is efficient handling of the problem. I agree with Michel Barnier, EU commissioner for Internal Market and Services, who said: "Now is the time for action" [9].This problem is recognized also by International Olympic Committee: its ethic commission proposes the same policy as in the case of doping (zero tolerance for illegal betting and match fixing). The findings of the Ethic Commission of IOC show that the most affected sports are football, cricket, tennis, volleyball, snooker and sumo; and that the illegal betting and match fixing are most common in Europe, Asia and Australia. [10]

IOC started to regulate this field by introducing the IOC Code of Ethics: this code forbids to all the participants of Olympic Games to bet or support betting at Olympic games.[11] I believe that a similar rule should be accepted by all international sports organizations. They should prohibit any betting to everybody involved in a certain sport, that means not only to athletes, but also to coaches, functionaries and to all other involved persons (family members and friends of the participants).

III

In the country I come from – Slovenia – the betting activity has to be organized in accordance with the law. Any betting activity has to be allowed by the

[9]European Parliament conference "How to Regulate Betting and Gambling in Europe – Track record and future perspectives" Brussels 27 June 2012

[10]Paquerette Girard Zappelli: Match-fixing linked with betting activities - European Parliament Conference – Brussels, 27 June 2012

[11]All forms of participations in, or support for betting related to the Olympic Games, and all forms of promotion of betting related to the Olympic Games are prohibited.« Article A 5 of the IOC Code of Ethics.

competent state authority (i.e. the office for the lotteries and gambling in the framework of the Finance Ministry) and has to acquire the so-called state concession. All gambling or betting activities without the direct stipulation in the law (in Slovenia we therefore have only two state lotteries with this status) or without the government permission and concession are considered illegal.

In theory thus everything is clear and should function correctly. But in my country – as in many others – the real life finds its own way. Besides the domestic illegal activities, there are practically no restrictions of international offshore betting companies (e.g. *Bwin*, *Bet at home* and others). These companies do not pay taxes to the Slovenian state, they do not pay concession duties and through that they also illegally take away the money that would otherwise go to sports, humanitarian and disability organizations.

This Slovene situation is similar to the situation in the majority of other countries.[12] There are many international organizations and illegal rings which organize illegal sport betting in the world today. They work (mainly offshore) and earn a lot of money because we do not have any effective sanctions against such activities.

There is only a short step from this situation to real cheating, such as match fixing. If somebody is cheating, if somebody is manipulating the matches, then the chances of winning are considerably increased. For somebody who is already involved in illegal betting, which is from the legal point of view an offence, match fixing is not such a great step aside.

There are many cases proving these findings (Germany – football, Montpelier France – handball, Maribor – Slovenia – football).

IV

The international community and above all the International Olympic and sports movement should take an active role in legal and effective regulation of the problem of the sports betting and match fixing.

My suggestions are the following:

1. There should be a common and overwhelming international recognition of the problem. The illegal sports betting and match fixing is today the greatest danger to the integrity of sport.

2. Besides national, we also need comprehensive international regulations of sports betting. My opinion is that we should follow the line of the international anti-doping policy: we need an internationally binding convention about illegal

[12]In the final document of the XIII Olympic Congress in Copenhagen 2009 (ISBN: 92-9149-132-2) there is an article 32: Governments should recognize that close collaboration and action in the fight to put an end to illegal an irregular betting and match-fixing is essential, both in relation to Olympic-accredited events and to the wider world of sport competition.

betting and match fixing (like the UNESCO Convention against doping)[13], which would include also the system of monitoring and sanctions.

3. We should dedicate special attention to the protection of consumers and above all to the protection of minors.

4. An international agency, similar to WADA, should be created by an international convention for the efficient fight against the illegal betting and match fixing.[14]

5. International Olympic Committee and international sports federations should in their autonomous law prohibit any (legal and illegal) sports betting to all athletes, functionaries and other persons involved in athletic competitions.

Let me conclude my presentation with the thought that international problems can be dealt and resolved only at the international level.

[13]Androulla Vassiliou, Member of the European Commission responsible for Education, Culture, Multilingualism and Youth Match-fixing at the European Parliament Conference on »How to regulate betting and gambling in Europe«, Brussels 27 June 2012. Council of Europe Sport Ministers have expressed their support, for a Convention in this field

[14]In Europe there are two organizations which deal with cooperation in cross-border investigation and prosecution of serious crimes: Europol and Eurojust.

LEGAL AND PROFESSIONAL FRAME OF COACH EDUCATION IN HUNGARY (1921-2012)

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Abstract: *In 1921 the Act 53 established national and local level organizations to provide regular physical activity for school-leaving youth and introduced daily school physical education. To meet the high quality and quantity demand for trained professionals, the Hungarian Royal College of Physical Education began PE teacher education in 1925 and coaching education in the next decade.*

Between 1947 and 1989 in Hungary - just like in every socialist country – there was no legal frame for civil actions and organizations. It was not possible to establish NGO's. However, there were some exceptions, when the one-party government could permit the foundation of a few ones, such as sport clubs and sport associations, which, when comparing to the non-socialist countries fulfilled less and more limited tasks.

During the 1960's the professionalization of sports coaching resulted in higher and higher level studies worldwide. The Hungarian coaching system was already well-established within the frame of the education sector (since the sport sector was limited, as a civil movement), just like in the other socialist countries. As a key part of this advanced system, the sports federations played an important role as collaborators in planning, executing and conducting examinations for lower and higher level qualifications in coaching.

After the political transition, in 1989 the Act 2 on the freedom of association made it possible to adjust on any existing structure and function in sport organizations as well. By that time the higher education-based coaching education became standard. At the same time due to the approximatization to the European Union's legal norms and laws, the vocational education and training market became liberalized, resulting in significant quality assurance problems in EQF Level 3 and 4 sport coaching programmes. The future lies in the continuous collaboration of the quality providers: the university (it's HE and VET coaching education) in joint programmes with the sports federations as the other main stakeholders. It became important to differentiate between those education programme providers, who create and own the sports knowledge and those who only wish to trade and use it.

Introduction

Taking an international outlook, nowadays, coach education systems differ from country to country, sport by sport. It has many levels, different education

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scenes and training providers, showing a great variety. A literature search brought no result when historical and legal bases of current coach education systems of other countries were in focus. The authors wish to provide a look-back to the legal roots of the Hungarian developments and the role of the coach education stakeholders.

The objectives

The study does not aim to analyse the international field and developments of the coach education as such, but endeavours find the cornerstones of the coach education systems with special regard to the role of the involved stakeholders. However, when looking at the legal and professional framework of coach education systems, there is a pattern can be found, namely the involvement of higher education institutions at higher qualification levels.

The global movement of creating regional qualification frameworks and referencing existing qualifications when making the national qualification frameworks is well-known (Benelux Bologna, 2010). Sport related professions, including sports coach qualifications are part of them. Figure 2. (and the text in the Annex) indicates one of the main objectives of creating supranational frameworks, namely the tool creation that makes comparison fair and easy.

The early years of sport professional's higher education

In the year 1921 the Physical Education Act (no. 53.) established national and local level organizations to provide regular physical activity for school-leaving youth and introduced daily school physical education in the Kingdom of Hungary. To meet the high quality and quantity demand for trained professionals, the Hungarian Royal College of Physical Education began PE teacher education in 1925 and coach education in the next decade. The only stakeholder of the sport education system, including coach education was the College itself (Krasovec, 2000).

About the training providers and actors

The higher the coaching qualification, the higher the number is of the involved stakeholders and experts, who take part in coach education. Better to say: the higher the qualification, the higher the number *should be* of the involved stakeholders, who take part in the coach education.

Rationale

The statement of the problem: one of the focus points is on balance, on fair business, on quality and on sustainability of the coach education systems. As the

argument builds up in the next few minutes, you will see that as some coach education systems operates – from a certain point of view – there is a lack of "fair deal", no "fair business" for one or more sports stakeholders.

Why is this topic to be discussed in this paper? Is this all about protecting business interests of some training providers? Is this to protect the interest of those stakeholders who happened to be not involved in, or in other words who are left out? Not at all. The motivation is different.

The ultimate objective of studying this topic is to keeping all stakeholders financially stable, this way keeping their "knowledge production" stable and sustainable.

There are hardly any studies made on the involvement of relevant stakeholders in coach education and with this presentation and paper the authors wish to highlight the necessity and benefits of involvement of all key stakeholders in the future.

During the presentation and study, when coach education system is mentioned, both initial coach education and continuous professional development (CPD) are meant to be included.

It is important to clarify that coach education programmes have two pillars: the sport-specific pillar and the general & sport science pillar. In a very simplified way we can say that the first pillar is mostly based on the sports federation's work, the second pillar is mostly based in a higher education institution. E.g.: an instructor of a basketball course most likely affiliated with the basketball sports club or association, while an exercise physiology or sport psychology instructor is university based. The paper focuses on higher level coach qualifications and programmes, at European Qualification Framework Levels 5, 6 and 7 (European Commission, 2012). (Note: at the end of the paper an annex gives a brief description about the qualification frameworks for better understanding the paper and oral presentation).

Regarding the not sport-specific modules/courses, when the organiser and owner of a sport coach programme is a sports federation, the instructors often sign a contract for a given number of hours of teaching. However, the higher education affiliation of the contracted expert indicates that his or her competencies are "sponsored" by his or her employing organisation.

In other words, from the sports federation point of view the stakeholder should not be the invited/contracted expert, but rather the college/university. The main reason is that the expert's knowledge and competencies are produced in an organisation, which has expenses, but this way no incomes. This is why I used the term such as fair deal", or "fair business" in the beginning of my presentation. Even in short term, but especially in long run, this is causing a lack of income, which makes the institution economically less stable. In poor financial status a given sport faculty or institution of the college or university is not able to employ all people it used to be able before. If there is less production of knowledge and

competency, the future of the module becomes more risky and the quality can be reduced.

There is another case when a key stakeholder happened to be less involved in the coach education system, at least, again only at a certain level. Namely, the EQF Levels 6 and 7. Due to the history of the development of coach education, there is a lack of involvement of sport federations in the programme adjustment and occasionally in the execution/teaching in some counties of Eastern and Central Europe. How and why is this happening?

Historical and legal development of the Hungarian coach education system after WW2

Self-regulation and self-governance in sport was not possible for the sports organisation, including national sports federations between 1947 and 1989 in many Central and Eastern European countries.

We take Hungary as an example, since we are from that Member State of the European Union.

Between 1945 and 1989 in Hungary - just like in every socialist country – there was no legal frame for civil actions and organizations. It was not possible to establish NGO's. However, there were some exceptions, when the one-party government could permit the foundation of a few ones, such as sport clubs and sport associations, which, when comparing to the non-socialist countries fulfilled less and more limited tasks.

During the 1960's the professionalization of sports coaching resulted in higher and higher level studies worldwide.

The Hungarian coaching system was already well-established within the frame of the education sector (since the sport sector was limited, as a civil movement), just like in the other socialist countries.

As a key part of this advanced system, the sports federations officially played an important role as collaborators in planning, executing and conducting examinations for lower and higher level qualifications in coaching. It is to be emphasised that "officially", because in case of some sports, maybe also limited to certain periods, and also depending of the sports federation's board activity and leadership, if the federation was not able delegate a person for regular consultations and development. Due to financial restrictions and lack of sponsors a typical Hungarian sports federation had to and still does concentrate on fund raising to reach the minimal level. It is not used to be the task that federation organises coaching programme and they are glad to have a highly reputed training provider (the college or university), depending on the region.

In other words, the problem in this type of less involvement of a stakeholder in coach education is not financial, but rather a quality issue, because the role of the federations is inevitable in maintaining and developing the coaching programmes.

Conclusion

The authors express their support for initiations conducting comparative studies to create a better understanding on the collaboration of national and international sports federations and higher education institutions in running coach education programmes with the vision and long-term objectives of the sport sector and the endeavour to better suiting the job market.

As it was mentioned at the beginning of the paper/presentation, there are hardly any studies available on the involvement of relevant stakeholders in coach education. After identifying the current systems and the relevant stakeholders in some of selected countries, the legal and professional frames should be analysed and further developed, where necessary. After studying the Hungarian history of coach education, it is to be further analysed, whether the current legal and professional frames suits the best the interest of the stakeholders, either already engaged and involved or not.

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Annex

The paper refers to the qualification frameworks, therefore, for better understanding please find a brief explanation on this system.

"A qualifications framework sets out all qualifications covered by the range of the framework as a hierarchy with generic descriptors of the required achievement to attain the qualification. The main point of a qualifications framework is to make transparent the meaning and value of a qualification, enabling comparisons with qualifications in other jurisdictions that also have qualifications frameworks" (University of Southhampton, 2012)

The equivalency of the qualifications based on the learning outcome approach has a high importance for a practical reason: comparison of the degrees world-wide can be done while the measuring and competing degrees and certificates against each other can

be avoided, making stakeholders co-operating. This often leads to continuous professional and/or scientific development programmes. One field is more than ready for such a measure: the required knowledge, skills and competencies of the EQF Level 7 postgraduate sport lawyer qualification is on a high demand internationally. *(Note from the editor: during the oral presentation of this paper the presenter spoke out of the paper's topic and gained a high recognition for his suggestion to create/design an international CPD programme in sports law.)*

The European Commission (2012) states: „The European Qualifications Framework (EQF) acts as a translation device to make national qualifications more readable across Europe, promoting workers' and learners' mobility between countries and facilitating their lifelong learning. The EQF aims to relate different countries' national qualifications systems to a common European reference framework. Individuals and employers will be able to use the EQF to better understand and compare the qualifications levels of different countries and different education and training systems. Agreed upon by the European institutions in 2008, the EQF is being put in practice across Europe. It encourages countries to relate their national qualifications systems to the EQF so that all new qualifications issued from 2012 carry a reference to an appropriate EQF level. An EQF national coordination point has been designated for this purpose in each country".

Figure 1.Map of National and Regional Qualification Frameworks

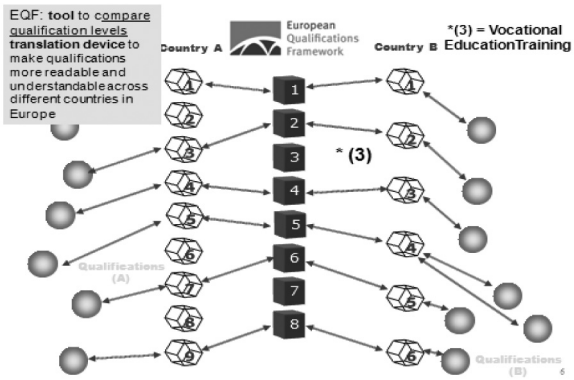

Figure 2: the mechanism for comparing national frameworks and qualifications

THE SUBJECTS OF SPORT LEGAL RELATIONSHIP

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Abstract: *This article starts from the concept of the sport legal relationship subjects. First, it clears the subjects of the sport legal relationship including the citizens, the state and the various organs, enterprises and institutions and sports community groups. Second, it establishes the legal status of athletes, coaches, referees in sports law by analyzing the rights and obligations of the coaches and athletes and referees source of power. Third, it specifically demonstrated the administrative body qualifications of the Sports Industry Association. At last, the article clarifies the relationship between the sports industry associations and the athletes, coaches, referees. In short, the article clarifies the main content of the subjects of sport legal relationship by means of comprehensive elaboration of the above aspects.*

1. The concept of the subjects of sport legal relationship

The legal relationship is based on legal norms, in the form of the rights and obligations between the subjects. It is a special social relation. This relationship is formed in the process of interaction. The sports legal relationship is rights and obligations when people engaged in sports.According to China's "Sports Law",the subjects of sport legal relationshipinclude citizens, foreigners, stateless persons, various state organs, enterprises, institutions, social organizations as well as other corporate organizations to meet the conditions.Countries in special circumstances can also become a special subject.

1.1. Citizens as the subjects of sport legal relationship enjoy the basic right to participate in sports activities. Article 5 of "Sports Law"says:" The state provides special guarantee to physical activities of children and young people to improve their physical and mental health."Article 10: The state advocates participation of social sports activities by citizens to improve their physical and mental health.Article 16 Participation of physical activities by old and handicapped people should be concerned and supported by the whole society. People's governments at different levels should take measures to make it convenient for old and handicapped people to participate in physical activities.Sports Law safeguard the basic human rights of citizens to participate in sports activities by specifying the rights and obligations of the state, society and other sports legal relationship subject ,but also clearly stipulates that citizens must comply with state laws and other discipline when they participate in sports activities and receive physical education.

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1.2. Countries and various national authorities have the duty and obligation to create conditions and provide convenient for the citizens or other subjects of sport legal relationship when they participate in physical activities, as well as effective implementation and management of various sports activities.Article 4 of China's "Sports Law": "The sport administrative department under the State Council takes charge of the work of physical culture and sport of the whole country. Other relevant departments under the State Council shall be responsible for the management of physical culture and sport within their respective responsibilities."Article 12 of China's "Sports Law": "The local people's governments at different levels should create necessary conditions for citizens' participation in social sports activities support and help the organization of mass sports activities. In urban areas the functions of the residents' committees and other community organizations at the grass roots level should be played to organize sports activities in residents. In rural areas the functions of the villagers' committees and grass roots cultural and sports organizations should be played to carry out sports activities suited to villagers' needs."These provisions may well explain the above point of view.

1.3. Enterprises and institutions have the rights and obligations to carry out a wide range of sports activities. Article 17 of China's "Sports Law": "The educational administrative departments and schools should take physical education and sport as a component part of the education in schools to cultivate talents who are all-roundly developed in moralintellectual and physical education."Article 18 of China's "Sports Law": "Physical education must be included in school curriculum and be taken as an examination subject for assessing students' work."Article 19 of China's "Sports Law": "Schools must implement the National Physical Training Qualification Standards and ensure the time used for sports activities during students' stay in schools every day."Article 20 of China's "Sports Law":"Schools should organize various kinds of after-class sports activitiescarry out after-class athletic training and competitions and hold annual school-wide sports games in the light of conditions."Article 21 of China's "Sports Law":"Schools should assign qualified physical education teachers according to the regulations set by the state and guarantee that physical education teachers enjoy the treatments that are in line with their working traits."Article 22 of China's "Sports Law":"Schools should abide by the criteria set by the education administrative department under the State Council to provide sports fields facilities and equipment. Sports fields in schools must be used for sports activities and must not be diverted to any other purpose."Article 23 of China's "Sports Law":"Rules for medical examination of students' health should be established in schools. The administrative departments of education sport and public health should strengthen the supervision

over students' physique."The third chapter provides the rights and obligations of the school in sports law relationship,reflects the school's dominant position in sports legal relationship on a full range.For other enterprises,China's "Sports Law" also encourages enterprises, institutions, social organizations and citizens in accordance with the provisions of the law organizing sports professional education,given the private professional sports schools to legal status.As you can see the provision in article 48 of China"Sports law ": "*The state promotes the development of physical educationestablishes various types of universities, institutes, departments and subjects of physical education to cultivate professional personnel working for athletic trainingcoachingphysical education teachingscientific research, sports management and mass sport. The state encourages enterprises and undertakings, public organizations and citizens to operate professional education for sport in accordance with the law*."

1.4. The sports community groups.Article 37 of China's "Sports Law":"The sports federations at different levels are mass sport organizations that connect and unite athletes and sports personnel. They should play their roles in the development of physical culture and sport."Article 38 of China's "Sports Law":" The Chinese Olympic Committee is a sport organization that takes the development and promotion of the Olympic movement as its chief task. It represents China to participate in international Olympic affairs."Article 39 of China's "Sports Law":" The sport scientific public organizations are academic mass organizations of sport scientific and technological personnel. They should play their roles in promoting sport science and technology."Article 40 of China's "Sports Law":"The national sports associations for individual sport take the charge of the popularization and enhancement of the said sport. They represent China in the relevant international sports federations."

2. The legal status of the athletes and coaches

Athletes and coaches are all the subjects of sport legal relationship; they are special talents indispensable for the development of sports undertakings in China. China Sports Law, however, is still in its early stages of development,provisions of the legal status of the athletes and coaches are not perfect.Clarity on the legal status is very important to safeguard the legitimate rights and interests of the athletes, coaches, and improve training results.If you cannot build a good system,it must cause more bondage for sustainable and comprehensive development of the various sports undertakings in China.

The law does not explicitly require the definition of the legal status.We attempt to broadly descriptive define on the legal position of the athlete.The

rights and obligations are core content and elements throughout various areas of the law, the legal link, departments and the entire process of law movement phenomenon.[1]So-called legal status can be recognized as of legal personality or referred to as of capacity for rights, legal subjects' eligible of enjoy of rights and obligations.The legal status of the athletes and coachesis that athletes and coaches enjoy the legal status of rights and obligations under the relevant legal systems.To clear the legal status of the athletes and coaches, it is necessary to sort out the rights and obligations of the athletes and coaches.

2.1. The right to life and health of the athletes and coaches.The right to life and health is the fundamental rights of the citizens of our law, but taking into account the high risk of competitive sports, the right to life and health of the athletes and coaches will have different characteristics. "Civil Law" Article 98 stipulates: "Citizens shall enjoy the right to life and health"."The right to life and health is not a specific personality rights, but includes several personality rights, its complete understanding should include the right to life, the right to health and body right so that the three personality rights."[2]Fierce confrontation with the inevitable unexpected incidents can cause athletes disability risks implied in competitive sports game,and violations due to the special nature of the sport, a lot of competitive sports athletes will not assume responsibility for the variety of injuries that occur in the sport,we have to distinguish between the situation properly because some of the damage can be expected, are the risks inherent in the sport, and that kind of injury is no perpetrator responsible.If this injury behavior as illegal or criminal acts, it will significantly dampen the enthusiasm of the athletes, but also not conducive to the improvement of athletic level and the development of sports. Conversely, if this inherent risk covers too broad, athletes and coaches' bodily harm will not be able to seek effective protection, therefore we should clear the boundaries of the inherent risk and sports injury tort.

2.2. Athletes and coaches image rights.The image right is the portrait. "Civil Law" Section 100 provides that "citizens enjoy the right of portrait, without her consent, the use of a citizen's portrait is not for profit."Many examples in our country, because such laws and regulations are not yet fully developed, the portrait rights of the athletes and coaches were violated. Image rights came into being as the image of the commercialization, it maintains that the commercial

[1]Liu Jinguo, Shu Ying, editor in chief: of "jurisprudence textbooks, the first edition of of China University of Political Science and Law Pressof April 1999, 39.

[2]Yang Lixin, such as: "compensation for personal injury damages justice of the Supreme People's Court personal interpreted as the core of the" People's Court Press, 2004, 37 to 39.

value of the commercial use of the image.From a global perspective, countries on the protection of the right of publicity did not form a fixed mode of legislation, but the image of the right of the U.S. athletes, coaches confirmed early, so my reference to the legislative system of the United States to strengthen the image of the athletes, coaches protection of the right.

2.3. Rights of athletes and coaches get reward.With the development of modern sports, some high-level athletes and coaches through the game and a variety of commercial activities can obtain substantial material benefits. In civil law, such rich material interests that are the private property of the athletes and coaches, athletes and coaches haveexclusive ownership of material; any other person cannot interfere with such rights.However, in the context of China's nationwide system, the achievements of athletes' personal credit for not only his coaches, but also includes all levels of departments, units and athlete belongs club, associations, etc., so the distribution of benefits has also become a major problem in China's Sports Law. China introduced some normative documents regulate the distribution of athletes, coaches, and various departmental units interests, but similar disputes practice is still emerging. How to protect the rights of athletes and coaches is a direction of the future sports law.

2.4. Rights of athletes and coachesget remuneration for their labor.Athletes and coaches are special labor body, and are by the adjustment of China's labor law, have the right to obtain payment for labor. "Labor Law" provisions of Article 3:"Laborers shall have the right toobtain remuneration for their labor", Article 46 provides that:" The distribution of wages shall follow the principle of distribution according to work and equal pay for equal work. The level of wages shall be gradually raised on the basis of economic development. The State shall exercise macro-regulations and control over the total payroll."Article 50 provides that:"Wages shall be paid monthly to laborers themselves in cash. The wages paid to laborers shall not be deducted or delayed without justification. Article 91 provides that: "Where an employing unit infringes in any of the following ways the legitimate rights and interests of laborers, the labor administrative department shall order it to pay laborers remuneration or to make up for economic losses, and may also order it to pay compensations: (1) to deduct wages or delay in paying wages to laborers without reason; ... " Therefore, any unit or individual shall not be deducted or delayed player salaries without justification, or they will assume corresponding responsibilities in accordance with the relevant laws.

2.5. Coach has the right to criticize and management of athletes.Coaches are fully responsible for the athlete's mind, body, technology, in this sense, the re-

lationship between coaches and athletes is similar to the teachers and students, and even more closely than the teachers and students. "Teachers law" uses a lot of space for teachers' guidance on student learning and development rights, of course, the coaches have administrative athletes, criticism of the athletes' rights.

2.6. Athletes and coaches are obligated to comply with the law. To comply with the law is the most basic and most important duty, athletes and coaches usually in the country should abide by the provisions of the Sports Law and other related laws and policies, when they participate in athletic competition, they also need to abide by the laws of the host country of athletic competition and related rules and regulations.

2.7. Obligations to tolerate minor injury.Competitive sports usually have a great deal of risk, and may lead to violence and bodily harm, involves not only athletes, but also may involve coaches, and even the audience. The sporting rules allow the injury in the athletics competition. Minor injury tolerance is essential for the conduct of the athletics competition. The damage done in the game specially adjusted by the sports rules to ensure that athletes are not subject to too many restrictions, to be able to enhance the intensity of competitive sports, and to increase the game viewing.

In summary, as a special group, athletes and coaches enjoy professional and special rights and obligations outside of the fundamental rights of our citizens.A good grasp of the content of these rights and obligations, to determine the legal status of athletes and coaches in sports law, is of great significance for the clear legislative direction for future laws and regulations of the sport, the better protection of the athletes and coaches'interests.

3. The source of authority of the referee

Sports referee assessed athletes (team) score and the outcome in sports competition process, in accordance with the competition rules and competition rules. The provisions of Article 30 of the Sports Law in China: "The state practices the systems of grading athletes, grading referees and grading professional titles for coaches."The current sports referees' technology level divided into national, one, two, and three. Some excellent national referee was recommended assessment, getting the approval of the international sports federations; they can get the international referees title of a single movement.

Clarity of the source of authority of the referee has major implications for the treatment of violations of the referee. "Sinister Whistle" Case in 2001, the Supreme People's Procurator ate and the Supreme People's Court controversy

comes from the lack of clarity of the source of authority of the referee. Specific analysis is as follows:

3.1. The referee's power comes from associations given. People's Procurator ate held this view in the "black whistle" case in 2001. The Procurator ate think Gong Jianping by the Chinese Football Association assigned as referee during the National Football League,He took advantage of his office served as a referee, illegally accepting bribes given by the football club of the participating parties, a huge amount, its actions undermine the normal management activities and the socialist market economic order, constitute corporate officers taking bribes. This means that sports associations as a corporate, the referee as a corporate officer of the company, so that the referee's power comes from communities given.

3.2. Referee powers come from the executive power.People's Court holds such a view in the 2001 case of "black whistle".The People's Court held that according to the relevant provisions of the Sports Act, the National Football Team of group A, group B league as the country individual sports competition, is responsible for managing by the Chinese Football Association. Gong Jianping assigned by the Chinese Football Association, the tasks performed in the National Football League, belong to the provisions of the Criminal Law of the People's Republic of China "and other engaged in official business in accordance with the law" should be based on the theory of national staff. That court held that the referee's power comes from the authorization of the Sports Act, part of the executive powers.

I believe that the powers of the referee come from the contract between sports participants. According to China's "Sports Law", our policy is a system of sports items Association.Various sports associations unified manage various projects under the guidance of the physical education department.Sports groups in China was set up after the sports administrative approval and after the civil affairs departments registered corporate social groups, including national, local, sports associations.Sports associations are autonomous organizations, organization constituted by the sports club's contract. Sports referee is staff hired by the Sports Association, they participated in the professional sports league, their relationship with sports associations was that they were hired, commissioned after the formation of the commission contract relationship. The referees in law enforcement should be seen as commissioned by the Sports Association on behalf of the Association law enforcement.

4. The legal status of the Sports Industry Association

National sports federations in the general provisions of the respective statutes themselves characterized as a national, non-profit sports community groups

with independent legal personality. Basedon the provisions of the "Ordinance on the registration and management of social groups":" social groups voluntarily formed by Chinese citizens, for the realization of the common aspirations of members, in accordance with its charter activities of non-profit social organization". Therefore, the sports associations have the purpose of sport or activities of social groups and have the folk, the nonprofit and add chance. [3]Sports Industry Association has the following characteristics:

4.1. Autonomy. Sports Industry Association is a social organization; an essential feature of the social groups is autonomy.Autonomous is essential characteristics that distinguish non-governmental organizations from government organizations.Association members joined the association in accordance with its will. The members of the association develop the contract given powers to the association to achieve the goal of association industry management autonomy.

4.2. Professional. Sports Industry Association management and operation is very professional, reflecting the professional features of the Sports Industry Association.

4.3. Monopoly. This is the unique characteristics of the Sports Industry Association distinguished from other social groups. "Sports Law" Article 31 provides:"The state manages sports competitions in grade and classification. Comprehensive national games are managed by the sport administrative department under the State Council or by the sport administrative department under the State Council together with other relative organizations. National competitions of individual sport are managed by the national sports associations of the said sport. Administrative rules for local comprehensive sports games and individual sports competitions are drawn up by the local people's government.""Sports Law" Article 40 provides:" The national sports associations for individual sport take the charge of the popularization and enhancement of the said sport. They represent China in the relevant international sports federations."Although there is no direct expression of the Sports Industry Association in its sports management monopoly, but in fact given the relevant Sports Law Association exclusive monopoly in its project management powers.

I believe that the sports industry associations have the qualifications of the administrative body, is authorized by the laws and regulations of other organizations. Laws and regulations authorize the organization refers to the organization of the non-state administrative organs authorized to exercise certain administra-

[3]Lu Yuan town: "On the Chinese sports community", set out in the sports research, 3, 1996.

tive functions in accordance with specific laws and regulations.Which contains three characteristics: First, the organization must be authorized by the laws and regulations, not the organization of the state administrative organs; second, it is the exercise of particular, specific administrative functions; third, it is the exercise of administrative functions must be laws and regulations grant. These three are complementary and indispensable. From the above discussion, the National Sports Federations of course, comply with the requirements of the organization; sports associations have "Sports Law" authorized management of sports affairs, "Sports Law 29:The national sports associations for individual sport take the charge of the registration of athletes of each relevant sport. Athletes that have been registered are permitted, in accordance with the regulations set by the sport administrative depart meat under the State Council, to participate in relevant sports competitions and move between different sports teams."Sports Law" 31: The state manages sports competitions in grade and classification. Comprehensive national games are managed by the sport administrative department under the State Council or by the sport administrative department under the State Council together with other relative organizations. National competitions of individual sport are managed by the national sports associations of the said sport. Administrative rules for local comprehensive sports games and individual sports competitions are drawn up by the local people's government."Sports Law "50: Anyone who resorts to banned drugs or methods in sports shall be punished by sport public organization in accordance with the provisions of the constitution, if the person directly responsible is a state staff member, he or she shall be subject to disciplinary punishment in accordance with the law.Sports Industry Association has the qualifications of the administrative body. Executive powers enjoyed by the sports industry associations also reflecttheir qualifications of the administrative body. First of all, the sports industry associations have the right to formulate rules and regulations. Sports industry associations can develop all kinds of standards, including the constitution of the association, sports ethics, athletes, coaches and referees and other the staff technical standards, and a full range of management of Sports Affairs thatunder the jurisdiction. Secondly, the sports industry associations have regulatory rights. Mainly refers to the powers of supervision and management of its members.Again, the sports industry associations enjoy the right to punish. Sports Industry Association has the power to punish member disciplinary offense, punishment according to its own constitution as well as the Association of Sports Industry Association disciplinary approach. Finally, the sports industry associations enjoy the right to dispute settlement.The right to dispute settlement is that Sports Association has the power in the internal affairs of the Association or the industry affairs arbitral award or mediation.

5. The relationship between sports industry associations with athletes, coaches and referees

5.1. The relationship between sports industry associations and referees.Sports Association in accordance with the provisions of the "sports law" and "sports competition referee management approach (for trial implementation), based on the authorization of the sports administration department, sports association have the right to manage the assessment and registration of sports referee.They are the management and the management of the relationship.In addition, sports referee hired by the sports industry associations to participate in the professional sports league to judge the competition. Here sports referees and sports associations' relationship is subject to hire, commissioned after the formation of the commission contract.

5.2. Sports industry associations and athletes. The athletes must go to the sports industry associations to apply for registration and filing procedures. In addition, the sports industry associations directly to athletes exercise of punishment often visible. For example, result in Wuhan Optical Valley Club exit the Super League is that Wuhan team is dissatisfied withthat the Football Association suspended for eight games and fined a penalty of 8000on its player Li Weifeng. The resulting, Sports Association and athlete's relationship is a relationship between the management and the managed.

5.3. Sports Industry Association's relationship with the coaches. Sports Association is based on the authorization of the legal provisions and administrative departments, has registration rights to manage coaches. Sports Association has punishment powers to coaches disciplinary offense .It also can prohibit coaches to enter the venue with their own team. So the relationship between Sports Industry Association and the coaches is also the management and the managed.

6. The sports club can become the main body of the sport legal relationship

China's "Sports Law" Article 36 provides: The state encourages and supports sport public organizations to organize and conduct sports activities in accordance with their constitutions to promote the development of physical culture and sport.The sports community groups do not include professional sports clubs. Corporate commercial operators in the nature of professional sports clubs, sports clubs have sports teams, operating sports teams and athletes is the staff.

6.1. Various sports clubs are a member of the national sports of individual sports associations, registration and record in the national sports federations before they can participate in national competitions in order to achieve the purpose of their sports activities and earnings.

6.2. Athletes and sports clubs signed a contract constitutes the relationship between businesses and employees. Sports Club uses athlete's athletic ability to get profit. Therefore, the sports club has a direct legal relationship of social groups and athletes. The protection of the athletes' rights and obligations of the realization cannot without the participation of sports clubs; athletes participating in various competitions are also inseparable from the management of the sports club.

As can be seen from the above discussion, the law, although there is no clearly defined legal status of sports clubs, sports clubs and athletes, sports associations and sports clubs produce countless sports legal relationship to enjoy sports law on the rights, obligations and responsibilities. Sports clubs can and should become the subject of the legal relationship of the sport.

A TENTATIVE ANALYSIS ON LEGAL STATUS AND REGULATIONS OF SPORTS SUPPORTERS THE CASE OF SOCCER SUPPORTERS

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Abstract: *The Chinese football supporters are growing and developing in last 20 years. We fully give positive affirmation that these football supporters are contribute their power to help our Industry developing, but at the same time, we find out some of them whom has negative behaviors were deeply infect some negative effects to our industry. Due to some of the fanatical football supporters are over-acting to the game; it may occur excessive action or criminal act. Thus, these criminals will prey on the social community, destroy the stable social environment, and even severely impair the vital interests of people in the whole society. It is necessary to post out written rules to conduct football supporter's behaviors. How do we establish the correlate standard and regulation concerning to make a better environment to the society and administer the violence and violent disturbance by law, is not only apply to the industry association's responsibility, to a higher degree, it apply to the legal responsibility.*

Introduction

The skill of Chinese football is not exquisite and the development history of football professionalism. But it's common occurrence that fans make troubles such as: after the draw between Shaanxi team and Chengdu team, the fans were not satisfied with competition result and gathered a crowd to make disturbances. At last riot polices had to be dispatched to maintain the order, using tear gas and fire water cannons for the first time in China to appease the fans riots[1].On March 24, 2002, at the end of game of Shaanxi home team and Qingdao team, fans dissatisfaction to referee led to serious fans violent riots, appeared extremely rare accident which fans rushed into the field beat up the referee and burned several police cars[2]. Another example: According to the record, from 2009 to 2011,there are 135 penalty

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[1]Shi Yan,*Domestic and foreign Legislationanti field audience violence,* published in Journal of Physical Education, Number2,Volume 11, May, 2004.

[2]Shi Yan,*Domestic and foreign Legislationanti field audience violence,* published in Journal of Physical Education, Number 2,Volume 11, May, 2004.

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cases of violation of discipline penalized by Chinese Football Association (CFA) disciplinary committee, including 30 cases in 135 under penalties for division, accounted for a quarter of the total number. The main reason for punishment to division is about the ill management of the division, such as, regulatory loopholes and relaxed security, which leads some fans to use a laser pointer or litter the field, seriously interfering with the normal progress of the game, also with threading to the personal safety of audience, athletes, referees and other fans. And parts of division lack security plans before, during, and after the game. So that the illegal violation acts occur frequently, i.e., some fans impact referee lounge, intercept and smash the vehicles of referee and the visiting team, and wound athletes and sports supporters. Regarding the above happened football violence cases, their characteristic shall be long duration, huge destructivity, and bad influence. If not to strengthen the regulation, Chinese football supporters will enter the ranks of the "football hooligans". This is undoubtedly a serious adverse consequence, so it is necessary to give special attention to the fans behavior, and do targeted research. This article will discuss the fans qualitative, legal status, rights and obligations, legal basis and the measures of regulating, in order to benefit the standardized management.

1. The demarcation of the sports supporters

To define sports supporters, involving several specific subjects, first of Allis to demarcate main body, the audience.The reason: fans come from the audience; notorious "football hooligan" is generated and degenerated from a small number of lawbreaker fans. Only we understand the nature and legal status of the fans can be targeted to regulate the fans under the law.

1.1. The definition of the audience

The audience is a gathering of spectators watching the performances or competitions. This subject mainly refers to the audience in the stadium and in front of the TV. The audience is the main body in a game, played a significant role in making sustainable development in a football match.The audiences are made up of individuals. The characteristic of the audience is not inclined to each group. They spend money to watch the game, as a consumer, in order to see the skills, good literacy, actively fighting spirit of the game. The audience feeling for the game can be described as satisfaction and dissatisfaction, under three levels: concept satisfaction ,behavior satisfaction[3], and audio-visual satisfaction.

[3]Liu Yu, *Customer Satisfaction Measurement*[M], Beijing Social Science Literature Press, 2003:8

1.2. The definition of sports supporters

Fan is the part of the audience.Football supporters are those enthusiasts who fascinate or indulge in the whole process of the football competition and development.They can be an individual, or an organization (fans association).They are characterized by more freedom and complete orientation.They are a loyal supporter of the team, beating the drums and crying for their team, to forget everything. They can forgive all the mistakes of their team.They are emotional and easily excited, and sometimes they are easy to lose their head, having acute behavior and doing things that are violated of regulations or laws. Fans behavior has the characteristics as sudden and accidental.

1.3. The definition of "football hooligans"

With the origin and development of the football, football violence in the field also increases. While enjoying happiness of football match, spectators put up with possible burst damage in football field at the same time, not only about the physical and psychological harm, but more important on the damage to the football and society. That is called "football hooligans". This behavior gradually spread from the venue to the off-site, from individuals to organized group,from domestic region to the whole world. Defined "football hooligans" according to the foreign scholars, this article agrees with Liu Yonggang, Xiangtan University graduate, this definition under: "The so-called football hooligans, are those related football conducts which, before, during or after the domestic or international football match inside or outside stadium, even at public transport to or away the playing field, in violation of the relevant laws and regulations, disturb public security and order, whether this behavior is achieved by scattered individuals or organized groups"[4].

At present, violence behavior and violations in China have not reached a harmful level as foreign "football hooligans", but have sprouted a similar situation. We must pay close attention and regulate such behavior according to the laws and regulations.

2. The legal status of the sports supporters

Fans have experienced a gradual evolution from individual to groups, from freedom to self-management. The existence of the fans is a special kind of social phenomenon, whichhas a direct relationship with the social politics, economy, law, culture, sports, and moral literacy. When we study the legal status of the

[4]Liu Yonggang,*The British legal regulation on football hooliganism and Its Enlightenment,*Xiangtan University graduate thesis.

fans, it is necessary to study the legal status of the fans associations. With fans association, fans will be able to restrain themselves and fulfill their legal obligations better in accordance with the relevant provisions of the association.

2.1. The legal status of fans association

2.1.1. In accordance with the provisions of the Ordinance on the registration and management of social organizations, the fans associations must comply with the Constitution, laws, regulations and national policies, shall not prejudice the national interests, social public interests and the legitimate rights and interests of other organizations and citizens; shall not violate the community morality, and shall carry out the corresponding activities under the law, while safeguarding the legitimate rights and interests of the majority of fans, and bearing the responsibility of ill management of the fans.

2.1.2. Fans association is a civil communal group organized by fans community, for a common hobbies and persistence towards a kind of ball game, in accordance with the provisions of the laws and regulations, and registered in the civil affairs department.It is not for commercial purposes, and only due to common hobby of ball games, aimed at better sharing emotional experience ball games brought, to unite with each other to form a strong and powerful fan culture. A fans association in essence is a basic form of social control and management for the fans, instead of society,to exercise some management functions, and is a socialized and organized result of the fans community.

2.1.3. Fans association should be governed by the local civil affairs departments or local football association. Actually in China, fans associations are closely related to the football club, under its organization and management, which is concerned with the club's own interests, apparently not conforming to the provisions of regulations of community organizations. Taken the nature of the fans association into consideration, the fans association does not belong to any industries, subjects or business within the government authorization.The main body is not confirmed, neither an administrative subject nor the administrative relative person, not to mention bearing independently civil or criminal liability. It can be said that the position is very vague. This article thinks that belongs to civil autonomous organization.

2.2. The legal status of the sports supporters

There is no a clear legal position of fans currently. The fans are discussed as an expansion of sociological and cultural sense. However, in order to make clear

the legal nature of the fans, and to maintain the interests of the fans, we need to start from the object of a legal relationship with the fans, to be able to grasp the legal status of the fans.

2.2.1. The relationship between sports supporters and fans association - the legal relationship of the members of the association and civil autonomous community.

Sports supporters shall have the rights to corporation initiation, organization, development of the articles of association, participate in the fans association meeting, and elections; fans at the same time shall fulfill the obligations stipulated by the fans associations articles, mainly to comply with competition order and to be a civilized spectator, as well as shall fulfill the obligations of arranging fans activities as prescribed in the articles of fans association.

2.2.2. The relationship between sports supporters and sports clubs - the legal relationship of the consumers and exhibitors of ball games.

If fans buy the club tickets to the ball games, they shall have the rights to watch ball games and rights to enjoy a real game - the club shall not make soccer fraud, or manipulate the game; fans shall fulfill the obligations of being civilized spectators - cheer reasonable to create a competition atmosphere, no hooligans, riots and other deviant behavior in the field.

2.2.3. The relationship between sports supporters and ball game associations - the relationship of supervisor and supervisee.

The ball game associations have been given to the functions of the public administration, the power to manage the ball game affairs.Thus these associations, in fact, exercise the public authority. According to the public administrative principle of "there is power, there is responsibility", the execution of power must be supervised. Fans as participants of the ball games, have corresponding interests of the healthy development of the ball games, and own the right of supervision for the healthy growth of the ball games, specifically including several categories: the rights to participate and speak within development policy of ball games, rights to require to protect the fans interests, rights to require the support and develop the fans group. Ball game association, as bearers of public administration of the ball games, in the execution of public power, shall respect the main status of the fans and listen to and absorb the reasonable opinion of the fans, respect and protect the demands of the legitimate interests of the fans.

To sum up, the legal status of fans in the fans associations isan association member (of course, here means a formal member fan); during a game,a fan is a consumer, also is a participant of the ball game. Fans and the athletes form a

complete game; in authenticity and sportsmanship identification, a fan appears as a supervisor.

From the current situation of the fans, the fans are still in a growing stage, with lower level of awareness of their rights and their organization degree. In view of the small amount of current laws and regulations about fans, the legal position of fans is only relying on the specific laws and regulations, fitted into the scope of the legal relationship, so that we could form a more three-dimensional understanding of the legal status of the fans. What we can confirm is that the fan is the significant subject in the related affairs of ball games in the process of operation, with corresponding rights and obligations.

2.3. The present dilemma of fans and fans associations

2.3.1. Fans need to further improve the overall quality, and fans association is not highly mature.

Specifically, although the quality of Chinese fans has improved in recent years, but there are still a large number of low quality fans cheering for the team, by the form of verbal and personal abuse, resulting in extremely bad social influence. The maturity of fans associations has some certain problems, such as the Beijing fans association did not exhibit the expected standards of a qualified association in organizingfuns cheering and crying, and watching games etc., but did act recklessly and allow the fans curse visiting team. Overall, the quality of the fans is not high.

2.3.2. Lack of attention to the dominant position of the sports supporters.

The current performance of the fans makes its own subject status not taken seriously. The fans did not show the quality civilized fans should have, in many cases, been regarded as rabble, not worthy of respect. The behavior of the fan base has a very strong scalability; a small number of non-rational fans is often easy to translate into a label attached to the fan base, which further worsened the access to room for growth in the fans dominant position.

2.3.3. Fans as well as supporter association is still relatively weak in awareness of rights.

When the rights and interests of fans have been infringed, our fans and the fans associations did not realize that they can rely on their own acts and fight for their rights. They in many cases, such as stadium corruption, the prevalence of fraud, gambling, and black whistle, control of the game, did not raise a protest.

2.3.4 Fans as well as supporter associations play a finite function of supervision and Weak awareness of their rights, wanting them to play an active role of

supervision and restriction is unrealistic. Industry autonomy regulations such as Chinese Football Association Disciplinary Guidelines and Penalties Methods stipulate simply to the audience and the sports supporters 'interests, but in the real protection for the exertion of supervision, there is a long way to go.

3. Several aspects of regulating fans behavior

3.1. Application of law of fans violence behavior. The law is the most effective weapon against stadium violence and crime.The legal basis is the embodiment of the legal legitimacy. Article 277 of the Criminal Law of PEOPLE'S REPUBLIC OF CHINA stipulates: "Whoever by means of violence or threat, obstructs a functionary of a State organ from carrying out his functions according to law shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, or public surveillance or be fined" , and Article 291 "Where people are gathered to disturb order at railway stations or bus terminals, wharves, civil airports, marketplaces, parks, theaters, cinemas, exhibition halls, sports grounds or other public places, or to block traffic or undermine traffic order, or resist or obstruct public security administrators of the State from carrying out their duties according to law, if the circumstances are serious, the ringleaders shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention or public surveillance.[5]" According to the Criminal Law, on the judgment of fanatic supporters' violations, such fans behavior constituted the crime of disturbing public order, of the ringleaders to them shall be sanctioned in accordance with the Criminal Law. Article 6 of the Regulations of the PEOPLE'S REPUBLIC OF CHINA on Administrative Penalties for Public Security provides:"Penalties for acts violating the administration of public security are divided into three types as follows: warning, fine, and detention"[6]. Dissatisfaction with the referee, the other players and fans behavior is the main cause why fans have violent behavior, because it is under a special scene to emerge ultra or out of control behavior, so it is appropriate to carry out the corresponding punishment according to the Regulations of the PEOPLE'S REPUBLIC OF CHINA on Administrative Penalties for Public Security, unless constituted other crimes should be punished in accordance with the relevant provisions of the Criminal Law.

Article 53 of Law of the PEOPLE'S REPUBLIC OF CHINA on Physical Culture and Sports provides that: "Anyone who commits seeking a quarrel of making trouble, or disturbing public order shall be criticized, educated and stopped; and shall, if the case violates public security administration, be punished by the public security organ in accordance with the provisions of the regulations on ad-

[5]*Criminal Law of the People's Republic of China*. Article 277&291.

[6]*Regulations of the PEOPLE'S REPUBLIC OF CHINA on Administrative Penalties for Public Security.*Article 6.

ministrative penalties for public security; or shall, if the case constitutes a crime, be investigated for criminal responsibilities according to the law" [7]. From the above provisions of three laws and regulations, Law of the PEOPLE'S REPUBLIC OF CHINA on Physical Culture and Sports, has stronger basis on handling fans seeking a quarrel of making trouble. But the Article 53 seems a little weak, lacking of special provisions upon stadium violence, troubles, riots and others. Therefore, this paper suggests it, should consider increasing "shall not have serious violence behavior and shall not cause trouble, mob riots before, during and after the game" such clause in the Law of the PEOPLE'S REPUBLIC OF CHINA on Physical Culture and Sports amendment, and assert what acts are criminal acts, and to punish according to the seriousness of the details of the case.

3.2. Give full play to the TV, newspaper, magazine, Internet and other news media propaganda effect, educating the football audiences to be civilized spectators and to rationally deal with winning or losing. Take exposure and condemnation measures into stadium violations, using stadium screen, broadcast, tickets and other publicity materials to display requirements of watching the game, and reflect the powerful resolute determination to crack down the stadium illegal behaviors. Through these forms, so that fans can understand what behavior is illegal crime, will be bound to be severely punished by law.

3.3. Improve and perfect stadium security environment. Each division shall strictly work out security plan no matter before, during, or after the game, shall coordinate the work with the local government and public security departments. All divisions shall strictly regulate security system, including security checks to the audience into the stadium, prohibiting all kinds of the articles in violation of the provisions, from the source, over the hole; shall expand the scope of monitoring, including outside stadium; as to small number of illegal egg in the community, shall be investigated for their legal responsibility by the public security department.

3.4. Strengthen the education of the professionalism of the athletes. Through different forms of education of professional conduct to athletes, let athletes affect the majority of fans and audiences on the pitch with excellent professional norms, and bring joy and happiness to fans and audience by tenacious fighting style and superb technical and tactical level. In addition, the every word and deed of athletes could have a huge impact on fans and audience, which is likely to induce significant event, so it is necessary to prohibit athletes from having antagonistic action and language across the field.

[7] *Law of the PEOPLE'S REPUBLIC OF CHINA on Physical Culture and Sports.* Article 53.

3.5. Think highly of great importance to the role of fans organization, management and education, including that: shall play a positive role in guiding fans associations with the Beijing spirit of "patriotism, innovation, inclusiveness, virtue" as criteria for activities; shall establish internal restraint mechanism, not only safeguarding the interests of supporters, but also undertake the responsibility of society; shall educate fans to be law-abiding and civilized spectators, creating the good atmosphere of game, to come into being the fans with lofty freedom and independent personality and a real football fans culture of virtuous circle. Starting with each individuals, and consciously safeguard the stable order of stadium.

Conclusion

a. From the nature, the rights and the obligations of the sports supporters, grasp the legal status of the fans, to explore a set of valid ways or methods to administrate fans.

b. Improve and perfect the structure of relevant laws, regulations and institutions on the stadium environment and the sports supporter's behavior, to achieve this goal through series of amendments of increasing and refining relevant provisions to the Law of the PEOPLE'S REPUBLIC OF CHINA on Physical Culture and Sports.

c. Promote a healthy, civilized, positive fans culture. Do foster fans culture in line with the spirit of the age of high-grade valiant and charming football.

d. Establish management system inner fans association. First, to confirm the legitimacy of each founded fans association to clear the institutions of higher jurisdiction. In other words, where the registration is, who will manage and be responsible for their actions. Secondly, the fans associations shall have their own statutes, rules of procedure and elected leadership authority.

e. Pay attention to the rights to participation, decision-making, evaluation and supervision of fans. Football supporters have a right to know the operation process, and become a real important subject in the whole football event, with the basic rights in the process of competition, and shall perform the corresponding obligations.

f. Strengthen the intensity of supervision and management of the fans associations and fans themselves, except that, shall gradually upgrade supporters ability of self-discipline and self-control in addition to safeguarding the interests of fans and fans of associations. The relevant departments and organizations shall have an obligation to supervise the fans associations and supporters, and main body shall contain the government, the Chinese Football Association, the local football associations, the football clubs, such as the Chinese Football Association and local football fans association should set up a fans management department.

A RESEARCH ON THE EVIDENCE ISSUE OF ANTI-DOPING

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Abstract: *In recent years people pay more and more attention to the issue of anti-doping in sports. The evidence issue related plays an important role to promote the development of anti-doping. However, there is no rule to regulate this problem at present, which is obviously not good for the solving of doping problem. The article starts from the peculiarities of evidence issues of anti-doping, including aspects such as object of proof, proof method, categories of evidence, and burden of evidence and standard of proof. Meanwhile it analyses the problems existing in the evidence issue of anti-doping and gives suggestions both in theory and in practice.*

Introduction

"True play",as the slogan of the world anti-doping organization, demonstrates the goal and practical significances of anti-doping. In recent years people have paid more and more attention to anti-doping problem in sport competitions since it is a threat to sportsmen's health, as well as the principle of fairness. To solve the problem, sportsmen will be punished for doping. And punishment is on the basis of evidences which play a key role in the identification of doping. The essay focuses on the uniquenesses of evidences in anti-doping and points out the problems for improvement suggestions.

1. The main evidence problems in anti-doping

1.1 The legislation status

There are no special provisions on the issue of anti-doping evidences in international agreement, international treaty or domestic legislation. In 2003, WADA held a meeting in Copenhagen and approve the World Anti-doping Code, which is the basic and uniform regulation of anti-doping. In 2005, the International Agreement of Anti-doping in Sports Competition was passed in a conference held by United Nations Educational Scientific and Cultural Organization, which enforced the coordination of anti-doping work of different countries.

As for the legislation status of China, the Anti-doping Centre of State Sport General Administration is competent authority and there are more than thirty

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legislations containing anti-doping provisions in China, among which Anti-doping Regulations of People's Republic of China remains a core position. However there are no special provisions on the issue of anti-doping evidences among all these laws and caused several practical problem.

2. The uniqueness of the evidence issue in anti-doping

Compared with evidence issue in civil proceedings, where the compensation is based on the parties' amount of loss, and in criminal proceedings, where the accusation is on account of personal danger and social harmfulness, the evidence issue in anti-doping is focused on whether the fact of doping exists. In details, the uniqueness of are as follows:

In the first place, there is only one objective of proof. In the evidence law, the object of proof is something that is needed to prove the main use of the evidence to prove or confirm the case facts and the relevant facts.[1] It is the initial step of proving. In anti-doping process, there is unique, namely whether the action of doping exist. According to the regulation of WADA, if there is objectionable substance in the sportsmen according to the List, or the sportsmen use the way in the List to improve their achievement, the sportsmen will be regarded as guilty. In other words, even though the sportsmen do not take the drug by intention, he will be identified guilty. Subjective intension is not considered when the organization is convicting the sportsmen a crime. This is the so called the principle of strict liability, which is a popular principle in anti-doping. In 2000's Olympics, Durakan took the some pills to cure her cough as the doctor told her to do so. However, there contains something forbidden in the List and she got a positive action in the Urine Analysis.As a result, the Olympic International Committee punished her.

In the second place, the way of proof is technical. The widely used way of checking in anti-doping is Urine Analysis and Blood Test. For the benefit of winning the competition, more technics are used to doping while anti-doping organization are also making an effort to improve the technics of doping checking. However, some new ways are used without enough test, which means the result of checks may be wrong and come innocent athletes maybe justified guilty. The athletes' should be in a very stable state before the game. Since this check is to some extent harmful to their own health some athletes have no alternative but to withdraw from the international competition to avoid the check.

In the third place, the categories of evidences are special. As Bentham said in his book, there are nine kinds of proofs, which include subject proof,

[1]Chen Weidong, the Principle: "Law of Evidence", Shanghai: Fudan University Press, June 2006, page 252.

witness testimony, direct evidence, indirect evidence, original evidence, hearsay evidence and so on. [2]According to the proceeding law in our country, physical evidence, documentary evidence, witness testimony, natural succession are included. Usually in the litigation, the parties will provide various types of evidence to prove the facts of the case, in order to form a complete chain of evidence. However, according to the proof issue of anti-doping, expert conclusion is the unique category of proof. In Sep. 2003,a famous athlete Montgomerie was sued as doping since the expert conclusion demonstrated so. And the anti-doping agency of the USA accepts the conclusion, regardless of other evidence leading to the opposite verdict.[3]

In the forth place, the burden of proof is borne by the department in charge of anti-doping. The burden of proof also known as "stands the burden of proof" "Proof of burden" refers to certain risks and responsibility when the proposition can not be established, or can not be confirmed in theory, sometimes the responsibility of this responsibility to be the result of type.[4] The burden of proof in civil proceedings is the principle of "who advocate who proof" while the burden of proof borne by the prosecution in a criminal case is in charge of office of the public prosecutor. The burden of proof of the administrative proceedings in the anti-doping is in the charge of the administrators, anti-doping authorities would have to make use of doping penalties to prove that doping in athletes does exist and when the punishment decision is handed over to the disputes arbitral tribunal the burden of proof is still borne by the anti-doping department in charge. The reason for such a requirement on the one hand is based on the protection of the rights of athletes, on the other hand is based on the trust of the testifying ability of anti-doping authorities and that it has made the decision in accordance with the law and its urge. Montgomery cases mentioned above, after the the two sides handed the controversial issue to CAS,the burden of proof was still borne by the United States Anti-Doping Agency.

In the fifth place, the standard of proof is between strict doctrine and advantages of proof. The standard of proof, also known as "proved requirements" "proof of tasks", refers to the degree of proof.that is enough to achieve the facts of the case.[5] "Beyond a reasonable doubt" is the standard of proof applicable in criminal proceedings in the common law system. And it is similar to the "high

[2]Liu Jingyou: "Evidence Law", Beijing: China University of Political Science and Law Press, 2001, page 197.

[3]Guo Shuli, Zhou Qingshan: "Sports argument - the legal issues in the sports, Hunan: Hunan University Press, 2009, page 125.

[4]Chen Haoran: "Principles of evidence, Shanghai: East China Press, October 2002, page 349.

[5]Fan Chongyi: Evidence Law, Beijing: Legal Publishing in September 2003, page 304.

degree of probability" in civil law. Both mean the strength of the evidence must achieve fully confirmed, completely convinced that the degree of the facts of the case before the fact has been identified. The two legal systems of civil law have adopted the preponderance of the evidence standard, which means if it is proved that the evidence provided by one party is higher in the overall weight of the other party then the party has completed his burden of proof. The first case of Chinese athletes' solving the problem through CAS is initiated by a Chinese swimmer. In January 1988, Chinese swimming team participated in the 8th World Swimming Championships held in Australia, in the drug test in the race, four Chinese athletes tested urine samples positive, and they were immediately disqualified from the competition. Four players in China refuse to accept arbitration and brought it to the Sports Arbitration Court. From the case, when sports disciplinary bodies of the athletes in doping cases start penalty procedures, the use of evidence standard of proof should be the split the difference, which means that the proof is enough only when the doping evidence are completely satisfying to the punished athletes The standard of proof is between the "advantage proved principle" and the "exclude beyond reasonable doubt the principle".

3. Analysis of the existing problems of the evidence issue in the anti-doping system

The above introduced the evidence issue in the anti-doping system, including proof objects, means of evidence, types of evidence to prove the basic of five areas of responsibility and standard of proof of evidence in the anti-doping issues. And the basic questions of evidence issue in the anti-doping system are mainly as follows:

First, whether the strict principle should be used. "There is non-compliance", the use of strict principle almost everywhere in today's anti-doping process, such as the Raducan case, Montgomery case and other famous anti-doping cases. In all these cases CAS maintains "If there is excting things in bodies, the athlete is guilty. "But whether the strict principle is preferable in doping cases? Scholars support the principle of fault think that "candles burning oxygen rather than light", which means the perpetrator's responsibility, is from their fault and not their behavior. Scholars for the strict doctrine explain from contract risk principle, which is the athletes voluntarily participated the game and they themselves should abide by the rules of the game and one should control their own behavior to avoid the use of any stimulants, otherwise, as long as the stimulants are detected, necessary risk should be shouldered. As a result, the delay of the process of competition can be avoid. I believe that the strict principle is more desirable in sports games. Because the time of the dispute resolution requirements are very

short, too complex matters requires proof of both parties and the competitions are likely to be delayed. Even if the athlete proved his innocence after the game he has delayed the game. And strict principle can help reduce stimulants events.

Second, with regard to the types of evidence in proof of anti-doping issue. in the current anti-doping cases the main evidence of doping is test report and CAS maintains a more cautious attitude towards other proof . I believe as long as it is a legitimate collection of the relevance of the evidence, it can be used as the basis of proof. On one hand it is good for the formation of the chain of evidence. On the other hand, it can release the burden of the improvement of anti-doping detection technology.

Third, the standard of proof in the anti-doping. According to the level of certification requirements, the standard of proof in the anti-doping includes advantage standard of proof, beyond a reasonable doubt and the the standard of proof similar to the administrative appeal. Exclude similar administrative litigation in the reasonable doubt standard of proof and in between the standard of proof. I think that the current standard is desirable. Because the advantage of standard of proof is not conducive to the protection of the legitimate rights and interests of athletes. If the player should be fined or suspended as long as there is the possibility of using stimulants, the rule is obviously not conducive to the development of sports undertakings and beyond a reasonable doubt principle which is the typical criminal standard of proof puts higher requirements on the doping authorities. Compared with the two, the compromising opinion more desirable.

4. Anti-doping evidence eystem recommendations

After a clear introduction of current situation of anti-doping evidence system in China, I think the issue can be improved from the following two aspects: firstly, the Anti-doping Centre of State Sport General Administration is competent authority and there are more than thirty legislations containing anti-doping provisions in China, among which Anti-doping Regulations of People's Republic of China remains a core position. However there is no special provisions on the issue of anti-doping evidences among all these laws and caused several practical problem. So on one hand the regular problem should be regulated in China. On the other hand, the doping process in the specific program should be added. Practically speaking, the Participation and openness during the process are supposed to be improved so as to Guarantee the authenticity of the evidence.

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A STUDY ON PROTECTION OF OLYMPIC INTELLECTUAL PROPERTY OF CHINA

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Abstract: *The protection on Olympic intellectual property is the very important economic guarantee for hosting 2008 Olympic Games in China. The successful organization of 2008 Olympic has great significance for reconstruction of Chinese nations. Following the constantly development of market economy of China, Olympic intellectual property has became the main target of tort, because of huge business benefits, the protection of Olympic intellectual property shall be applied by the civil, administrative, judicial channels and relating thereto, so as to effectively safeguard Olympic intellectual property, and it's the important content of pushing forward the future construction of Chinese law system in all aspects. This paper states the basic feature of Chinese Olympic intellectual property, and analyses the current status of Olympic intellectual property of China, as well as proposes the relevant measures and strategies in view of the existing current issues of protecting Olympic intellectual property of China.*

1. The definition of Olympic intellectual property

1.1. The concept of Olympic intellectual property

Olympic intellectual property is the exclusive rights of Olympic related trademark, special symbol, patent, productions and other creative achievements, all of which are enjoyed by the rights owner of Olympic intellectual property, as well as regulated in the contract signed by The Beijing People's Government, BOCOG and IOC. The coverage of Olympic intellectual property is very complicated and comprehensive, which is included in the complex system containing the abundant contents of IOC and Olympic games, and relating thereto, as well as elaborating the wisdoms, knowledge, public relationship, organization system, financial system and relating thereto of human being whom are devoted for Olympic games.

1.2. The classification of Olympic intellectual property

Olympic intellectual property includes 4 following kinds: 1 The permanent property rights of IOC, namely Olympic name, 2 the intellectual property of NOC: the name, emblem, flag of NOC; 3 the intellectual property what have emerged in the period of bid construction organization of Olympic game conclude Olympic symbol name maxim, and so on; 4 the property rights what are

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obtained by organizations or persons from legal means including broadcasting rights of Olympic programs, authorized commodities of Olympic intellectual property, Olympic related productions and patents, and relating thereto.

1.3. The features of Olympic intellectual property

The Olympic intellectual property has not only the general features of intellectual property, but also its specific features, which are exclusiveness, monopolization, no limits, region and subjects to Olympic charter.

2. The current status of the protection on Olympic intellectual property in China

2.1 Chinese government attaches much importance to the protection of Olympic intellectual property

China is the rare one whom specifically legislated for protecting Olympic intellectual property, and enacted "the Olympic Intellectual Property Protection Rules""the Olympic Symbol Protection Provision", so as to fully shows the determination of Chinese government for protecting Olympic intellectual property, as well as the great importance attached by China to host Olympic games.

2.2. Further complete the legal orders of protecting Olympic intellectual property

China already has 10 or more parts of legal rules referring to protection of intellectual property, such as "copyright law" "trademark law" "patent law" "specific symbol management provision"and relating thereto. In the period of bid for Beijing Olympic, Chinese government made the specific commitment to comply with the "Olympic Charter"and "Host City Contract", when won the rights to serve as the host of Olympic games, Chinese government specifically signed the official guarantee based on the above content. Now days, China already has a fairly complete legal system to protect the Olympic intellectual property containing all aspects protection frame of local law.

2.3. Legal Affairs Department of China

The establishment of legal affairs department made the further progress for the legal protection of China, the core services are profit guarantee and contract management, and to handle the legal relationship of IOC and IFs, and cooperators containing media, safeguard the profits of IOC and Olympic intellectual property, so as to create the excellent environment and atmosphere.

3. The existing issues of protecting Olympic intellectual property in China

Tort is the most important issue of protecting Olympic intellectual property, which is illustrated by following aspects:

3.1. The large number of tort cases

The number of cases that are dealt with by national commercial and industrial administration is rapid going up.

The relevant torts refer to a great variety of commodities, and have various forms.

3.2. Wide coverage of tort

Each province of China have taken strong actions to investigate and punish the torts of manufactures and sells of Olympic licensed merchandises, which covered various forms of tort, in addition, copyright and trademark administration of Hong Kong collaborate with IOC for specific administrative work of licensed merchandises.

3.3. Various forms of tort

In the view of subjective psychology of infringer, the enforcement of tort shall be classified into no harm misusage; intentionally use the Olympic related symbol for manufactures and sells in a direct and open manner; the behaviors of "ambush marketing" is the main manner, which intentionally use the Olympic related symbol for tort of Olympic intellectual property.

3.4. Indifference conciseness and less understanding of protecting Olympic intellectual property

Most of people have neither good understanding on Olympic intellectual property, nor deeper realize its protection. Accordingly, public are short of knowledge on Olympic intellectual property, don't have proper approach to understand, don't have the consciousness to voluntary compliance, all of which become the main cause of many tort behaviors.

The definition of the scope of Olympic intellectual property is not clear, thus largely affect the communication and cooperation with enforcement of legal organs, and the infringement of Olympic intellectual property can't be attacked effectively, connive the behavior of the infringement of Olympic symbol.

3.5. Lack of communications between relevant administrations

Because the administration for protecting Olympic intellectual property involves many branches, the cooperation between them need to be improved, and measures of enforcement of law need to be unified.

3.6. The behavior of infringement of Olympic intellectual property of news media to certain extent

Several news media openly support the behavior of infringement of Olympic intellectual property, even regard the infringements as positive news to circulate, and go so far as to publish the advertisements of infringement of Olympic symbol.

4. Strategies and measures of protection on Olympic intellectual property of China

4.1.The laws and rules of intellectual property of China continue to be improved and adjusted

For pushing forward the protection of intellectual property of China, in particular, when China joined in the WTO, we shall figure it our in two parts, one is active adjustment, which needs to actively, independently adjust legislation and the enforcement system of the protection of intellectual property of China, the other is passive adjustment, which mainly points that the protection system of intellectual property of China needs to be advanced to get closed to international practice, in particular, the agreement on TRIPS. As long as the statutes on the protection of intellectual property of China accesses to the international development, the Olympic intellectual property will be regulated and safeguarded effectively.

Each branches of administration shall establish the coordination mechanism, and strengthen the cooperation and communication of each branches, decrease the conflict between, advance the enforcement effectiveness of Olympic intellectual property, step up the crackdown against the infringement of Olympic intellectual property, so as to create the excellent legal environment to safeguard the Olympic intellectual property.

News media shall provide the correct guidance and instruction, and introduce how to properly use the Olympic symbol, thus, the public will more correctly understand “Olympic charter”, ”Olympic symbol protection provisions”, as well as strictly criticize the infringement of Olympic intellectual property, firmly resist to circulate any advertisement concerning tort. Only in this way, the news media can fulfill its duties for protecting Olympic intellectual property.

Strengthen the publicity work, we shall *popularize and propagate* the relevant knowledge on Olympic intellectual property, and advance the public consciousness of protecting the Olympic intellectual property.

Up to now, the 80 percent of the cases of infringement of Olympic intellectual property are caused by insufficient knowledge, and indifferent awareness of protection. Thus, it is urgent to strongly strengthen the propaganda and popularization of legal protection of Olympic intellectual property, and advance the public consciousness of protecting the Olympic intellectual property, so as to deeply root it into people's mind, create the excellent social environment. Only in this way, the public will initiatively refuse to purchase the tort commodities, it is more effectively to resist the tort behaviors. In the meanwhile, we shall carry out the report awarding system for arousing the enthusiasm of the public.

4.2. Establish the early warning system of protecting the Olympic intellectual property

Our country shall establish a specific early warning system to protect Olympic intellectual property, namely by means of collecting the materials of Olympic intellectual property, and feedback to the enterprises for timely carrying out the countermeasures, and negotiating with the competitive ones, so as to avoid the behavior of ambush marketing happened, and establish initiative early warning system.

5. Strengthen the clampdown for ambush marketing

The behavior of ambush marketing seriously violence the legal exploration of the Olympic market, and disobey the Olympic spirit, thus, we need to strengthen the clampdown for ambush marketing. Because of the large number of the behaviors of the ambush marking which have a wide range, and most of infringers have insufficient relevant knowledge, we shall put more stress on education and persuasion to aid the public for deeper understanding the Olympic intellectual property.

5.1. Strengthen the training of the professionals for Olympic intellectual property

China shall advance the force and team of legislation, jurisdiction, law enforcement of Olympic intellectual property, so as to ensure the present base of protecting Olympic intellectual property to move to a higher level, which needs our country to train more excellent professionals who are great at domestic intellectual properties.

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ON THE POLICY OF CHINESE SPORTS FOR THE DISABLED

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Abstract: *This article uses the literature material, expert interviews, social surveys and other methods based on sports for the disabled in China. The development of policies and regulations related to the analysis, pointing out the policy and regulations for the disabled sports development to provide a strong guarantee and largely determine our country's sports for the disabled to continue in the direction of development. In recent years, our country's disabled athletics sports development has increased significantly, but the disabled sports still need to increase its strength further.*

Introduction

Since the founding of the new China, the Chinese government, the Chinese Sports Association for the disabled and the athletic group United has forwarded the disabled sports development. From the early years of the new China, especially since reforming and opening, the Chinese government has paid more attention to the cause of disabled athletes' sports. From the 1990's, China began to develop the "law on the protection of disabled persons" and the "Sports Law of the People's Republic of China" for protecting the rights for persons with disabilities, and has adopted a series of measures guaranteeing that the sports for the disabled is revitalized as the responsibility of the state.

In 2004, the Chinese Paralympics sports management center was established, in order to dedicate a disabled athlete sports training venue, the Beijing Paralympics Game. In 2006, the "disabled sports work", the "implementation plan" and the "Eleven five" period, was developed. In addition, China can not only actively participate in international sports competitions, but also successfully hold venues for the disabled, such as Beijing 2008 Paralympics Games and the 2010 Guangzhou Asian Games. The total number of gold medals and great achievements came to the world's attention. From that time, the 2008 Beijing Paralympic Games was an opportunity, and has promulgated a lot of related policies, regulations and implementing schemes for the sports for disabled. Especially in 2012 Paralympic Games in London and to the gold and total medals first achievement

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became historical, and achieved the expected goals. At present, along with the Chinese society, on the "humane, humanitarian, human rights" issue, there are more respect and understanding. The Chinese government and the whole society pay more attention to the cause of disabled sports.

The purpose of this study is through discussions of sports for the disabled in China and the basis of the history of Chinese sports for the disabled, to clarify relevant laws and policies, the implementation of the policy, its contents, characteristics and deficiencies.

1. Chinese history and the current status of sports for the disabled

From the founding of new China in 1949 to the middle of 60's, the Chinese government began to support the cause of the disabled, set up organizations of persons with disabilities, which entered the initial stage of sports for the disabled. In 1982 the constitution of the people's Republic of China promulgated forty-fifth stipulates: "the state and society, blind, deaf, dumb and other citizens with disabilities work, life and education ", and the government began to disabled sports funding system related policy. In 1983, the China injury Sports Association (Disabled Sports Association) was established.

In 1984, China sent its first Paralympics delegation, represented by 24 disabled athletes, which participated in the seventh Paralympics games in Nassau County, New York. Since then, China has worked for the disabled sports development, to safeguard the legitimate rights and interests of the disabled sports. The Chinese government has increased the various types of legislations, such as, the 1991 " law on the protection of disabled persons ",[1] enacted in 1995 by the people's Republic of China " [2]and " referred to as " the sports law**.** Also on the rights of persons with disabilities, guaranteeing the disabled sports promotion as the responsibility of the state. From 2006, the "disabled sports work" eleven five "implementation plan" [3]has been developed.

The "eleven five" period, has been a rapid development of sports for the disabled, *disabled body quality rises apparently***.** Especially in the competitive sports for the disabled, China successfully hosted the Sixth National Games for the disabled, the first session of the third National Special Olympics Games; the remnant Austria Deaf Olympic sports, sports project reached more than 30 Spe-

[1]Law on the protection of disabled persons: http:\/\/baike.baidu.com\/view\/84101.htm [EB\/OL].2012-08-18

[2]The people's Republic of China Republic of China Sports Law: http:\/\/baike.baidu.com\/view\/113781.htm[EB\/OL]. 2012-08-18

[3]Disabled sports work "eleven five " project: http:\/\/www.cdpf.org.cn\/2008old\/zcfg\/content\/2007-12\/06\/content_50505.htm[EB\/OL].2012-08-18

cial Olympics athletes to reach 530000 people. China's disabled athletes have in international competitions won 771 gold medals, most from the Chinese sports delegation at the Athens Paralympic Game. Major international tournament games has been held in 2007, when Shanghai successfully hosted the twelfth world special Olympic Games, in 2008, Beijing thirteenth Paralympics Games and in 2012, Guangzhou hosted the Asian Paralympics and achieved good results. Especially this year, in London 2012 fourteenth Paralympic Game, Chinese athletes won a total of 95 gold medals, more than in the Beijing Paralympics Games and won 89 block, creating a new historical record in the Paralympics Games. It can be said that China's disabled athletes excelled behind, is China's economic and social development for the cause of the disabled. From the policy laws and regulations to improve the " two systems " construction, and the " cause of Chinese Disabled Persons " Twelfth Five-Year Plan " development compendium " macroscopical blueprint to specific supporting the programme, and from the city of barrier-free facilities for the disabled and in the idea transformation, cause for the disabled in China along the road of scientific development.

According to the Chinese FIMITIC data, it shows that currently there are about 2700000 disabled athletes, taking part in sports of the disabled to achieve 6000000 people. In the "eleven five" period, disabled sports, according to the 2006 April, the National Bureau of statistics of China "the second national sample survey on disability" shows that China's disabled adds up to 82960000 people, and of the total population of 9480000 people in 6.34%. In addition, according to the 1996 report on sports of the disabled to participate in the survey - comparative analysis of the results shows that, for sports according to the number, age, cultural degree, the different income differences, cultural level and high income, the disabled person to attend the sports proportional to.[4]

According to Wang Wei [5](2006), "China City Disabled Sports Life Survey" In 9 of China's cities: Zhengzhou, Xuchang, Wuhan, Jingzhou, Yichang Suizhou, Taiyuan, Beijing and Guangzhou, which were the objects of the survey, shows that living in the city of only 800 people disabled physical exercise. The results show that disabled sports in the popularization and development of the situation is not good.

To sum up, the "eleven five" period, our country's disabled sports development is highlighted in disabled sports development, and a mass of disabled sports development compared to relatively weak. That is «takes athletics disabled sports, mass sports for the disabled. «The tendency problems.

[4]Zhang Linfang, the world sports policy research - China Sports Policy Research Report, the Japanese Ministry of Education commissioned research report: 2011414-4254:

[5]Wang Wei, our country city disabled sports life survey, sports science and technology to the bulletin 8 : 2006, 12:15

In 2011 December the State Sport General Administration and the Ministry of education, according to the "cause of the China's Disabled Persons" [6]Twelfth Five-Year Plan "development compendium" provisions, formulated the "disabled sports work" 925 "implementation plan".[7] In this "scheme", the development for the next 5 years, the target and main measure is namely:

a, strengthening disabled sports, promoting the rehabilitation of the disabled fitness and improve the social participation ability.

b, improving the disabled sports level in a major international competition to achieve outstanding results ".

Although in the "program" on the mass sports for the disabled to carry out the stipulation, but still not big enough to carry out the implementation of measures.

2. Disabled Sports Organizations Structures of China

i. China Disabled Sports Organizations supervisors

The head of China disabled sports organizations, is the China Handicapped Federation and the State General Administration of sport. China Disabled Persons Federation (China Disabled Persons Federation), English abbreviation is "CDPF", is 1988 according to the Chinese disabled welfare fund (established in 1953) and Chinese visual auditory association of people with disabilities (established 1983) to set up. China Disabled Persons Federation, according to the law on the protection of disabled persons, representing people with common interests, rights of persons with disabilities, safeguarding the unity of education, social organizations established the cause of the disabled. The State Sports General Administration of sports, as China has overall responsibility for the administrative organs, is to promote and implement the cause of disabled sports. Especially in promoting lifelong sports is an important part of the cause of disabled sports at the same time, promote and improve the level of competitive sports, the international domestic disabled sports organizations management and international exchanges.

ii. China Disabled Sports Organizations

Chinese Sports Association for the disabled [8](1983), China Sports Associa-

[6]Cause of the China Disabled Persons "Twelfth Five-Year Plan" development compendium, http://www.cdpf.org.cn/index/2011-06/09/content_30340867.htm[EB/OL].2012-08-28

[7]China disabled persons work "925 " executive plan, http://www.zgmx.org.cn/before/NewsDefault-47515.html [EB/OL].2012-08-28

[8]Chinese Sports Association for the disabled, http:\/\/baike.baidu.com\/view\/1099314.htm[EB\/OL].2012-8-29

tion for the deaf[9] (1986) and Chinese are stupid people??? Sports Association[10] (1985)

Since its establishment, the China Disabled Sports Association joined the international disabled person sports organization (ISOD), cerebral palsy International Sports Association (CP-ISRA), the International Blind Sports Association (IBSA), the international Wheelchair Sports Association (ISMWSF), the Far East and South Pacific Games Federation for the disabled (FFSPIC) and other international sports organizations.

iii. China Disabled Sports Management Center[11]

In order to strengthen the Chinese disabled sports facilities, the Chinese Paralympics sports management center officially opened in 2004. The center was set up as the new China Disabled Sports Training center.

3. China disabled sports related law and policy

Since the founding of new China, the party and the country has attached great importance to the needs of disabled in this special group, to enable the disabled sports gradually moving towards standardization, institutionalization and legalization. The relevant departments has formulated and promulgated a series of laws and regulations related to Secure Disabled Sports and healthy, orderly development. As of1982, 1) the constitution of China, Article forty-fifth of the state and society “, blind, deaf, dumb and other citizens with disabilities work, life and education “ the provisions of.2) In 1991, the state promulgated the “ law of the people’s Republic of China on the protection of Disabled Persons Act “ stipulates: “the state guaranteeing disabled people ‘s right to education, education of the disabled, the combination of popularity and improve, to popularize the focused approach. Organize and support people with disabilities to carry out mass cultural, sports, entertainment, organized a special art performances and special sports meets, participate in major international competitions and exchanges. “ In particular, the same law forty-first, persons with disabilities to participate in sports and entertainment equal rights, the provisions of article forty-second, the government and relevant agencies to actively create a good environment for the disabled, forty-third, perfecting the sports facilities of the law. According to the

[9]Chinese Sports Association of the deaf, http://baike.baidu.com/view/716813.htm[EB/OL].2012-8-29

[10]Stupid Chinese Sports Association, http://baike.baidu.com/view/1099321.htm[EB\/OL].012-8-29

[11]China Disabled Sports Management Center, http://www.caspd.org.cn[EB/OL].2012-8-29

laws, government, society to encourage, support people with disabilities to participate in various special sports activities, it marks the cause for the disabled in China has entered a new historical stage. 3) China "sports law", the sixteenth stipulation: "the whole society should be concerned about, support for the elderly, disabled people to participate in physical activities. People's governments at various levels shall take measures, for the elderly, disabled people to participate in physical activities to facilitate". 4) other related laws, 4): In the 1995 "National Fitness Program"[12] in regulation, hope more people with disabilities to participate in various sports, improve the physical and social activity ability, training of disabled sports instructor, improved disabled sports years force.in 2000, " 2001~2010 sports reform and development compendium"[13], the next ten years of sports development is elaborated and provisions. The eleventh article: "pay close attention to old people, disabled sports. The elderly, the disabled is a vulnerable groups, various sports organizations should participate in sports activities for their help. The new stadium will take care of the elderly, the disabled features. Sports organization for the elderly, disabled people to participate in physical activities to provide scientific guidance". the to development of the cause of disabled sports, according to "the cause of disabled people in China" eleven five "development compendium", made 2006 "disabled sports work" eleven five "implementation plan ".implementation plan", the 2008 "promote disabled education industry views"[14], "further strengthen the disabled physical working opinion"[15] and 2009 "national fitness regulations"[16] In the set, in order to disabled sports must in international communication, sports venues to support policy, By 2010 China Disabled Persons Federation, the State Sport General Administration, Ministry of education and the Ministry of civil affairs put forward "new period impaired mass sports work strengthening the opinion", in the opinion of the disabled, sports facilities, sports equipment and so must provide convenient, 2011.) "National Fitness Program" (2011~2015). "[17] Promote and

[12]Outline of the nationwide body-building plan, http://baike.baidu.com/view/139868.htm[EB/OL].2012,08-28

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[16]National Fitness regulations, http://www.gov.cn/zwgk/2009-09/06/content_1410533.htm[EB/OL].2012,08-28

[17]"National Fitness Program" (2011~2015), http://wenku.baidu.com/view/4204433083c4bb4cf7ecd1ab.html[EB/OL].2012,08-28

strengthen the work of disabled sports rules. The cause of disabled people in China, In 2011 the State Council". According to the cause of the Chinese people during the Twelfth Five-Year Development Program", made "Twelfth Five-Year Plan Work of sports for the disabled". For the next 5 years the cause of disabled sports developed a clear goal.

4. Disabled sports policy measures

i. Chinese sports for the disabled and handicapped sports facilities management center

China Disabled Sports Management Training Center is the China Federation of the disabled under the public welfare institutions. The "center" covers an area of about 230000 8235 square meters, an construction area of 60000 4 square meters, containing the athletes dormitory, sports science research building, integrated training field, swimming pool, blind person gateball court, public and medical facilities. In addition, there is the Qinghai multilateral China Disabled Sports Training Center, Jilin Province China Disabled table tennis training center, Heilongjiang Yabuli ski field (Chinese Paralympics Winter Sports Training Center) and 20 other specific disabled sports training centers.

In order to train professional talents in the guidance of disabled sports, the Physical Education College of Beijing Sport University, Shenyang Sport University, Tianjin University of Sport, Shanghai Institute of Physical Education and other institutions opened "sports for the disabled" and "sports health care and rehabilitation" professional curriculums.

ii. Financial measures

In recent years, the Chinese government and society, along with the rapidly economic development, the disabled sports budget is in unceasing increase. According to the May 13, 2005 promulgated "China disabled career 5 years plan special fund management method"[18], the cause of disabled sports in the budget, is given priority within local government, central government. However, according to the national sports president, in the 2008 Beijing Paralympics Games, the central financial capital invested nearly 600 000000 Yuan.

The major sources of China disabled sports funding is: *the government* (central and local), the Federation of the disabled and Sports Association for the disabled, the sports lottery and public welfare funds, enterprises, companies and individuals.

[18]The cause of disabled people in China 5 years plan special fund management method, http: www.bjcz.gov.cn\/zwxx\/czky\/bjcznj\/2004nj\/dwbf\/t20050513_245648.htm[EB\/OL].2012-08-8

iii. Other measures

The National Fitness Day

To commemorate the 2008 Beijing Olympic Games success, and promoting national fitness, in 2009, the Central Committee issued the "national fitness regulations", "Regulations" provisions, on August 8th each year as the "National Fitness Day", and for the disabled sports activities, to protect and provide service provision.

The cause of disabled sports

For the development of the cause of disabled sports, made in 2006, the "disabled sports" eleven five "implementation plan", and the "eleven five" period, China has actively participated in the International Paralympic Games, Paralympic Games held in Asia and various domestic types of disabled sports games. China has achieved excellent results in the Paralympic Games and international competitions. And has also established handicapped sports management mechanisms, improved the formulation of the disabled sports system, selecting and training groups of outstanding athletes, and training of international and domestic excellent referees in the provinces.

Adhere to the protection of the disabled athletes scientific training, scientific research and medical supervision system has been developed. Major sports events on all levels are given large capital investments by the government and various groups.

In 2011, according to the " disabled sports work" 925 "program", and the "the disabled sports work" 925 "implementation plan", are "plans" for the next 5 years to develop the 2 target and 4 main policy measures. Its mission is to strengthen the disabled mass sports work, promote for the society to improve the rehabilitation of the disabled and to improve the level of sports for the disabled and handicapped athletics in international competitions, to achieve excellent results. Its policy measure is: public sports facilities are open for free to the disabled, to provide convenient sports and fitness for the disabled, to carry out the "National Fitness Program (2011-2015 year)", and the "disabled fitness project". The National Games for the disabled, the Paralympic Games, deaf games and other sports activities, policies and measures. The reform of the system of sports for the disabled, disabled sports athletes grading method implementation, the retired athletes' social security, education, employment etc..

Conclusion

China Disabled Sports has after decades of development, the initial formation of the constitution as the basis, with dozens of related laws as the basis to the

"law on the protection of disabled persons". The core is to administrative regulations and local regulations to place and assist the disabled people's preferential policies for the disabled sports supplement, to perfect the system of policies and regulations, and to form the characteristics of disabled sports development.

However, the author thinks, although our country has "the cause of disabled sports" 925 "implementation plan", the future disabled person athlete retirement social security, education, employment and disabled sports developed policy targets, the implementation of measures aspect, or highlights of the disabled competitive sports for disabled people and sports development is relatively general, not specific. In Japan, there has been attached great importance to mass sports work, especially the disabled mass sports, whether sports policy making and policy implementation process execution, the corresponding facilities are more perfected. In 2010, when promulgating the "sports strategy establishing a country", and in 2011, the new "sports law" and "sports basic plan issued in 2012", on the disabled sports, are relevant to the law and policy measures to do specific detailed rules. In order to promote the development of mass sports for the disabled, so that each disabled person in the region can enjoy sports and rehabilitation opportunities, Japan Sports Association for the disabled has developed training of primary, intermediate and advanced sports for instructors and coaches, the sports rehabilitation medical system, for the implementation of the policy of formulate specific implementation measures and other aspects worthy of our reference. The future for the Japanese disabled sports and Chinese disabled sports projects will be continuing to do further study.

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PROFOUND INTERPRETATION OF CHINESE COLLEGE PHYSICAL EDUCATION POLICY AND REGULATION CONSTRUCTION

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Abstract: *This paper aimed to have a historical review and profound interpretation on the regulation of Chinese college physical education. Research methods the author used include documentation review, expert interview, logical analysis, etc. Through these studies, the author tries to proffer some recommendations for the construction of the Chinese college physical education, such as, the legal system of the education should be established, teachers and students' legal awareness need to be enhanced, physical educational legislation should be strengthened, and supervision system need to be set up for the better law enforcement. This research did with the purpose of promoting the college physical educational reformation, perfecting the sports laws system, and providing beneficial reference for the construction of laws and regulations in our country.*

1. Purpose of the Research

Looking back to the development of the Chinese college sports education in the past five decades, laws and regulations was the basic instruction of the reformation and development of the college sports education in the different time and aspect. The law and regulations, put the country's educational policy into effect, protect students' rights to do physical exercise, have a profound function in cultivate the whole-developed college students in the physical aspect. With the changing of the times, the situation and task of physical education varied a lot. In order to have a better carrying out of the "Healthy First" guiding ideology of the college physical education and the diversified prospect, the college needs to strengthen the executive ability and improve teaching method by means of regulation.

From this reason, analysis and interpretation of the college sports regulation in different times are the ways to find out problems and proffer the countermeasures, which becomes the reference foundation for the improvement of the sports law and regulations.

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2. Methodology

2.1. Documentation Review

The author reviewed numerous sports administration law, school sports rules, college sports regulations and related materials from CNKI and many other data in the past fifty years in China.

2.2. Expert Interview

The author interviewed Professor Sun Jinghai, famous physical education expert in China, during academic meeting, and mailed with many other specialists in the field of law and sports. Furthermore, blog plays an important role in communication with famous professors in law of physical culture and sports, such as Shan Xu, Dong Xiaolong, and other authorities, to exchanging ideas in the problem-solving process.

2.3. Logical Analysis

Induction and logical analysis are used to collect and systemize the data.

3. Discussions

3.1. The Definition of Sports Law and Regulation in China

Government and its department control administration routine by means of law and regulations, which is the foundation of law-based administration. Despite the different scope of application and function, Sports laws and regulations, the component of country's law system, should be the behavioral norms, which is approved by the state and put into implementation with force. China sports laws and regulations include the Constitution articles related to sports, China Physical Culture and Sports Law, Sports administrative laws and regulations, the state council department regulations, and local rules.

The college physical education regulation that is formulated by sports education department and approved by the government, to ensure the physical education in schools of all levels, to guarantee each student's right to enjoy the physical exercise.

3.2. The Historical Development of Chinese College Physical Education Laws and Regulations

To understanding the particularity of the college physical education, history retrospection is the essential way.

3.2.1. Six Historical Periods:

3.2.1.1. The Embryonic Stage in the Late Qing Dynasty

In the modern history of China, *the Articles of School* promulgated in the 1903(the late Qing Dynasty), is the first official statutory school document that executed in the whole country. The document ordained and established that the gymnastics class became compulsory school course, which laid the foundation for the physical education. The task of the time was to "*Save the nation from subjugation and ensure its survival*."

3.2.1.2 The Primary Stage during 1949-1956

After the founding of the new China, the party and government attach great importance to physical education. For instance, the 1949 *Common Program* stipulates that "To advocate national sports". In 1952, Chairman Mao's inscription goes like that "To promote physical culture and sports, to improve the people's physical fitness."In that period, the recreational sports launch an extensive exercise campaign for the general public, and college physical education attached great importance which could be found from following official documents: The Instructions for the *Industrial Colleges to Work Out Teaching Plans* issued by the ministry of education in 1952; *The Instructions for Strengthening Leadership to Further Research on Prepare High School Sports* issued in1956; and *The Sports Teaching Syllabus for Elementary, Middle schools, and Normal Schools* issued in 1956. At that time China's physical education used Soviet experience for reference. The sports regulation took "*Labor and Defense System*" for the foundation and the "*Three Basic*" for teaching instruction. Following the Statutes and regulations at that time:

List 1 school sports regulations from 1949-1956

Time	Issued department	Content of the regulation
1951	Administration Council of the Central People's Government	The Decision for Improving Students' Physical Condition
1951	The national sports association	The Circular to Popularize the Broadcast Gymnastics
1952	Ministry of Education	The Instructions for the Industrial Colleges to Work Out Teaching Plans

1953	The Indication of the Ministries and Commissions	Joint Indication for Carry Out Physical Exercise at School Correctly and Avoid Injurious Accident
1954	Indication of the Student Federal in Communist Youth League	Joint Indication for Developing National Sports Activities in College
1954	The MPCSC	The Provisional Regulation of Labor and Defense System
1954	Ministries and Commissions	Joint Indication to Popularize the Broadcast Gymnastics at School
1955	Ministries and Commissions	Joint Indication to Popularize the Broadcast Gymnastics among Children
1955	National Sports Commission	Joint Circular for Developing National Defence Sports Activities among Adolescent
1956	Ministry of Education	The Instructions for Strengthening Leadership to Further Research on Prepare High School Sports
1956	Ministry of Education	Indication for Improving works of Elementary School
1956	Ministry of Education	Indication of Physical Education at Middle School and Normal School
1956	Ministry of Education	Physical Teaching Syllabus of All kinds of School

3.2.1.3 The Creating Stage from 1957-1965

The feature of that time was consolidating national defense and enhanced physique, meanwhile the new framework of school physical education institution was formulated gradually.

List 2 school sports regulations from 1957-1965

Time	Issued department	Content of the regulation
1958	State Council & National Sports Commission	The Provisional Regulation of Labor and Defense System

1960	National Sports Commission & Ministry of Education & Communist Youth League	Joint Notification for Developing Swimming Activities among Adolescent
1960	National Sports Commission & Ministry of Education & Communist Youth League	Joint Notification for Developing Athleticism among Adolescent
1960	National Sports Commission & Ministry of Education & Communist Youth League	Joint Notification for Developing Football Activities among Boys
1963	State Council to National Sports Commission	Report of National Fitness Forum
1964	Ministries and Commissions	Report of Students' Physical Condition and School Health Work
1960	Department directly under Ministry of Education	The Interim Work Regulations in College
1960	Ministry of Education	The Interim Work Regulations in Elementary School
1960	Ministry of Education	The Interim Work Regulations in Middle School
1961	Ministry of Education	Physical Teaching Syllabus of Elementary & Middle School

From above on, the number of regulations related to elementary & middle school much more than college. These regulations play a positive role in promoting teaching process, accelerating student's physical health, and motivating national sports activities. Especially the *Interim Work Regulations in College* promulgated by the *Ministry of Education* in 1960 normalized the college physical education. The regulations promulgated in this stage cement the foundation for the education law of China.

In general, the overwhelming majority of codes in this stage were regulations limited to class and competition while insufficient in comprehensive laws and statutes.

3.2.1.4 The Destruction and Disordered Stage from 1966-1976

During the Great Cultural Revolution, Chinese college physical education was destructed and disordered influence by the political situation.

3.2.1.5 The Enriching Stage from 1977-1989

"Yangzhou Meeting", convened by the Ministry of Education in 1979, marked the recovery of China's school physical regulations and organizations, put forward a whole set of measure to reform college sports to pursue a road of legalization, standardization and scientific. In 1979, the Ministry of Education & National Sports Commission approved following regulations: *Provisional Regulation of Higher School Sports Work, National Student Sports Competition System, Teaching Syllabus of Higher School Physical Education*, and the new emended *National Physical Exercise Standard* in 1982. These regulations are the beginning of the college sports law and it accelerated the enthusiasm of the undergraduate students.

3.2.1.6 All-round Development Stage since 1990

After the 1990, with the reformation of the college sports curriculum, China's physical education regulation develops into a systematic and standardization period. The government drafted, improved, promulgated a serious of basic educational regulations and rules to provide strong guarantee for the college physical education reformation.

List 3 school sports regulations from 1990- 2011

Time	Issued department	Content of the regulation
1990	State Education Commission	The Eligibility Criteria of Undergraduate Sports Activities
1990	State Education Commission	The Implementation of Eligibility Criteria of Undergraduate Sports Activities
1990	State Education Commission	The Working Regulation of Physical Education
1990	State Education Commission	The Working Regulation of Health

1992	Indication of the Student Federal in Communist Youth League	The Outline of Physical Education Curriculum Guide for Higher School
1995	Ministry of Education	Law of the People's Republic of China on Physical Culture and Sports
1995	Standing Commitee of the National People's Congress	National Fitness Program'
2002	State Council	New Outline of Physical Education Curriculum Guide for Higher School
2002	Ministry of Education	Students' Injury Treatment Method
2003	Ministry of Education	Several Opinions on School Ruled by Law
2005	Ministry of Education	Opinions on Further Strengthening and Improving University High Level Sports Teams
2006	Ministry of Education & State Sport General Administration	The Circular on Developing Students Sunny Sports All-over the Country
2007	Ministry of Education & State Sport General Administration & State Council	Opinions on Further Strengthening Adolescent's Sports Activities and Improving Their Physique
2009	State Council	National Fitness Regulations
2011	Ministry of Education & State Sport General Administration	The Administrative Measures of Middle Sports School

In this period, the National People's Congress promulgated *Law of the People's Republic of China on Physical Culture and Sports*, the highest code in physical education, which made the sports law system entered a new highly developing stage.

3.2.2. Analysis from the Dimension of the Laws and Regulations

According to incomplete statistics, the total number of the sports laws and regulations promulgated by the NPC and its standing committee, State Council, Ministry of Education, and State Sport General Administration count to 268 during the year from 1979-2008.

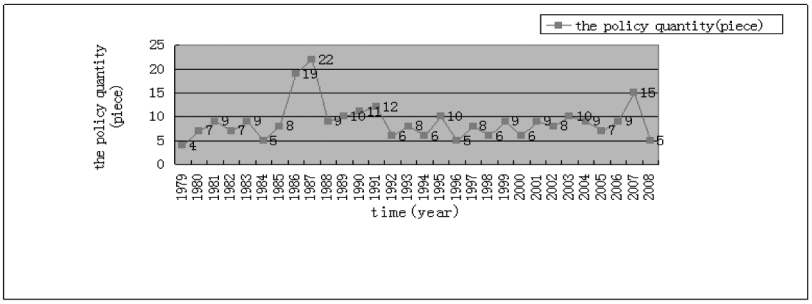


Chart 1 *the number of school sports regulations from 1979-2008*

There are three characteristics shows in the above curve chart:

Firstly, new policy and regulations issued for enforcement every year, which shows government paid great attention to physical education. Secondly, proceeding-phase characteristics are different in each stage. Turbulent period from 1979-1984; Growth in the number from 1986-1987; Minor fluctuations from 1993-2000, and the largest number in the year 1995; the second fluctuation happened in 1997 because of the *Central Committee Seven Document*, which related to the physical education. Thirdly, the development of regulations is generally stable and continuous. The number of regulation in 1986 count to 19, in 1987 is 22, and in 2007 is 15, and these documents vary not much.

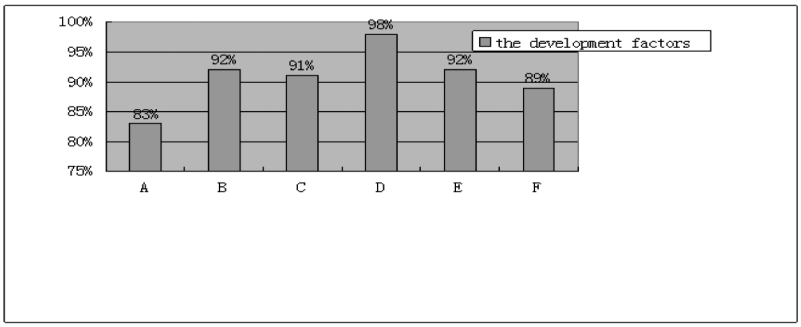
3.3 Thinking from Clarifying the Process of Physical Educational Laws and Regulations

After analyzing the progress in each period, the author has following considerations:

3.3.1. Existential Issues

There are no denial that China's physical educational made great progress, while shows little maladjustment to the requirement of modern sports laws and regulations. According to investigations, there are following issues: The professional skills of teachers need to be improved; the sports funds are insufficient;

the sports facilities are restricted; and the governance is lag behind in some way. Due to the lack of the authentic, stability, and mandatory laws to ensure the college physical education, the above issues existed for a long time rather than newly-emerged.



A-*educational regulation B-sports teacher's specialty C-sports facility D-fund lackness E-administration F-rewards and* punishment system

Chart 2 *the limitation elements*

3.3.1.1. The legislation cannot adapt to the requirements of college physical educational reformation and evolution.

Despite of the relatively small progress, the legislation of the physical education is the first step to ruled school by law, while which is lagged behind the newly-developed educational condition. The legislation, up to now, the NPC formulated one and the only code, *the Law of the People's Republic of China on Physical Culture and Sports*, which instruct main domains of the sports but inadequate. Analyzing from the joint regulation promulgated by the National Sports Commission and State Education Commission the author find that the sports legislation level is relatively lower, the content can't keep pace with the times, and cause serious influence to the implementation. Due to the limitation of the sports law professional, the corresponding research and study lag behind very much. Looking from the sphere of application, the existed college sports laws mainly adjust to the interior relationship rather than socialization.

The law protecting undergraduate's right of sports activities lack of binding force at the present. What we really need now is the laws and regulations embody college sports reformation ideology in extracurricular training and achievement in socialization and marketing of the sport industry and athleticism. It is necessary to perfect the systematic legislation of *Sports Law* so that the establishment of sports legal system could be strengthened. The following legislation work

should pay attention to the conflict and overlap among the new and old rules, the incongruous in the sports law system.

3.3.1.2. Sports Law Enforcement

There are following problems existed in the enforcement of the college sports laws and regulation: Firstly, legal consciousness is rather worse, which give great difficulty to the implementation. Secondly, some department of the government didn't have strong awareness of law enforcement, and even worse, irregularity themselves. For instance, sports educational funds was embezzled, the sports facilities was misappropriated. Thirdly, imperfection of the law-executor caused slack law enforcement, simplex technique, and lack of humanistic solicitude. What's more, the relevant responsible punishment clause is insufficient.

3.3.1.3. Judicial Supervision

Traditionally, college sports judiciary in China is relatively defective. School governance is not a powerfully way of supervision. So, a complete judicial supervision system, which contains supervise in law-enforcing process and censorship, need to be established. On the one side, school governance institution cannot get physical educational laws and regulations implemented on the ground, while a safeguard mechanism really needed nowadays is absent in protective measures and legal remedy. On the other side, community supervision is an indispensable part of the mechanism of the authority supervision and a reliable guarantee to the real enforcement of the laws. Furthermore, legal relief system of the college physical education has not well-established yet. Legal relief is a kind of means for individual to maintain their rights from infringement, and impact to the effect of the law enforcement. At present, when the college student's physical educational rights suffered without legal remedy, school escape from the legal responsibilities sometimes.

4. Suggestions

Sports laws and regulations should go ahead of the reality to provide a scientific and stable legal circumstance for the improving of physical educational reformation. For this reason, the author put forward the following countermeasures based on marketing economics and inherent requirement of modern physical education.

4.1. Further Propaganda of the College Sports Laws and Regulations

Education administrative department and school administrators should strengthen the legal awareness education to make teachers and students safeguard their legitimate rights and interests by law.

4.2. The Physical Education should be Ruled by Law

Fundamentally, supervising school affairs according to laws is the premise of reformation. Every aspect of the school works, especially physical education, should adhere to the law and regulation, this is the realization of law-govern at school.

4.3. The School Sports Legislation Work should be Accelerated

Legislation is blank in certain major areas. So, the first and foremost thing is to fill the gaps in legislation, especially the investigation and research to the issues of misappropriating the athletic facility, encroaching on student's sports time, and measures to handling sports emergency. Second, the school sports legislation system should be set up. Last but not the least, College Sports Law should be enacted as soon as possible to give the college physical education and competitive sports have legal support. This law would make the college education and sports law coordinated, hierarchical ordered, and systematic.

4.4. Supporting Regulations should be Formulated Urgently to Ensure Effective Enforcement of Laws

The discordance in college sports management system made it harder to form the joint effort in reality. Hence, supporting regulations should be formulated urgently to perfect basic laws, constructing legal system to realize effective enforcement of laws.

4.5. To Cultivate the Sports Law Professional Talents

The college physical education needs teachers who are specialized in legal awareness and sports training. But in reality, specialized managers and teachers are insufficient in lots of school. We are badly in need of specialized personnel in our legal system for culture. Hence, the colleges and relevant training institutions should take the opportunity to develop corresponding professional talents who knows sports and laws as well.

4.6. Physical Culture Construction Work should be Put on the Agenda

At present, China's school sports haven't formed a scientific system for laws and regulations in culture. Hence, there exists the phenomenon "The law is not obeyed and the law enforcement is not strict". The popularization and awareness of cultural laws and regulations are to be strengthened. Under such circumstances, teacher and students should carry out sports law and regulations study. The purpose is to help them know, abide by, and accept the law and to form a civilized atmosphere.

Conclusion

Understanding the particularity of nowadays college physical educational laws and regulations based on the study of its historical development. The uncoordinated administration should abolish, and future progress needs to exert legal potential in comprehensive regulation as well as daily management.

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GOVERNANCE IN SPORTS GOVERNING BODIES

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Introduction

Many SGBs and IFs have not adopted effective approaches to properly deal with the issue of corruption. Despite the importance of sport governance, it is an issue that has not received enough attention from academics or the public. Furthermore, existing sports governance literature tends to focus on specific organizations, and not common issues that exist across all SGBs and IFs.[1] In this section, the term corruption refers to corruption of the organization, or management corruption, as opposed to competition corruption which includes match-fixing and doping.[2] Like competition corruption, management corruption poses a serious threat to the integrity of sport since it may endanger the most essential elements of sport, including: fair play, ethics, and trust in the rules of both the game and organization.[3] There are different types of corruption that can occur within a SGB or IF. For instance, there is match-fixing, organized crime, sports governance, construction procurement, and media rights. The focus here will be on the relationship between sports governance (management corruption) and match-fixing (competition corruption) and how the former has an effect on the latter.

i. Difficulty of Governance in Sport

Sports governance can be defined as "the exercise of power and authority in sport organizations, including policy making, to determine the organizational mission, membership, eligibility, and regulatory power, within the organization's scope."[4] SGBs and IFs, especially the largest ones, exist in a very unique governance environment. While they often receive public funding, they are not subject to stringent regulation or oversight. This differs from other organizations, such as governments, corporations, and police forces, which are all regulated, monitored, and investigated to some degree. Despite public funds being given

[*]M thanks to my research assistant Cole Vegso JD candidate 2013 Western Law.

[1]Global Sports Organizations and their Governance (72, 75)

[2]Corruption in International Sport (no specific reference)

[3]TI – Corruption and Sport Working Paper (1-2)

[4]Issue of Governance in Sport Organizations (1-2)

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

to SGBs and IFs, there is often minimal accountability for these funds. They are also not regulated by a professional association, as is in the case law, medicine, and other professions. This gray area, which is partly caused by the structure in which SGBs and IFs exist, contributes to the low levels of accountability, transparency, and integrity of that is generally found in these organizations.[5] This results in a governance structure that is inevitably weak, which facilities management corruption.[6]

The most commercially successful SGBs and IFs, such as the IOC and FIFA, find themselves in a very unique position that further reduces their need to practice good governance. Unlike other non-government organizations, they are not dependent on government or their member associations below them for funding since the sport they manage produces significant revenues. This greatly reduces their dependency, which encourages good governance, and thus increases their autonomy. This is very different from non-sport non-government organizations (NGOs) that are dependent on either government or private actors for funding. These NGOs inevitably must practice good governance or else their financing could be threatened. A lack of good governance also prevails because there is no ownership of SGBs and IFs. Since there is no clear beneficiary, such as shareholders, there is not the same emphasis on accountability and due diligence in order to maximize efficiencies and profits.[7] History has shown that demands for enhanced sports governance often comes from academics, journalists, and the public; in other words, actors who do not have a direct relationship with the SGB or IF. Therefore, SGBs and IFs must enact good governance practices on their own as they often cannot be compelled to do so – change must come internally.

ii. Practices to Ensure a High Level of Governance

The use of a code of ethics is an effective tool to promote an ethical culture and outlines rules related to issues such as conflicts of interest, gifting and hospitality procedures, and betting by members of the sport. The IAAF, FIFA and ICC are just a few examples of the many international federations who have developed such codes.[8]

Conflicts of interest, both personal and institutional, are a topic that all ethics

[5]TI – Corruption and Sport Working Paper (6); Investigating Corruption in Sport (391)

[6]TI – Corruption and Sport Working Paper (3)

[7]Global Sports Organizations and their Governance (79-80)

[8]IAAF Code of Ethics (2012), International Cricket Council, ICC Code of Ethics; FIFA, *FIFA Code of Ethics: 2009 edition*,

codes need to address. A personal conflict of interest occurs when an Official[9] has a decision-making role within a sports federation but also has personal involvement with sponsors, suppliers, contractors, venues, broadcasters or customers for example. If acting in a material capacity with one of these business entities then it is questionable whether an unbiased decision can be made as an Official, particularly when the Official involved will personally benefit in the outcome. Conflicts should be declared and recorded in a registry, where they can be assessed as to whether that particular official should be removed from making a decision on that matter. An institutional conflict of interest can arise when a SGB Official is also a representative member of another institution. Such is the case in professional cricket, where ICC Officials are nominated representatives apart of the national sport authority. The Cricket Review[10] recommended that the fiduciary duty to the ICC must be firmly established as the primary interest when acting in an Official role. The ICC Officials' duty to represent their country's interests should be acknowledged, but only as a secondary role. Once secondary interests are provided, then they can be treated similarly to personal interests in assessing the conflict's relevance.

Gifting and hospitality has long been part of sport entertaining and hosting international federation officials. A code of ethics gives the opportunity to outline the limits by avoiding excess. So far many codes have included gifting policies (IAAF, FIFA, ICC) but there are some that have yet to do so (let alone make a code (FINA)). An issue with most SGB gifting provisions is that the wording has led to uncertainty as to what treatment or gifts an Official can accept. The IOC Code of Ethics asks for the use of the local cultural standard for gift limits.[11]The IOC requests that all participating parties of the Olympic movement to abide by or model their own SGB code of ethics after the IOC's.[12] The attempted effect is that they set the standard and most sports bodies do follow to a similar level. The IAAF and FIFA use a similar standard of disclosure as any gift that is above the average cultural standard of the host country. Full disclosure is ultimately the most ethical method of acceptance. Such transparency of gifts will allow an ethics officer to determine what is excess and will be able to control gifting appropriately.

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[9]The definition of "Officials" includes those who are in a position of trust within the SGB, such as the members of an SGB Council, Committees and Commissions, and those who are otherwise entitled to act for, or on behalf of the SGB, such as SGB officials and staff, as well as SGB consultants, agents, etc when acting for or on behalf of the SGB. (Based on definition of Official as it applies in the IAAF Code of Ethics)

[10]PricewaterhouseCoopers LLP, Governance Review, "An Independent Governance Review of the International Cricket Council" (1 February 2012) at 17. (*Cricket Review*)

[11]International Olympic Committee, *IOC Code of Ethics*, Lausanne: IOC, 2012, at 129.

[12]*Ibid*, at 118.

Gifting and hospitality in sport is a problem in politics as well. The Canadian Federal Accountability Act ("FAA") effectively responded to these problems in 2006.[13] Clause 39 of the FAA put a clear limit for non-disclosure of any single or series of gifts at a total of $500. Further the FAA put clear penalties to anyone not reporting gifts over the limit. If the offense is committed intentionally it may result in a fine of up to $5000 and a maximum jail sentence of five years. Such harsh terms are an effective way of combating the problem and would eliminate any clarity concerns or penalties to be delivered. These concepts of accountability and transparency parallel what the Cricket Review recommended for gift and hospitality rules. Firstly, they advised a log of all gifts that lie over a de-minimus standard. The FAA is a good example of a model to follow as it sets out $500 maximums. The Cricket Review also suggests clear limit and enforcements of infractions. The FAA clearly outlines how to report a gift above the limit, as well as what will happen to those who commit such an offense.

The problem with enactment of provisions relating to gifting and hospitality is that Officials of SGBs enjoy these luxuries as part of their role. Often positions on SGB committees are extracurricular volunteer positions, even though the expenses covered while travelling are so lavish that it can outweigh their regular job's salary over the course of a year. This is a large obstacle in promoting a transparency regime in sport similar to that of the FAA. Even if Officials were paid a salary and thus did not feel entitled to the perks of their positions, there is still a fundamental difference between accountability of government and accountability in sport. With government, the taxpayer can demand increased accountability and the political party that represents this will likely get elected. For instance, the FAA was enacted after a very serious corruption scandal that involved the governing federal Liberal Party of Canada. In large SGBs like the IOC or FIFA, there are no direct stakeholders who can demand increased accountability. Furthermore, the media pays much more attention to the conduct of government because of its sheer size and the influence it has in people's lives. The same cannot be said for SGBs and IFs. As the 2002 Salt Lake City Olympic scandal demonstrated, pressure for increased accountability will likely have to come from those outside the organization.

Restricting betting by anyone associated with sports bodies helps eliminate corruption stemming from within the sport itself. Limiting betting by those within the sport must not only extend to Officials but be a provision that also incorporates any person that is a member of a team as well. It needs to be preached from the beginning of an ethical education to avoid any inclination to become involved in match fixing activities in the future. It is a fundamental

[13]S.C. 2006. c. 9

rule of prevention as those close to the sport have easy access to Perpetrators or Facilitators. It is surprising that the IOC's Code of Ethics was only amended in 2006 to restrict Olympic Games participants from betting on Olympic events.[14]

Once the appropriate provisions are clarified in a code of ethics, it must actually be used. For this to happen an ethical code must be more than just words. Three keys to this success are the creation of an ethics officer or commission to enforce the code, clear penalty procedures and spreading awareness to all members of the sport. If these concepts are adopted ethics will become a part of their culture engrained in the sport's DNA.

iii. Governance at FIFA

FIFA is one of the most commercially successful IFs due to its ability to generate enormous annual revenues. Member federations, represented by officials, determine its mandate. FIFA must answer to the over 200 national football associations that these officials represent. These officials are partly dependant on FIFA for funding. This greatly weakens accountability as those who are supposed to govern FIFA are also dependant on it. This suggests that improved governance is unlikely to come from within FIFA.[15]

FIFA, which operates under Swiss charitable association rules, is subject to weak disclosure laws relating to financing and the transfer of money.[16] When money is distributed with minimal oversight it is not surprising that FIFA has experienced numerous scandals of late that relate to financing and management corruption. These include a bribery scandal linked to the 2018 and 2022 World Cup hosting cities,[17] the ISL marketing agency bribery scandal,[18] and the 2011 FIFA presidential election scandal.[19] Generally, FIFA needs to ensure that its code of ethics represents the highest standard of integrity, meaning that it takes a zero-tolerance approach to bribery of any nature. Similarly, FIFA must ensure that its code of ethics applies to its employees, FIFA officials, including those who do not receive a salary but receive luxuries such as travel expenses.[20]

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[14]Mike Morgan and Stacy Shevill, "Tackling sporting fraud: part four" *World Sports Law Report* 10:5 (May 2012). (*Morgan IV*)

[15]TI – Governance at FIFA (2)

[16]Investigating Corruption in Corporate Sport (395)

[17]http://www.worldfootballinsider.com/Story.aspx?id=35304

[18]http://espn.go.com/sports/soccer/story/_/id/8159595/sepp-blatter-defends-role-fifa-kickbacks-scandal

[19]http://espn.go.com/sports/soccer/news/_/id/6602952/mohamed-bin-hammam-quits-fifa-presidential-election-ethics-hearing

[20]TI- Governance at FIFA (4, 5,

iv. The Relationship Between Organizational Corruption and Competition Corruption

The underlying similarity between management corruption and competition corruption is that in either case the individual is using their position within the organization to benefit themselves. While the methods of an executive and player will differ, their intention is to maximize their wealth through violation of established codes of ethics and conduct.[21] This suggests that corruption within a SGB or IF cannot be separated and viewed as separate and distinct problems. Instead, as will be argued below, management and competition corruption are highly interrelated problems that both need to be addressed in order to reduce the occurrence of each.

From a purely administrative perspective if a SGB or IF experiences weak governance it may be very difficult for that organization to implement competition anti-corruption rules and codes. This could be caused by the organizations ineptness, or by the inability to hold the organization accountable due to the lack of transparency. Furthermore, if management of a SGB or IF were against advancing competition anti-corruption rules, the member associations would have a difficult time forcing the issue as they are often reliant on the organization for funding. This is especially true of the most powerful SGBs and IFs. There may also be a fear among management and officials that progressive anti-corruption rules against players and referees will eventually result in them being pressured by the public and media to act with far more accountability and transparency.

The other connection relates to the integrity of the SGB or IF. Good governance of an organization will have a top-down impact on anti-corruption efforts at the bottom of the organization. This is because players, referees, team officials, and other who are involved of the competition of the sport will see that the fight against corruption is being addressed seriously.[22] This top-down impact has two benefits. First, it helps establish an anti-corruption culture within the organization since all aspects of the organization are held to the same high ethical standards. Second, it enhances the integrity of the organization in the eyes of the public since it demonstrates that the organization is seriously addressing the issue of corruption at all levels. Organizations that only advance anti-corruption rules at the competition level run the risk of being viewed as hypocritical and not serious about corruption at any level of their organization. This is especially true when there is a management corruption scandal. Furthermore, if an organization cannot address corruption at the management level there is real doubt as to whether it has the capacity and competence to do so at the competition level.

[21]TI – Corruption and Sport Working Paper (2)

[22]TI – Governance at FIFA (6)

Conclusion

SGBs and IFs operate in a unique gray area of governance which generally allows them to not be overly accountable or transparent. This is especially true of the organizations that experience the most commercial success, such as the IOC and FIFA. There is also an interesting dynamic where the member officials of SGBs and IFs who are suppose to hold these organizations accountable are partly financed by them. This would seem to create an inherent conflict of interest and make the member officials dependent on the SGB or IF. Because of this efforts to enhance governance of SGBs and IFs will likely need to come from the public and the media. Moving forward, organizations need to improve their governance by adopting practices that promote accountability, transparency, and due diligence. This can be accomplished by creating or amending rules that provide structure and certainty regarding what is allowed, and what the sanction will be for a breach of that rule. Along with the enactment of clear rules that reflect good governance practices, rigid enforcement of these rules is necessary. Good governance will also benefit anti-corruption efforts at the competition level.

CONTEMPLATION ON THE SPECIAL NON-MARKETLIZED TICKETING RULES IN MAJOR SPORTS EVENTS

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Abstract: *Generally speaking, the relationship between sports business professionals and spectators has to be an equivalent exchange of property transactions. However, the ticket price does not always match its real value, that is, a ticket price appropriate for the common people. These features and requirements can lead to unreasonable ticket terms and conditions which is not market-oriented, such as restricting ticket transfer. Special ticketing rules have their specific reasons. Design non-market-oriented special ticketing rules for major sports events can keep sports from the restless pursuit of pure commercial interest, and thus reflect the return of essential sporting spirit, as well as the harmony between sports and the society and culture. Therefore, such special ticketing rules are certainly justifiable.*

Introduction

According to sports marketing theories, similar with the price adjustment of other commodities, ticket pricing of sports events is used to stimulate or guide the demands of potential consumers for a kind of special commodity, i.e., watching sports events. [1] As pointed out by an American sports sociology scholar, commercial sports have already become a visible part of the contemporary society. Sports are a unique business. In accordance with the general business rules, when sports fans want to decrease the ticket price of sports events, the best action they can take is to stand united by not going to the sport competitions, because sports managers generally increase ticket sales by lowering prices. [2] Taking the United States Seattle SuperSonics Club for example, since its start of the 1995-1996 season, after suffering its worst average home attendance rate (15,018 people), in order to bring back the fans who have been uninterested from its sports events, the management was determined to take measures to cut prices. [3]

Thus, from the perspectives of common people, the relationship between the sports managers and audience is certainly a kind of property transactions that exchange money for the rights to appreciate sports events. According to law terms, this relationship falls within the category of civil contract laws. As a British

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

sports laws scholar indicated: a ticket of a sports event is in essence a permission of possession for some time of the properties of the owner(s) of the venue(s), and it usually is confined to a particular part of the properties.[4] According to this view, similar with any other business activities, parties involved in the contracts of selling and buying sports tickets shall all take their corresponding responsibilities and exercise their corresponding rights in accordance with such principles of mutual consultations and exchange of equal value. Of course, there are sports law researchers in China who have insightful observations on "the relationship between the sports events organizers and audiences does not belong to civil contract relationship in the traditional sense."[5]

It should be noted that pricing of tickets of some major sports events (What is a major sports event? On the basis of Article 153 of Sports Event Ticketing Act 2002 of Victoria, Australia, when making decisions on ticket management of a certain sports event, the Minister of Sports and Recreation must consider whether it is a major sports event or not in accordance with the number of the audiences possible to present. [6] This is of course a simple and feasible standard to define major sports events, and I think that there are other factors which can also be taken into consideration, including degree of influence, degree of monopoly, identity of the organizer(s), and so on.), such as those events we are familiar with, including the Olympic Games, the FIFA World Cup, Pan American Games, Professional Tennis Competition, and so on. In fact, usually the prices do not truly reflect the actual value of the tickets, which is called plebification of tickets pricing, a pricing system often leads to non-market-oriented special ticketing rules. What are the manifestations of plebification of tickets pricing and the associated non-market-oriented special ticketing rules? What are the reasons for their existence? Furthermore, is there non-reasonableness as a result from their divergence with normal rules of the market and the general civil contract law principles? This article will explore such issues so as to summarize the basic principles of ticketing rules of major sports events. In China, explorations combining sport science theories and legal jurisprudence in this area are warranted.

1. Plebification of Ticket Pricing and Reasons Therein

1.1. Plebification of Ticket Pricing

Ticket pricing of many major sports events usually does not truly reflect the actual value contained by such tickets, and under some circumstances, the ticket prices are quite low. The ticket pricing in the various Olympic Games takes into account the general level of income of the local people. Taking the pricing of tickets for the Beijing Olympic Games for example, there were 240 ticket prices in total, with 30 RMB being the lowest (such as handball, hockey and modern

pentathlon) and RMB 5,000 RM being the highest (opening ceremony). [7] In addition, 14% of the tickets of Beijing Olympic Games were provided for the implementation of Olympic educational programs for the youth, i.e., education of Olympics among the young, and the prices of such tickets were only 5 RMB and 10 RMB. [8] Such plebification of ticket pricing is also common in some major sports events other than Olympic Games. The Pan American Games Organizing Committee, for example, had announced the ticket prices of all of the various sports and games on March 5, 2008, such that the lowest and the highest were respectively 10 reais (1 real equals to about 0.5 USD) and 120 reais. Even though the tickets to the opening and closing ceremonies of the Pan American Games were sold extremely well, the prices ranged only from 20 reais to 250 reais. [9]

1.2. Reasons for Plebification of Ticket Pricing

There are two reasons for plebification of ticket pricing.

Firstly, the public have the right to watch major sports events and more audience are needed to watch the competitions. On the other hand, even though it is generally considered that "money is the universal solvent, and everything can be transformed into paying and gaining money", [10] it is not always the case in the field of sports. The spiritual enjoyment from "the excellence of players, the unpredictability of the results of the competitions, the infatuations of sports fans for a certain competition, and adoration towards certain sports teams and / or athletes" [3] can not be all completely exchanged with money. Major sports events per se are characterized with monopoly and scarcity, so, without considering the general income level and economic capabilities of the public, the determining of the ticket prices and the ticketing rules on the basis of market-oriented principles will definitely cause ticket prices to be abnormally high, and sports events will become exclusive luxuries for ordinary people, which will essentially deprive the public's right to watch major sports events. Do only the rich have the right to walk into major sports event venues? On the other hand, one particular reason that exciting major sports events can hardly be produced is that there are inadequate audience to make presence in the competitions. As we all know, the role played by the audiences on the scene is quite unique and important in major sports events. Sports events are not only a special kind of „commodity", but also a kind of public goods, because audiences, by watching the competitions, are involved, but only by taking part in public sports activities through buying tickets. Because they, in addition to their own great spiritual enjoyment, may influence the participating athletes or teams coaches, referees and the audiences watching the televised competitions outside the venues with their performance on the scene.

Obviously, vigorous and enthusiastic presenting audiences can inspire athletes (teams) to generate passion, so as to make the competitions more intense; they can make the competitions more exciting and more perfect, achieving better effect of the televised competitions by being civilized and rules-abiding as well as cheering at the right time in the process of the competitions. But it is a quite undesirable when competitions are far from being intense or exciting, because there are only a few audiences in presence and many vacant audience areas in huge venues, producing faint sound of cheering and applauding. This can further make athletes (teams) difficult to be in full passion to compete. It is thus clear that only large size of audiences can match huge venues. [11] Presenting audiences are an important part and factor of sports events and direct participants of major sports events. Some Chinese scholars advocate that, as far as competitive sports themselves are concerned, scene audiences and athletes are in a relatively closed system such as a stadium or a gymnasium, and are in a dynamic process of interdependence and mutual reinforcement. The size and the atmosphere of the audience play an important role in promoting the athletes to bring their potential to a full play and achieve ideal competition results.12] Thus, plebification of ticket pricing shall be implemented so as to attract more audiences to walk into venues of major sports events.

Second, ticket sales are not the main source of income for contemporary major sports events. As for competitive sports, in a relatively closed system such as a stadium or a gymnasium, it seems that sports organizers and athletes, as one party, and presenting audiences, as the other, are respectively the most direct suppliers and consumers of sports goods, which is as simple as what will occur when we do some shopping or watch an opera. Thus it seems necessary that ticket pricing of sports events shall provide a strong support to the organizers and managers of the sports events so as to enable them to get their investments back and even achieve profits. But the reality is not necessarily the case. Major sports events are open societal and business systems, in which the ticket sales are generally not the main way in which they achieve the balance between income and expenses. Taking the 1984 Los Angeles Olympic Games for example, its total income from ticket sales and TV broadcasting were respectively 150.3 million USD and 236.8 million USD, respectively 24% and 38% of the total revenue of the whole Olympic Games, [13] which showed that, for a long period of time, TV broadcasting of sports events has already gradually become the main way in which organizers and managers of major sports events to achieve balance between income and cost (But studies have shown that there are exceptions. For example, income from TV broadcasting rights accounts for only about 7.2% of the total revenue of Manchester United Football Club. [14]).

In accordance with statistics of actual revenue and profit of the Beijing Olympic Games released by the report titled *Findings of Follow-up Auditing of*

Financial Revenue and Expenditure and of Construction Projects of Olympic Venues of the Beijing Olympic Games on June 19, 2009, as of March 15, 2009, the total income of the Beijing Olympic Organizing Committee reached 20.5 billion RMB, about 40% of which was mainly accounted for by a part of the income from marketing and TV broadcasting developed by the International Olympic Committee which was allocated to the host city in accordance with relevant agreements, but only less than 6%, i.e., 1.28 billion RMB, of which was from ticket sales. [15] In addition to Olympic Games, other major sports events favored by TV broadcasting are mostly the similar case. Since ticket sales have for a long time already been not the main way in which major sports events achieve balance between income and cost, it is not surprising that the pricing of tickets of many major sports events usually does not truly reflect the actual value contained by such tickets and that the ticketing rules thereof are unique.

2. Open, Fair, Orderly and Controlled Ticketing Sales and Reasons Thereof

2.1 Open, Fair, Orderly and Controlled Ticketing Sales

Ticket sales of many major sports events are restricted in forms, qualifications and quantity, and are even conducted by allocating the tickets in accordance with geographic areas, which means that some non-market-oriented tools are used to adjust the relationship between supply and demand of tickets of major sports events.

In accordance with the ticketing policies announced by the Beijing Olympic Organizing Committee, the fundamental principle of selling tickets to the domestic audiences is, on the basis of complying with the international practice, providing equal chances and rights to cover the general public as widely as possible. [16] In the first phase of ticket sales, ticket booking takes the means of "public subscription in addition to confirming by lot", rather than the method of "first-come-first-served". In the pre-sale phase, in the event that supply falls short of demand, the final winners of the tickets will be determined by lot. [17] The final statistics results showed that, the total of the subscribed tickets of the most attention-attracting sports events of the Beijing Olympics, the opening ceremony, was 551,017, and the actual total of the tickets allocated to be provided to domestic audiences was 26,000, where, in average, every lucky person came out of 21 supplicants. Other principles stuck to by the Beijing Olympic Organizing Committee in selling tickets to the domestic public mainly include: dividing ticket sales into various stages in conjunction with the progress of the organizing work of the Olympic Games so as to ensure ticking sales to be conducted in order; providing the public simple and easy ticketing channels and processes to the fullest extent of possible on the basis of obeying Olympic Games

security requirements. [16] As far as the opening and the closing ceremonies of the Beijing Olympic Games were concerned, in order to ensure the personal security of the on scene persons and prevent speculative reselling of tickets, the Beijing Olympic Organizing Committee determined an effective measure: checking the identity of every ticket holder entering the venues by comparing the identification picture of him or her and him or her per se. The tickets for sale of the opening ceremony of the Beijing Olympic Games totaled 60,000, out of which 26 000, 40.8% of the total, were provided to the domestic audiences. When allocating such domestic tickets by lot, the Beijing Olympic Organizing Committee determined an arrangement of regional quota of the tickets, where the quota allocated to Beijing region was slightly higher than those in other regions. [18]

Let us have a look at the situation of ticket sales of major sports events held abroad. In accordance with the abovementioned Sports Event Ticketing Act 2002 of Victoria, Australia, in his or her ticketing guidelines issued to organizers and managers on the ticketing affairs of a certain sports event, Minister of Sports and Recreation may demand the latter to offer a certain ticket discount to a particular social class or to the general public in their ticketing program. [19] When handling the ticketing affairs of the1990 FIFA World Cup in Italy, there was the well-known case concerning the distribution of group travel tickets, where the organizing committee granted a joint venture set up by two Italian travel agencies the exclusive right to sell all over the world a portion of the tickets specified to be provided to group travelers, and such tickets accounted for at least 30% of the total capacity of all the venues of the World Cup. [4] Refusal to provide tickets to certain persons, including refusal to provide football tickets to sports hooligans, has also occurred in Europe. In some regions in the United Kingdom, for example, sanctions of prohibiting violent fans from entering their stadiums imposed by some football clubs have already gained support from judicial courts. For example, Bristol City Football Club and Swindon Town Football Club respectively filed lawsuits, in the both of which the judicial courts supported their requests that violent fans would be restricted from gaining access to to their respective football stadiums. In this way, a person with record of history of violence may be possiblly be prohibited from entering football stadiums, but sufficient evidence shall be provided to prove that he or she has the possibility of creating disturbances. [20]

2.2. Reasons for Open, Fair, Orderly and Controlled Ticketing Sales Reasons for Open, Fair, Orderly and Controlled Ticketing Sales include the two as follows

First, regulatory tools other than pricing must be found to adjust the supply and demand relationship. Now that the pricing of tickets of major sports events

usually does not truly reflect the actual value of the tickets, and the ticket prices thereof are even quite low, and it's an undeniable fact that such sports events are scarce resources, it shall be a natural outcome that, according to the laws of economic, as for these tickets, supply are not enough to meet demands. As a concrete example, during the Beijing Olympic Games, the tickets of the third phase of the sports events were provided by on-site retail, where tens of thousands of sports fans, queuing for quite a few days and nights, rushed to purchase all the remaining tickets of all the kinds of sports events (including some which were usually considered as non-popular). Since pricing can not act as the lever to regulate the relationship between supply and demand of the tickets of major sports events, and the „first-come-first-served" on-site retail method may not be entirely fair and reasonable. For example, it is difficult for the potential audiences in foreign lands or outside the host cities to buy tickets in such way; we must find other tools to regulate the relationship between supply and demand. For many major sports events, ticket sales are not simply a commercial marketing behavior, but rather social and public affairs, so it shall be a social goal of the organizers of the sports events to put efforts in achieving reutilization of ticketing service so as to make it as convenient for the public as possible. Therefore, it is of great necessity for the organizers to stick to the principles of being open, fair, orderly and controlled when conducting on-site retail of tickets, so as to ensure that the public, especially sports fans, in the various regions of the country and even across the world have fair opportunities to obtain such tickets.

Second, the special rules of sports events should be followed. Fairness does not necessarily mean that everyone enjoys the absolute equality of opportunities, and sports events must follow its own special rules. Although the measures (such as limitations in qualification and quantity) taken to adjust the relationship between supply and demand of tickets of major sports events are often accused by "full competition theory" and "anti-discrimination theory", the fact is that such measures are reasonable and are gradually used in more diverse ways. In the abovementioned well-known case concerning distribution of group travel tickets during the1990 FIFA World Cup in Italy, the exclusive agreements can be defended by the purpose of ensuring the safety of audiences, that is, to separate them on the basis of their nationalities. [4] Although this reason was opposed to by the argument that reasonable competition between travel agencies should be maintained, it is undeniable that it was appropriate for the protection of the audience and for increasing momentum of the fans cheering for their respective teams or athletes. At the same time, although it is emphasized that inadequate audiences will make it hard to generate exciting major sports events; there is absolutely no need for sports hooligans to make disturbances. Therefore, it's justifiable to refuse selling tickets of major sports events to sports hooligans.

3. Limitations on Ticket Transfer and the Reasons

3.1. Limitations on Ticket Transfer

The ticket sales policies and operational mechanisms of the Beijing Olympic Games had considerably controlled speculative reselling of tickets. [21] The related ticketing policies stipulated that reselling of the tickets of the opening and closing ceremonies must be approved by the Beijing Olympic Organizing Committee, and should be conducted in accordance with ticket transfer policies set by the Beijing Olympic Organizing Committee, and transfer without permission would cause the ticket holders unable to enter the venues of the sports ceremonies. Although tickets of other sports events of the Beijing Olympic Games could be lawfully transferred without any permission, transfer at inflated prices for profits would be subject to punishment according to relevant laws. [18]

Some major sports events held abroad also limit ticket transfers. In the abovementioned well-known case concerning distribution of group travel tickets when handling the ticketing affairs of the1990 FIFA World Cup in Italy, the tickets specified to be provided to worldwide group travelers are also restricted from reselling. [5] In recent years, with the emergence of online ticketing, several states in the United States, including Tennessee, Colorado and New Jersey, have passed legislations to limit ticket reselling by issuing network operation licenses to resellers or by limiting numbers of resellers, as well as by prohibiting the use of a software programs for purpose of booking tickets, so as to ensure the general public to enjoy the equal opportunities in obtaining access to tickets. [21] Queensland of Australia also prohibits resale of tickets for profit, but allows resale of tickets based on legitimate purposes at a price of no more than 10% higher than the par value. [22]

3.2. Reason for Limitations on Ticket Transfer and the

The reason for limitations on resale of tickets is to highlight the principle of fairness. From the point of view of sports marketing, resale of tickets of sports events is certainly natural, and sports marketing experts even advocate reselling tickets. [1] However, in many major sports events, the pricing of the tickets usually does not truly reflect the actual value of such tickets, i.e., the prices of the tickets are quite low, and such tickets are scarce, it is definitely unjustifiable for a ticket holder, especially the lucky one that gets tickets by drawing lots or benefits from regional quota, to exploit passionate sports fans by recklessly reselling his or her ticket(s) at a far higher price than its / their face value. Ontario, Canada, in response to the discontent and anger of the public resulted from reselling tickets at too far higher prices than their face value, has enacted a legislation titled *Ontario Ticket Speculation Act* to ban network resale of sports tickets at excessively higher prices than their face value. The act stipulates that both purchasing tick-

ets with the purpose of reselling and reselling tickets on auction sites at a price higher than the par value are illegal, with a fine of up to $ 5,000 for such violations to be imposed. Attorney-General of Ontario said that people in Ontario have clearly and successfully resisted activities of the relevant companies which pursued huge profits by making use of the primary market and the secondary market of tickets, which definitely reflected the principle of fairness. [23]

Conclusion

Special non-market-oriented ticketing rules designed for major sports events have kept sports away from commercial and material impetuousness, brought it back to the very origin of athletic spirit, and reflected the harmony between sports and society and between sports and culture. Therefore, even though meeting neither the common market rules nor the general civil contract law principles, they have reasonable legitimacy. As an American sports sociology scholar has pointed out: what we must note is that the business model of sports is not the only thing able to offer athletes and audiences experience of enjoyment and satisfaction. However, most people have not realized the alternative models .... therefore, if currently sports are not so closely connected with the economic factors, changes would appear only when sports professionals are able to come up with its may-be (and shall-be) prospects. [2]

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RULES OR ETHICS: CONFLICT AND HARMONY- THE CASE OF "NEGATIVE COMPETITION" IN BADMINTON TOURNAMENTS AT THE 2012 OLYMPIC GAMES IN LONDON

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Abstract: *At the 2012 Olympic Games in London, for the sake of strategic gains, a Chinese double- player team, an Indonesian one, and two South Korean ones together played negative matches of competing for defeats. As a result, they were disqualified by the Badminton World Federation. This incident is detrimental to the reputation of Olympic Games and has aroused widespread controversies both at home and abroad. Rules are the criteria for behaviors in sporting events, while ethics are the values orienting sports competition. In a normative sense, the two should be in harmony so as to guide athletes' behaviors. However, in this case of negative competition, they are in serious conflict -- one of whether to make use of the rules to gain and compete negatively, or to hold up Olympic ethics and play the match positively and fairly. The choice between rules and ethics, or the question of how to choose rules under ethics is crucial in sports.*

Using both case study and empirical analysis, this article looks into the negative competition phenomena in the women's badminton doubles, investigates the conflict between rules and ethics when those athletes chose to act, analyzes the underlying reasons, lists the harms of negative matches, and suggests ways of governance in realizing the harmony between sports ethics and rules. This article is organized into four sections. Section one analyzes how the incident of negative competition leads to the conflict between rules and ethics. Section two points out the reason underlying this conflict is the Gold Medal mentality and the manipulation of rules for gains. Section three illustrates how negative competitions harm the Olympic Games and its spirit, affect athletes and the pubic, and damage the national image of member countries. Section four proposes some aspects of governance to transform the ideas in sporting events, eliminate the cognitive misconception of negative competition, strengthen the accountability mechanism on negative matches, and perfect the competing rules.

The Conflicts between Using Rules and Guarding Ethics

At the 2012 London 30th Olympic Games badminton women's doubles competition, four teams played negative matches of competing for defeats. This phenomenon not only caused strong resentment among the audience, but also caused widespread controversy at home and abroad. A Chinese double- player team, an Indonesian one, and two South Korean ones together played negative matches of competing for defeats. As a result, they were disqualified by the Badminton

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

World Federation. The combination of these four pairs charged with breach of the Code of BWF athletes 4.5 and 4.6 two terms -- "did not do their best to win the game" and "whose behavior humiliated and hurt the badminton sport". The IOC supported the BWF's penalties and required teams and related National Olympic Committees launch an investigation into the causes of the incident, to make sure whether other personnel should be responsible for the negative match except for the athletes.

In general, the rules are the basis of the behavior of sports competitions, and ethic leads to ethical value-oriented sports competitions, in the normative sense, both of them should harmoniously guide the behavior of the contestants. The contestants participate in sport, ought to comply with the rules of the game, and always stick to the Sports Ethics. However, competitors in this negative event took advantage of the rules to gain and compete negatively instead of making efforts to beat opponents and actively seek for victory. Diverse voices cropped up after the BWF made the punishment and the International Olympic Committee condemned and required accountability, the sports community, the media and the public, opposed such a negative game behavior, meanwhile , there are a lot of sympathy and even supports against the incident. This departure from the rules and ethics caused a great confusion in cognition and behavior. It caused serious conflicts between using rules and guarding ethics. It is essential for us to know the choice between rules and ethics, or the question of how to choose rules under ethics are crucial in sports.

The Reason for Choice between Rules and Ethics

Gold Medalism

China's sports career has been considerably developed since China participated in the 23th Los Angeles Olympic Games. And the national strength become stronger along with China's reform and opening up policy. As a result, Chinese become more and more confident. Besides, the success of the Beijing Olympic Games and the largest number of gold medals greatly satisfied the national need of achievement. Gold medals became a symbol of powerful state and arose the nation's expectations for them. At the same time the gold medals have become a relentless pursuit of the government, sports administrators and athletes. The similar history as well as the similar collectivist cultural background of independent countries in East Asia led to the fanatical pursuit of Olympic gold medals of government and society. Gold medal has been a great honor to the winners, organizers, managers, as well as state and nation.

Meanwhile the gold medal can bring tremendous benefits for athletes and coaches. Since the gold medal was given to a particular social significance,

whether to win the gold medal made a great influence on athletes and coaches. There are plenty other rewards along with the gold medal, for instance, bonus from government and society, and higher social status, etc. In the matter of fact, this leads to a huge gap between gold medals owners and silver, bronze medals owners. So it's easy to understand why teams and athletes have a strong motivation to win the gold medal, even at the price of violate the sport ethics.

Especially badminton, it is well known that China, Korea and Indonesia are the powerhouses at badminton; each of them has a chance to win the gold medal. In these countries badminton has been thought as the national sport, and to win the gold medal has become a demand by public. This has caused tremendous social pressure to the athletes. When facing the pressure, honor and interests of the temptations, the contestants' behavior might be distorted easily, and it might cause a strong departure from sports ethics.

Profit from the Rules

There are two Chinese teams participated in the group game, the first team is in group A, and the second team is in Group D. Since the Chinese players of Group D took the second place in the group game. The Chinese team in Group A decided to lose the group game in order to avoid the competition between domestic players. Moreover, South Korean players of Group A don't want to win the game either, they want to finished second in the group game, so that their teammates in Group C striving for the first place in group game, so as to ensure that at least one Korean team can succeed to reach the semi-finals. As a result, both sides are not actively competed for winning but actually competed for losing. Their mistakes during the competition strongly opposed by audience, and been interfered by the referees.

London Olympic Games changed the knockout competition rules of women's doubles competition in badminton. Instead, it implemented a new competition system of get in the knock–out phase after the group stage. As a result, in the final round of the group stage the players have already qualified can determine the results of the competition according to their own wishes. Thus, using rules in a reasonable way became an excuse of the negative competition. This event shocked the sports community and the public within and outside the Olympic venues.

Fully Aware of the Dangers of "Negative Competition"

Serious Harm to the Reputation of the Olympic Games

The Olympic Games is the world's highest level of comprehensive sports event. It's been widely loved and actively participated by the whole world. Be-

cause it's not only the highest level of sports competition platform but also has the inspiring spirit which pursuit "faster, higher, stronger" and lay emphasis on the concept of "unity, peace and progress". "The practice of sport is human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play".[1]

The enduring guarantee for the Olympic Games is stick to its noble quality and the spirit of fair play. "That honor is determined not by whether you win, but by how you compete." [2]International Olympic Committee President Jacques Rogge said on the London Olympics opening ceremony. The negative race to fight for favorable ranking damaged the reputation of the Olympic Games badly.

Damaged the Spirit of Olympic Games

The Olympic Games is not only reflected the sporting sense, but also reflects the cultural and educational significance. The Olympic spirit is an athletic spirit of fair, impartial, equality, liberty, and pursuit of "faster, higher, stronger" .At the same time it's an attitude toward life and philosophy of life. Olympic spirit stresses self-training, self-involved in to pursue a healthy body, a positive attitude and love of the good life. "Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind."[3] Olympic spirit is a harmonious, free, healthy, positive, modern ethics. Olympism enlighten the society and youth as well as inherit and carry forward the excellent human culture and ethics through struggling, positive and enterprising spirit, educational value, and ethics of social fairness. Therefore, the negative competition broke the moral bottom line, and set a bad example of damaging the basic social values and ethics.

Prejudiced the Right of Athletes and the Public

Negative competition harms the interests of the athletes who involved in the negative competition; it also undermines the interests of other athletes. As we all know, the implementers of this negative competition can take part in the Olym-

[1]The practice of sport is human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.----- P10,Fundamental Principles of Olympism, Olympic Charter.

[2]"That honor is determined not by whether you win, but by how you compete."--- IOC President Roger's speech on London Olympic Games opening ceremony.

[3]"Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind."----- P10, Fundamental Principles of Olympism, Olympic Charter.

pic Games only after four years or even a longer period of hard training just like others. And during that time, they have to overcome difficulties such as injuries, and foster a sense of among team. Players are outstanding and reached the Olympics enrollment criteria of players; their coaches are the excellence of teaching personnel. The athletes of the negative competition lost the honor and interests of the game no matter they did it based on their own wishes or to accept the arrangement of the coaches. For other athletes, the negative competition damaged their interests of fair play, and made them became the objects of "trap" set.

The negative competition also prejudiced the right of public. Olympic events attract national audience and the audience around the world. They enjoy the high level of the Olympic Games and the Olympic culture through the television broadcast. However, the negative competition prejudiced public right of enjoying a real high level of competition, and distorted the normal social values.

Damaged the Image of Countries which Participated In the Negative Competition

The negative competition created a bad precedent of the Olympic Games sine it got punished and made a negative significant impact to the society. Moreover, the implementation process is extremely embarrassing, damaged the image of people from the countries which participated in the negative competition. This event is a huge disaster especially for East Asian countries that aiming to make the world accept their own cultural values.

Recommendations on Govern the Game Rules and Game Ethics Harmoniously

Change the Concept of Sport Games

People's Daily Online and Xinhua Online launched a research after the negative competition event.

People's Daily Online: Chinese player are disqualified because of the negative competition. What do you think of this event?

Up at 23:00 August 2, 2012, a total of 4515 people participated, of which, 35.3% of users (1596 votes) said "understand, the negative competition violated the sport ethics, it is inadvisable."; 41.3% of users (1863 votes) said "oppose the vent, and competition system is imperfect ";22.3% of users (1007 votes) said" The competition system should be improved, and we should stick to the Olympic spirit". In addition, 1.1% of users (49 votes) Selected "other views, I have something to say".[4]

[4]http://news.xinhuanet.com/yzyd/society/20120802/c_112609932.htm

Xinhua Online: What's your view of the negative competition?

Up at 8:00 on the August 3rd, 2012, the survey results show that a total of nearly 4,000 Internet users participated in the survey, of which 41.5% (1655 votes) users believe that the system setting is defective and Chinese players should not be disqualified; about 31.1% users (1242 votes) thought that the negative competition violated the sport ethics; and approximately 20.9% of users (836 votes) thought it was a disrespect to the audiences; about 3.56% of users (142 votes) believed that that is a tactical design, we shouldn't blame the athletes; approximately 2.81% of the users (112 votes) thought that this is understandable behavior for getting a better result.[5]

The negative competition events related to the three countries, four pairs of eight players, which established the result of Gold Medalism. There are paradoxical attitudes against the negative competition event around the world after the incident, and indicated that t the concept of participation in sports should be changed.

The transformation of the values is the key point of effective governance. Ethics are the major and minor premises on which the rules are based.

Besides, the attitude for the competition should also be changed, and we should spurn Gold Medalism. Though the gold medal gold medal embodies the Olympic spirit of "faster, higher, stronger". "The most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well". [6]The value of participation is through which athletes could achieve the goal of being faster, higher, stronger. Except for that, athletes will also cultivate a sincere attitude, dedication and good spirit from participation, to which significance is far more than the rank and medals.

China's experience in recent years made us realized that it's impossible to be a big and powerful country in the eyes of the world by merely relying upon the national strength. The point is there must be a strong culture accompanied by powerful national strength in order to get accepted by the international community. Similarly, the gold medal doesn't stand for a sports power. Instead we must encourage people to participate in sports and enjoy sports, and promote the all-round development of the whole nation to become a real sports power. It's the right time to change now.

Eliminate the Wrong Cognition about Negative Competition

Literally there're no obvious errors in "utilize rules reasonably ", but there are huge differences in different behaviors. In fact reasonably utilize rules is on the

[5]http://news.xinhuanet.com/politics/2012-08/02/c_123513346.htm

[6]The most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well.---Baron Pierre De Coubertin.

premise of observance of the Olympic spirit, sports ethics and people's awareness of the bottom line.

When you look over the remarks of participants and the coaches who took part in the negative competition, you will find out the reason for their action is they confused the "rules" which allow making use of in traditional and moral way with "negative competition", and violated the sports ethics arbitrarily.

For instance, weight lifters choose to loose weight according to the quoted level, and have proper food after the weighing process to maintain their strength. This belongs to reasonably utilize sports rules.

However, in the London Olympic badminton women's doubles game, under the rule-bound that the race staff can not be replaced, the players choose to lose the game in order to change their opponents. This kind of behavior has been seriously out of range of reasonably utilize sports rules. And this behavior was against the spirit of sport , sports ethics and the tradition of competitions.

Enhance the of negative competition

Lack of the accountability led to the result of the unscrupulous negative competition. It's the first time that the participants were disqualified because of negative competition. In order to control the negative competition effectively, International Olympic Committee asked for a thorough investigation and hoped that this event should be a warning sign to everyone. Besides, IOC cautioned that "if such incidents happening again, we will definitely take action."

After the incident, the Indonesian competitors who involved in the negative competition received severe suspensions as well as the Korean competitors. And their coaches have been disqualified from competing at the same time. Chinese delegation and chief coach made an apology as well and pledged to carry out an investigation, but did not announce the findings after the Olympic Games and accountability.

The problem is not the lack of standard for negative competition, because we can determine its properties by the spirit of sport and sports ethics. The most important thing is whether to change the concept of sports competitions, and has the political will of the investigation and punishment.

Improve the sport rules and system reasonably

There are double reasons for the negative competition. Firstly, players who involved the negative competition violated the spirit of sport and sports ethics subjectively. Secondly, unreasonable rules of the game provided the players the chance of selection of game opponents under the pretext of "use rules reasonably". The different competition time of each group in the final round may lead

to the result of selecting the opponents. Based on the situation, I recommended that either cancel the team tournament or contestants who entered the quarter round should corresponding to a certain level and drew lots to decide their opponents. Only in this way could we avoid the negative competition.

After the BWF's punishment, the table of final eight in women's doubles immediately became fragmented and seriously degraded. Therefore, it's essential to improve a reasonable competition system and contest rules.

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- The most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well.---Baron Pierre De Coubertin.

PROFESSIONAL SPORTS CLUB'S DEVIANT BEHAVIOR AND ITS CONTROL

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Abstract: *Chinese football "sweeping gambling" and "Anti-triad evil" legal practice shows, professional sports clubs are often the main perpetrators of deviant behavior in the professional sports league. Therefore, it is great significance to purify the professional sports league environment, protect the league stable and orderly, according to the law to control the transgressions of professional sports club. Research according to professional sports clubs to the deviant behavior of the object, the classification described the deviant behavior of a professional sports club for athletes, league related parties, government and society, From a society in transition, system , the league specification point of view, to discuss these deviant behavior reasons, and the corresponding legal control measures.*

Introduction

Professional sports club is the fundamental organization of the professional sports league. For insider, it has a direct stake in very large numbers of coaches and athletes, this could influence those professional sports bodies' behaviors; For outsider, it could be related to project institutes, professional sports league management Institutions, and society. This situation has important implications for league management and occupational sports image. Unfortunately, some behaviors of professional sports clubs are not expected in reality, however. From K League of Korea to the long history professional league: Premier League, Serie A or NBA, there are lots of events often appeared in the newspapers such as ground violence, "telephone affair", false ball, black whistle and defaulted wages. From the sociology points of view, those events were involved professional sports league are called "deviant behavior". How to evaluate the "deviant behavior" and Implement effective management control has become a very important and urgent subject.

1. The concept of professional sports clubs' deviant behavior

"deviant behavior" was the notion that first occurred to sociologist R.K.Robert King Merton (1938) in the United States. He considers "deviant behavior" is a kind of behavior which people face anomic pressure or nervous that using an un-

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orthodox means to get success. David Popenoe thinks: social deviant behaviors are those acts violated the important norms of social and groups, the definition of the deviant behavior will vary with the social situation[1]. Chinese scholars give the definition: deviant behavior is individuals or groups against the behavioral norms what they should abide[2]. So, professional sports clubs' deviant behavior means that professional sports clubs violate the rules and norms of professional sports game during the competition, or the behaviors which against the values, morals, legal perspective, and the basic behavior rule people usually believed in.

2. The deviant behavior of professional sports clubs

2.1. Deviant behaviors to athletes

It mainly includes: the behavior of delaying in paying athletes' salaries; the behavior of limiting athletes' registration rights and transfer rights; the behavior of violating athletes' the fair competition rights. Because of the labor contract or the employment contract, the professional athletes could get their due reward based on their training or competition achievement. This is the most basic right of all the labors' economic rights, it is also concerns the mainly income of athletes and their families. These rights are not only protected by the Constitution, Labor Laws, and Labor Contract Laws, but also protected by the rules of payment which about athletes in professional league. Therefore, the behavior of wage arrears on professional athletes is more than violating the primary norms of league, it is also an illegal activity. Registration rights and transfer rights are the basic rights for professional athletes working on professional sports, using the condition that whether allowing athletes register or not to ask them for concession on the term of a labor contract and some other aspects, is against athletes' will, and it also forms the material violation on athletes' transfer rights. This is obviously violate the Labor Laws and Labor Contract Laws; By means of charging transfer fee and setting transfer procedure to restrict athletes on a legally acceptable transfer, this violate the principle of signing labor contract should be abide by voluntary behavior in the Labor Laws. Furthermore, there is suspicion of buying and selling athletes. Deviant behavior violate the professional athletes' rights of fair competition is mainly embodied in the selection of second line promoting to the first-team squad, it is not based on the competitive ability, but the unreasonable charge on athletes, contrary to fair competition obviously. In addition, some professional clubs in order to maintain athlete's competitive ability, they tempt or instigate athletes take stimulant, the behavior violated both the regulation of

[1][美]戴维·波普诺著,李强等译.社会学[M].北京:中国人民大学出版社,1999:204.

[2]王思斌主编.社会学教程[M].北京:北京大学出版社,2004:244.

anti-doping and the rules of sports association, and harmed athletes' health, the worse thing is, it harmed the fair competition rights of athletes. The behaviors damaged the footstone of the professional sports competition, also easy to make athletes produce some other deviant behaviors because of life pressures, such as participating in "ball betting", "match fixing" and so on. And then it makes a depressed competition level and chaotic order. So, professional sports club has grave harmful consequences on the deviant behavior to athletes, it deserves to be taken seriously, and should be controlled strictly through a variety of effective measures until it is plucked up by the roots.

2.2. Deviant behaviors to related party of the league

It mainly includes: bribing the referee; bribing the club and its athletes which are participating in the game; match-fixing with related club. The most important way to control games is the "black whistle" by referee[3]. Clubs bribe the referee is the most direct also the most important reason and pattern to the deviant behaviors, it is not only breach the fair competition principles of athletic contest, but also against the law which is criminal offense. The behavior of bribing the club and its athletes is deviant behavior that could control the game as well, it makes the competitive game pointless, can both constituting fraud of audience, as well as violating the competition norms, should be punished with criminal penalty too. The behavior is scorned by sportsmanship. The behavior of professional sports club match fixing includes two kinds, affiliate club "match fixing" and relationships club " match fixing", it is so called "ball of tacit agreement". Practice shows us that "black whistle", "match fixing" is already become an international problem, it is easy to find in lots of professional sports leagues which is the professional sports clubs' principal means to obtain high ranking and points. These behaviors are cheating audience and making the charm of sports discounting heavily; it have wreaked havoc on sports competitive performance, and violated world professional sports industry norms at the same time, should be severely cracking down by laws.

2.3. Deviant behaviors to government

This consists mainly of bribing the government officials, tax evasion, the behavior of refusing or disguised refusing participate in NT Games. Through bribing the local government officials, professional clubs could get the policy and funds support by local government, such as soft loan, tax concessions, low -cost land or direct funding; The professional sports club could get preferential

[3]韩勇著.体育法的理论与实践[M].北京:北京体育大学出版社,2009:325.

treatment like national team selections, referee selections, home and away arrangement, players' health tests through bribing the related officials of national sports trade association. Bribing the officials is not only violate the institutional norms of league, go against the sportsmanship and the requirement of fair competition basic principles, but also a deviant behavior which should be punished with criminal penalty. Tax evasion is also a deviant behavior adopted by clubs, the first way is rising costs and bribing officials to enjoy the tax relieves, the second way is using "equivocal contracts" to reduce association management fee payable. Tax evasion is punishable by law, the behavior that using "equivocal contracts" to reduce association management fee payable is violating league matches norm, also is breaking the law of individual income tax. Professional sports clubs and its athletes have an obligation to play in the international competition that are drafted by national team, but it is common occurrence that some professional sports clubs and its athletes refused or disguised refuse when they are drafted by national team, this is go against the sportsmanship that citizens should have, and violating the sports industry management norm. It could have an impact on professional sportsmanship and Cultural effects.

2.4. Deviant behaviors to society

This is mainly includes:" match fixing"; striking match; players violence; the financial crisis caused by indiscriminate spending. " match fixing" violate the basic principle of fair competitive in competitive sports and principle of good faith, it could degrade social conduct, affect the national image. Meanwhile, it constitutes the cheat to fans as consumer, violating both the sports industry norms and laws (includes crimes and civil prosecutions). Striking match is one of the norms which behavior is strictly prohibited, is also noncompliance of civil prosecutions, it damage the authority of the sports norms seriously, constitutes the great damage to sports development. Although the mainly target of players violence is the other athletes, it spread the capable of violence between audiences, the substance is deviant behaviors to society too. indiscriminate spending cause the financial crisis is very common in professional sports club, "state-owned enterprise football", "cash burn football" is the typical depiction, it is a waste of social resources, and it have an impact on social values principle to people, More serious are the negative effects which is brought to social capital investments on professional sports. The deviant behaviors to society by clubs is violating the important order and norm which is principal inherent in professional sports competition, cause a very bad influence on the society, have an impact on people's usual values, morals, awareness of law and basic behavior rules, derogate national image, is an important reason of breaking sustainable development of professional sports, is a serious constraint to development of professional sports.

3. The causes of professional sports clubs' deviant behavior

3.1. Social transformation period and professional sports clubs' deviant behavior

Social transformation period is the period that social structure has been whole changed, social relationship has been re-adjusted, social norm has been replaced, social value is tend to be diversified, people's social behavior is unwarranted. It is because of the Social transformation features above, we could extrapolate easily: Social transformation period is a high-incidence season of deviant behavior[4]. During in the transformation period, only rely on the fair competition of market economy, the development space of professional sports club still has a great limitation, it is even An Existential Affair, so, using deviant behavior to pursue profits and development is unavoidable; In the value respect, social value diversification makes a great changes on people's view of interest, expression of interests openness is increasing day by day, this provide a behavior-based value identity for deviant behavior of professional sports club; In the social norm respect, the standard documents for normalizing club operations are not enough obviously, and it is often interfered by national sports policy, neither guaranteeing the rights of sports club, nor restricting their deviant behavior, and makes illegal profits of deviant behavior inevitable by take advantage of the competition system loophole. On the other hand, it also shows the reverse encouragement of deviant behavior, makes more and more professional sports clubs go for deviant behavior.

3.2. System and professional sports clubs' deviant behavior

System is a structure that using rules as substance, and using a set of relevant organizational system as the element. The basic function of system is to provide a general and certain behavior pattern for social subject which is used to guide social subject's behaviors, affirming and protecting those independent behaviors that obeys the rules, punishing the behaviors of overstepping the limit and illegal ones[5]. The top-down professional sports system is likely give rise to contradictions and conflict, and presenting a hazard for professional sports club doing deviant behavior; In the value of the system construction respect, it requires professional sports competition totally serve or submit to the arrangements of national team or international sports competition, while ignoring the Interest expression of sports clubs, and makes the deviant behavior as a inevitable choice for pursu-

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ing profits; In the system rule respect, sports policy, administrative order is the mainly standard and this is go against the legalization management of market rule requirement, the typical features is rule of man and uncertainty which could leads to behave deviant cause at a loose end, finally deal with the "rule of man" issue by bribes; In the organizational system respect, we are now using the linear management pattern which is governmental sports administrations administrate relevant associations or centers and associations or centers administrate the professional sports clubs, decision-making power is highly centralized to sport administration and each management center, the executive staffs are mainly from sports administrative system, they are not adapt to the system consciousness and culture which is required by market, and usually despise established system and rules, even change or violate rules casually, or using their power to trade, this also compel sports club achieve their aim by deviant behavior. The below follow the behavior of the above, this condition would impel the attributes that professional sports club ignore the rules too, thus, they often behave deviant. Setting the rules from rigid to liberal would inevitably leads the punishment of deviant behavior is difficult to enforce, then, impel more and more deviant behaviors.

3.3. League normalization system and professional sports clubs' deviant behavior

Under the wholesome social regulation system circumstances, people are living in a behavior pattern framework full of enough norms, whatever they do, there are some relevant norms to guide their concrete behavior frequently. But, if the behavior pattern framework has its flaws, people would sink into a state which is difficult to follow the norms, and arousing deviant behavior happened. The flaws exist in professional sports league normalization system is an important reason why deviant behavior happened to sports clubs. Firstly, the authority of league normalization system is insufficient, caused professional sports clubs could not form a correct behavior pattern and not follow the behavior pattern implementing activities, it will not get reliable expectations of action also, consequently bring the deviant behavior. The second, league normalization system is insufficient caused professional sports club produce a misunderstanding on recognition of some behavior that they could not get the accurate judgement of deviant behavior. Thirdly, there is a conflict between league normalization system laws and international sports standard, also known as standards are incompatible. It weakened standards' authority and unity, makes sports club's consequences to the deed unpredictable, and automatically steps into deviant behavior.

4. Legal control countermeasures to professional sports clubs' deviant behavior

4.1. Revising league normalization system impeccable, making clear the rights of sports club

Profits' legalization is called rights. There is no doubt that" laws because of rights" is imperative motivity to establish the system of law, and it is also the inevitable outcome to establish the system of law[6]. During in the modern legal system, rights is the cells of legal body and the footstone of nomocracy edifice, it is the fundamental goal of laws[7]. As the professional sports which is appropriate to market economy development, to make clear the rights of sports club in the professional league normalization system, firstly, could use relevant normative documents get the profits of sports club fixed. Clarifying the Interests boundary, and getting well profits anticipation, this is important to standardize their behavior of seeking profits. Secondly, rights is corresponding another subjectival obligation, a clear rights description could set obligation to other subjects in professional league, for professional sports clubs, this is conducive to resisting authority expansion of project Institute or other management department, and resisting the behaviors of some other subjects Infringe their interests. This is also could help sports club realize due profits to reduce the deviant behavior.

4.2. Strengthening the legal consciousness of professional clubs, playing a inner optimized control role by laws

The ideal laws control is not realized by using legal force, only when the members of society could believe in law justice with their heart and abide by the law consciously, laws can fully play its efficacy of social control[8]. In fact, not all the behaviors could be set directly by laws. Consequently, in order to realize the control of professional clubs' deviant behavior, we should give full play to laws' inner optimized control. Not only strengthen the legal consciousness of professional clubs, but also pay attention to the effects of club's staff behavior influenced by sport ethics and morals, and let it be institutional, reified and contracted.

[6]龙世发. 从呼唤到运作:权利理论研究的中国演进[J]. 特区经济, 2011, 1:244-247.

[7]征汉年, 章群, 刘玲. 法律权利化:权利本位[J]. 南京工业大学学报(社科版, 2005, 3:32-36.

[8]皮艺军主编. 越轨社会学概论[M]. 北京:中国政法大学出版社, 2004:317.

4.3. Aggressively sought external justice supports, crack down on the serious deviant behavior

Without laws' support and guarantee, the standard of professional sports business could not be fully implemented. Therefore, only aggressively sought external justice supports could set professional sports order maintain a steady growth. Otherwise, to those serious deviant behavior such as athletes to cheat by doping, non-legal agency has no right of search, it certainly become the legal barrier of against doping. As another example, to those clubs' "strike" behavior, bribery behavior and back pay behavior only use the inner autonomy specification punishment, the cost of deviant behavior is obviously too low and makes actors have a mistake which is careless to the league norms. But if we have the aid of high location-step low which means civil and economic law, to prosecute civil and economic liability of club's "strike" behavior and using criminal law to prosecute the criminal liability which is subject of bribery, the deviant behavior's cost would be raised tremendously. This could both punish the illegal club and educate or direct the other clubs do not behave deviantly.

4.4. Strengthen professional league standard construction, reduce the incompatible norms' exist, make standard identify from clubs' heart

Make sure that all of professional clubs participate in the new norms making, for normalizing and improving the dispute decision mechanism, provide a professional sports behavior pattern which is professional sports club agrees on sincerely. Consciously enforce non-deviant behavior, avoid the situation of deviant behavior happening.

DISCUSSING LEGAL PROPERTY OF THE AMBUSH MARKETING BEHAVIOR

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Introduction

In recent years, more and more people take part in sports activities and pay close attention to sports events, the related enterprises incorporate their products or their enterprise spirit into the sports activities through the style of "title", "place advertising panels" and "give the tournament supplies" to attract public attention, raise the brand awareness, expand the market share, and obtain economic benefits ultimately. In view of the Tournament Organization, they need the relevant enterprise's sponsorship and support with holding the large sports events. There are some enterprises which have no the authorized permission because of Tournament's limitation or failing to pay the sponsorship fee[1], but they intend to mislead the public describing themselves to the tournament sponsors, the tournament-related institutions, or to link their own enterprise name or product to the tournament. This behavior is undoubtedly great harmful for the sponsors, tournament organizers and the tournaments healthy and orderly development. This behavior is ambush market behavior decided by the influence of the activities. This phenomenon occurs mainly in the Olympic Games, which is seen as the studying subject by the legislation and theorists. Historically, although the International Olympic Committee has the special requirements about the host city fighting against the ambush marketing behavior[2] and the host city

[1]As take the "exclusive" sponsorship style to the sponsor of the Olympic Gamesformulate the sponsored industry and product category according to the high-to-low principle, the product category of high-level sponsor will not appear in the lower level sponsor repeatedly. The low-level sponsor sponsored products do not conflict with the high-level sponsored products. Once it happens that the sponsor of the same level conflict with each other in the production category, it will be subject to the sponsorship category provided in the contract signed by them and the Olympic Organizing Committee. "Exclusive" sponsorship, the sponsors of each type of product becomes "the exclusive sponsor". It ensures the effective interest of the sponsor and limits the number of sponsors. On the one hand, the psychology of free-riding behavior is ubiquitous; on the other hand, the existence of ambush marketing behavior also highlights the arbitrariness, exclusive and monopoly of the Olympic sponsorship model. This is why the ambush marketing behavior highlights in the Olympic events especially.

[2]In the Host City Contract, the National Olympic Committee require the host city, the Olympic committee and the Olympic organizing committee should guarantee"There are no any other markets, advertisement or promotional programs impacting the Olympics market development plan in

Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds), *SPORTS LAW: Structures, Practice, and Justice - Sports Science and Studies*, Proceedings of 18th IASL Congress (2012), China University Political Science and Law,

will also formulate the relevant bill, it is different to treat the ambush marketing behavior because of the force limitation of "requirements" and "bill" and a different understanding of the nature of the ambush marketing behavior itself. In china, although Beijing successfully held the 29th Olympic Games, research is very little in this regard, because sports Law started so late, the ambush marketing behavior is discussed only from a marketing perspective; scholars concerned the study of law inadequately[3].

I. **Legal meaning of the ambush marketing behavior**

Ambush Maketing behavior in the field of economics is known as "Parasitic Marketing". In the United States, scholar Matthew D.Shank thinks: Ambush marketing behavior is to make the non-sponsors contact a events together indirectly, and an official sponsors should have certain recognition and the interests of a planned effort or a business activities[4]. "The Swiss federal committee defines the ambush marketing behavior as"The enterprise without the authorized permission clearly intend to contact this tournament through the advertising behavior to obtain some benefits, but he didn't pay the corresponding consideration about the interests of his acquisition"[5].

The explanation of ambush marketing behavior in the domestic market is different. Some scholars think that: the ambush marketing behavior is that another company, which is usually the opponents of the sponsors, carry out a series of marketing activities, seek the contact with the sponsorship, poach a part of the audience from the sponsor and attracted them to their company by not paying the master of the sponsorship manner[6]. Some scholars believe that: the ambush marketing behavior is that a company, Under the condition of the sponsors pay-

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the sponsored country". It Requires to ensure that "advertising or promotional program organized by one or more National Federation, the sports organizations or any public or private entity in the host country are not involved in the Olympic Games, any Olympic team or the Olympic Games Year, and not imply any Olympic games, any Olympic team or the Olympic Games Year.

[3]In the past few years, there are Law degree thesis beginning to specialize in the ambush marketing behavior, for example, *"Olympics ambush marketing behavior Legal Issues"* by Xie Xiaozhuan, Xiangtan University*; "legal regulation of ambush marketing behavior"* by Dong Yuezhuan, Southwest of the Finance University*; " research the ambush marketing behavior's infringement and the sponsors' tort relief" by* Zhao Pu, China University of Political Science and Law, and so on.

[4][USA] Matthew D. Shank: *Sports marketing--- strategic point of view* Dong Jingu, Qiu Zhaoyi, Yu Jing, Tsing Hua University Press (2003), Page 419.

[5]Hufschmid Daniel.Switzerland:New Legislative Steps against Ambush Marketing, I.S.L.R(Mar.2006).pp.77—78.

[6]Li Shiding, Zhou Yunjin : *trafficking Olympics: Sports Marketing Strategies in the Code*, Guangdong Economic Press(2002)page 344.

ing, link with the certain characteristics of the activities with the theme of the event, invade the public consciousness around the theme of the event, occupy the space of the intelligence of consumers, and then avoid the expensive sponsorship fee and implement the brand awareness and the brand marketing activities target with low cost[7]. From the view of the business opportunities in the Olympic Games, they define ambush marketing behavior specifically as: the institutions without sponsoring the Olympic Games intend to mislead the public, describe themselves as sponsors of the Olympic Games or the relevant agencies and put their business name and products with the Olympic Games.

The enterprises neither pay the organizing committee nor provide products and services to the organizing committee. They contact themselves with the sporting events which are false impressions for the public opinion. They are *mistakenly* seen as the Enterprises are the tournament's sponsor or there is some link between them and the tournament[8]. From the above definition of ambush marketing behavior, we can see that most scholars at home and abroad focus on the analysis of the ambush marketing behavior from the point of commercial marketing, but the ambush marketing behavior need to be anlysised from the perspective of legal remedies. We should do broader and deeper research about the maintenance of the sponsor or the interests of the organizers of the tournament.

With the Olympic Games as an example,Unlike Olympic intellectual property violations directly and clearly, the ambush marketing behavior is a behavior by the way of misleading the public to convince the public that they are associated with the Olympic Games and derive commercial interests, which does not violate undoubtedly the interests of the sponsors, but also violates the rights and interests of event organizers. In this regard, the law is not only to make the prohibitions also provide specific legal effect. Therefore, analysis the ambush marketing behavior from a legal point, it should be defined as: the actors make the public believe that he has some link with the tournament (usually refers to the Olympic Games) and lead to the truly related people contract rights and interests associated with the event organizers equity damages should bear tort liability. Such a definition, firstly, it means that the description of the ambush marketing behavior are tort action, secondly, it means the elements of the infringement is the actor has fault (intentional) subjectively and violate the law and others' legal rights objectively.

[7]Zhou Jianshe, Yu ZhongDong: *crack the moral dilemma of ambush marketing* contained *commercial era • Academic Review*, 9(2006).

[8]Meng Lifen: *Olympic opportunities hidden market* , contained *China Economic News Letter Weekly* , 13(2002).

II. **Legal regulation and attributes of Ambush marketing behavior**

A. Determine the nature of ambush marketing behavior among countries

All countries regulate ambush marketing behavior, but they are not uniform qualitatively: Some people think that the United States' *Olympic and Amateur Sports Act* provision (if using Olympic intellectual property is for commercial purposes without lawful authority, related civil liability will be based on the *U.S. Trademark*, is based on the ambush marketing behavior regulation. But obviously the circumstances of the provisions does not apply to ambush marketing behaviors, in fact, the U.S. has special provisions about the ambush marketing behavior in the *Lanham Act*. according to the bill: if companies make false propaganda behavior about their products sources that may cause confusion, or the enterprise fraud to publicity about the relationship between the product and Whether it's contains sponsored or endorsed, these kinds of behavior should be prohibited. About identification of ambush marketing behavior, as long as there is a likelihood of confusion or fraud promotional content, it is considered illegal, and it's not to cause actual confusion to the public for the conditions[9].

The London Olympic headed Using "infringement" term, rather than "tort", so it protects ambush marketing behavior as a kind of intellectual property in nature. And from the provisions of the Articles of Association: A person infringes the London Olympics association right if in the course of trade he uses in relation to goods or services any visual or verbal representation (of any kind)in a manner likely to create in the public mind an association[10] .

Australia had Trade Practices Act before it host the Olympic Games in Sydney, the provisions of Article 53: In the provision of goods or services or to engage in marketing activities, the company may not be claimed that the goods or services have sponsorship, authorization, functions, features, affiliation, use or benefit, but in fact it does not, and shall not be false claims that company sponsored, authorized or has some connection[11]. During the 2000 Summer Olympics, Sydney specially made *Sydney 2000 Olympic Games logo and image protection bill,* about marketing behavior, in accordance with the requirements of the International Olympic Committee. The court can issue temporary restraining or-

[9]Hu Feng, Zhang Zhenyu: *Legal Regulation On the Olympics recessive market behavior*, contained *Wuhan Institute of Physical Education* ,4(2006).

[10]A person infringes the London Olympics association right if in the course of trade he uses in relation to goods or services any visual or verbal representation (of any kind)in a manner likely to create in the public mind an association between the London Olympics and-(a)the goods or services ,or(b)a person who provides the goods or services ,London Olympic Bill,Schedule 3-London Olympics Association Right,page 38—39.

[11]Hu Feng cite, Zhang Zhenyu write.

der, or corrective advertising, and compensate for the Olympic Committee and sponsors by the loss on the same time to enterprises engaged in the provisions of *Trade Practices Act* ambush marketing behavior during the Olympics. It also has detailed provisions of individual, such as, expand the "evoke" as "suggest ", the protected object is expanded to sports teams and individual athletes.

Though the understanding about the ambush marketing behavior and circumstances introduced of Yuan Bin, director of the Beijing Olympic marketing, on Market development news conference about Beijing Olympic Games in March 27, 2007, the way to solve the ambush market in China is mainly through publicity and communicating, rather than through legal channels. This approach cannot be effective constraint on the "free-rider" behavior, and it's also ineffective for sponsors and the protection of the Olympic symbol. In order to fulfill the IOC's commitment to crack down on the ambush marketing behavior, Beijing has formulated the *Regulations on the Protection of Olympic Symbols*, after its successful bid to host the 2008 Olympics, The provisions of Article 4 of the Ordinance:"holder of the Olympic flag in accordance with the Ordinance enjoys the exclusive rights of the Olympic flag." Without the permission of the rights of the Olympic logo, no person shall use the Olympic logo for commercial purposes (including potential commercial purposes, the same below). Representation of "the potential commercial purposes" is generally understood as the "ambush marketing behavior".

From the States to define the situation, the majority of countries see the ambush marketing behavior as a violation of intellectual property rights to regulate, but our country's understanding of the ambush marketing behavior is not clear on the properties. Dealing with such incidents during the Olympic Games in 2008, we rely mainly on the "communication" between Olympic Organizing Committee and the parties, although we have achieved good results, but this kind of China's unique solution has no practical guarantee, and the damage that has been created cannot remedy. Therefore, it is very important to qualitative and regulate the ambush marketing behavior accurately and reasonable legally.

B. Regulate the ambush marketing behavior with the intellectual property system

From the provision of the countries above, we can see that some countries regulate the ambush marketing behavior with the style of intellectual property protection; however, its logical premise is that the ambush marketing behavior is applicable to logo, name, etc protected by law directly or indirectly. In Practice, most ambush marketing behavior do not explain that they are the Olympic sponsorship directly using the Olympic symbols, emblems, names, language or words, that is to say, they do not do the commercial promotion using the Olym-

pic intellectual property or even using the sports events and organizing committee logo, name, etc. indirectly. For example, during the Olympic Games in 2008, Li Ning Sports Goods Co., Ltd., (Li Ning Company) as a non-sponsor, signed a contract with the CCTV sports channel, whose contents include that all the presenter and appearing reporter in the 2008 sports channel should wear the clothes with the brand and LOGO of Li Ning Company. This behavior makes the public believe that Li Ning Company is a sponsor of the Olympic Games, but in fact the real sponsor is Adidas. In this case, Li Ning Company does not use the Olympic LOGO, but it violates Adidas objectively. If Adidas Company or Beijing Olympic Organizing Committee sues Li Ning Company for its infringing its intellectual property rights, it is probably not supported by the court. To regulate the Ambush marketing behavior with the intellectual property legal system is flawed.

C. Regulate the ambush marketing according to the Law against Competition by Inappropriate Means

In fact, ambush marketing is the infringe upon others' legitimate rights, which is reflected by occupying the market share without paying sponsor fees. Such behavior damages others' the legitimate interests and is misled intentionally by relevant business. It belongs to the "competition behavior in violation of the principle of good faith in industrial and commercial activities" and is referred to as "acts of operators which contravene the provisions of this Law, with a result of damaging the lawful rights and interests of other operators, and disturbing the socio-econimic order."[12] As early as 1909, Germany gave protection to the "knowledge" which was left by the intellectual property law through Law against Competition by Inappropriate Means. There are provisions concerned with "the prohibition on confusion with others' business logos and violation on others' business secrets".[13] There is no specific provision on ambush marketing in the Law against Competition by Inappropriate Means. Article 9 of the law stipulates that,"An operator shall not use advertisement or other means to give false, misleading information on the quality, composition, performance, use, manufacturer, useful life, origin, etc. of the goods." For this, some scholars hold the view that ambush marketing can be explained as "other ways" and "misleading". However, it can be known from careful analysis that this provision is made from the characteristic of the commodity itself, which protects the quality of the goods from being mislead, rather than other's misunderstanding of towards

[12]Article 2 of Law of Peoples' Republic of China against Competition by Inappropriate Means.

[13]Jiang Fan, Competition Law's protection and restrictions on intellectual property rights, Modern Science of Law, Vol. 2, 2007.

producers. Therefore, although ambush marketing belongs of unfair competition behavior in theory, it cannot be used as evidence in judicial practice due to the lack of specific regulations.

D. Regulate Ambush Marketing in Tort Law

Objectively, ambush marketing's damage to sponsors and organizers exists, including International Olympic Committee in the Olympic Games. To the Olympic Games, the International Olympic Committee and all previous Olympic Games Organizing Committees takes the prevention and cracking down on ambush marketing as an important job. However, ambush marketing was never stopped. People's debate upon its characteristic never stopped as well. I think, the regulation of ambush marketing from the aspect of Tort Law was considerable. Of course, due to the differences between ambush marketing's influence on organizers' and sponsors' benefits, the result can vary based on different petitioners. To sponsors, who provide fund, goods or service for the competition, the return is the permission from organizers to use the name of the competition in business development and promotion, which includes relevant intellectual property rights in Olympic in the case of Olympic Games. With regard to the sponsorship of the Olympic Games, this permission is exclusive in the specific industry, since the sponsors have underwent strict review process, and only enterprises with high credit rating, good product quality and service quality.In the eyes of the public, sponsors of the Olympic Games have good reputations, and will have huge economic returns by sponsoring the Olympic Games. Sponsors enjoy the right to use the name, flag, emblem and other rights, which was based on the authorization of organizers, including the Olympic Committee, and BOCOG. Such right will not be infringed by any third party. And its expected benefits from sponsorship are based on the sponsor contract. Such benefits belong to creditors. However, non-sponsors' ambush marketing leas to the loss of expected profits of sponsors belongs to the third party's active infringe on creditors' acts.Contractual rights belongs to relative right, which is based on obligators' active obligations and focuses on results between the parties. In fact, any right is inviolability. In this sense, the creditors' right is the same with the property right. Knowing the creditors' right but impeding the the realization of such rights viciously and illegally, or infringing others' creditor rights in other ways constitutes infringement and shoulders corresponding responsibilities. Article 2 Paragraph 2 of the Tort Law enumerates civil rights under this law. There is no creditor right in this law, that is to say, it is impossible to incorporate the benefits of the losses into a specific rights. But it is undoubtful that such benefit shall be protected and belongs to the violation against "other benefits" besides "rights".

As for the event organizers, ambush marketing does not make use of the marks or names, therefore it does not violate the intellectual property right. However, such behavior lead to the drop of of enthusiasm in sponsors, threaten the economic income of event sponsors and infringes the market development right of event organizers. It can also be regulated by Article 2 of Tort Law.

III. **The identification of injury caused by ambush marketing rules**

The identification of injury caused by ambush marketing rules is the key to crack down tort and protect the right owners' interest.ambush marketing's injury to sponsors is that they may not achieve the aim of public cognition and expected sales goal in spite of huge amounts of sponsorship funds. To the event organizers or (International Olympic Committee), the injury caused by ambush marketing is not instant, but will face huge impact in the long term development. The existence and flooding of ambush marketing affects the sponsors' enthusiasm, reduces the sponsorship amount, and directly affect the enthusiasm of of competitions holders. Of course, in judicial practice, it is difficult to prove the existence of the damage and calculate such damage. There are no unified regulations for this. I think most sponsors for big events, especially the Olympic Games, are well-known brands. Its market share for similar products can be calculated and computed. The determination of injury relies on changes of market share before and after a certain period of time of the competition, For example, in the 1984 Los angeles Olympic Games, non-sponsor Kodak company got the chance to advertise its brand through broadcast by sponsoring the ABC TV network, while the real sponsor Fuji Corp's market share increased by only 4 percent from 11% before, which was insufficient to meet the cost of Olympic sponsorship. During the Beijing Olympic Games, Li Ning Cooperation's ambush marketing made 37% of the poll regard Li Ning co. as sponsor, while the real sponsors Adidas Company took up only 22% of the market. In the determination of the scope of damage, it can be achieved by authoritative survey institutions and request for compensation. In addition, our country's Law against Competition by Inappropriate Means can be used as reference. Article 20 of the law stipulates that, "Where an operator, in contravention of the provisions of this Law, causes damage to another operator, i. e., the injured party, it or he shall bear the responsibility for compensating for the damages. Where the losses suffered by the injured operator are difficult to calculate, the amount of damages shall be the profit gained by the infringer during the period of infringement through the infringing act. The infringer shall also bear all reasonable costs paid by the injured operator in investigating the acts of unfair competition committed by the operator suspected of infringing its or his lawful rights and interests."

China has successfully hosted the Olympic Games and will undertake other large-scale events. In addition, Chinese enterprises will also be more involved all kinds of competitions worldwide. Legal issues of ambush marketing will occur in each session of the Olympic Games and other large events as well. Regulating by Tort Law is a way to solve the problem.

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IV. SUBJECT OF SPORTS JURISDICTIONAL

- Sports Arbitration and Justice
- Resolution of Sports Disputes and Mediation in Sports Disputes
- Court Arbitration of Sport (CAS)
- Applicable Law and Decisions' Excitability in Sports Law

THE THEORY OF SPORTS INJURY OF THE IMPUTATION PRINCIPLES AND THE MEDIATION

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Abstract: *It is very common that College students could be injured in the school sports activities by various degrees, however, subject to the special nature of the sport itself, and the limitations sight of legal scholars and it is lack of academic research on college students' injuries. This article mainly focuses on the jurisprudence basis and imputations of different types of injury accidents. This paper considers four major reasons on college sports injuries. So the imputations of legal Liabilities under the four reasons are different. However, these four imputation methods are under the principle of fault liability, which is «no-fault responsibility". There are some problems in principle.*

Introduction

It is very common that College students could be injured in the school sports activities by various degrees. According latest survey of 58 universities in China, researched by Zhou Qiang, more than 80% of the colleges had physical injury incidents. Four of 58 universities have happened serious injury incidents, some students got disabled in the injury incidents. Another three universities have student casualties in the accidents. The numbers of legal disputes and actions, against injury accident about campus sports activities of students in middle school, also shows the trend of rising year by year. However, subject to the special nature of the sport itself, and the limitations sight of legal scholars and it is lack of academic research on college students' injuries. In this way, judicial practice circles couldn't do well as they wish, due to lack of theoretical support, in specific judicial activities. Therefore, from this angle, it is of necessity to strengthen research for relevant field of legal issues.

This article mainly focuses on the jurisprudence basis and imputations of different types of injury accidents. Owing to the complexity of injury cases of students in college sports activities, however, the imputation methods are different. Therefore, this article will mainly start from the analysis of the students to the types of injury, and determine the imputations of various types of injury accidents, so as to explore their jurisprudence basis. However, the law itself has its own limitations. To overcome the deficiencies of the legal approach of the college sports injury, we have to find some complementary way. Hence, the third part of the article is to focus on solving this problem.

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I. **Typological analysis of student injury in college sports**

To talk about the personal injury during college sports, injury can be divided into five main aspects: body right against students; student body injury; student body disability; cause death to students; moral damage caused by infringement of students' body right, the right to health and the right to life. [2] If we do a typological analysis of reasons for these five aspects of personal injury, we can find that student injuries in college sports mainly caused by the parties in violation of the corresponding obligations:

A. The nonfeasance or fault[3] of students. Students, as active participants in the sports, shall be liable for the obligations of the following aspects: students shall (a) choose sports activities suited to their physical condition; (b) carry out sports activities as teachers requested; (c) comply with the requirements of the stadium; (d) act in compliance with instructions for sports equipment and facilities; and (e) provide mutual support to each other in the complement activities, etc.

B. The nonfeasance or fault of universities and teachers. Speaking from space angle, campus is the main place for student in sports activities, and sports activities are completed at internal colleges. In legal terms, college is a legal person with personality, bearing the corresponding legal responsibility independently. Thus, the college has related capacity for civil conduct and administrative functions. In sports activities, a university is mainly responsible for the obligations of the following aspects: universities shall (a) provide qualified sports equipment and facilities, which meet the relevant national standards and requirements; (b) regularly maintain, manage, and examine stadiums and sports facilities; (c) no requirement for students to carry out the activities that more than a student's physical qualities, mental qualities, the health status; and (d) take the necessary security measures, etc. Just for university faculties are, in addition to obey the education law, teacher's law and other relevant obligations, but also to fulfill the special obligations required due to the characteristics of the sports activities. Personally, I think that in general have several obligations: teachers shall (a) carry out the necessary safety education before students doing sports activities; (b) organize sports activities to comply with the requirements of the syllabus; (c) fulfill their duty and love their career during physical education curriculum; (d) take the necessary measures to prevent injury expanded when the student injury incident happened; and (e) impart the correct sports technical essentials, select the qualified sports venues and facilities, and properly demonstrate the usage method of sports facilities, etc.

C. Joint fault of universities or teachers and students. We have talked about the case of the student injury caused by the unilateral act at the head. And the third category of student injury is mainly on account of joint fault. Student injury

triggered by the so-called joint fault of colleges or teachers and students, is about that schools or teachers and students, both of them, who have their faults or who do not fulfill their obligations, lead to student injury in sports activities.

A. Force majeure. In terms of force majeure, colleges or teachers and students are not at fault, but the student injury still occurs. Caused this type of injury is mainly due to the following types of events: (a) schools and teachers take immediate rescue measures at the sudden illness of the students in the physical education, but the injury still existed; (b) school sports facilities suddenly collapse as a result of natural factors, yet the school is not at fault; (c) happen in confrontational or risky sports contest; (d) lawbreakers force into school; and (e) other unexpected factors.

II. **The jurisprudence basis and imputations of different types of sport injury accidents in college**

To make clear of undertaking the responsibility of student injury in college sports activities, we look into the legal relation between universities, teachers and students, for which the legal relation determines the nature of the applicable law and choices of the concrete act. From latest understanding of jurisprudential circle, cognitive with nature of college subject basically has the following kinds of ideas: (a) colleges and universities are legal person of public law, can be used as subject of administrative lawsuit; [4] (b) there is a kind of dual legal relation among colleges, universities and student, with the existence of conflict between rights and authorities, to hope to achieve authority of right; [5] and (c) colleges and universities has tripe position of the subject to administrative, administrative counterpart, and civil subject. [6] So far, while colleges or universities and students happening legal dispute, the university might be subject to administrative or civil subject. Is College as a subject to administrative to exist, or as a civil subject to present? That should be confirmed according to different situation. Accordingly, universities and students are mainly formed two types of legal relationship, administrative one and civil one.

In terms of student injury in college sport activities, we think that universities, teachers and students are of formation a kind of civil extinguishment. In the sports activity, the main obligation of college is to provide qualified venues and facilities as well the reasonable arrangement of sports and course project. Consequently, function that universities exercised is not or not mainly about administration. Mostly, it reflects a service contractual relation. First of all, in the school sports activities, there is no administrative or administrated relation between the universities, teachers and students. They are equal. If the request of a university or a teacher doesn't fit to the certain provisions, students may

ask for the change. Second, universities, teachers and students are eligible to be a civil subject. A university is the subject with judicial personality, and it has corresponding capacity for civil act and civil liability. Most of teachers and college students are over 18 years old and sanity. According to the Article 11 of the *GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA*, a citizen aged 18 or over shall be an adult. He shall have full capacity for civil conduct, may independently engage in civil activities and shall be called a person with full capacity for civil conduct; a citizen who has reached the age of 16 but not the age of 18 and whose main source of income is his own labour shall be regarded as a person with full capacity for civil conduct. They are all proper civil subjects. In addition, employment relationship is shaped between teachers and university. With respect to the relationship of teachers and students, authorized by the college to exercise normal teaching, thus, if the teacher causes student injury under their duties in the school sports activities, they could direct imputation to the university because of their behaviors. If the teacher acts beyond the authorization by the university, he should take the responsibility by the teacher himself.

According to general principle of legal imputation, someone should take responsibility for his behavior which caused injury, if the following three components exist: firstly, subject to the responsibility must be clear; secondly, the actual injury; thirdly, causal relation between subject and damage result or harm result. Only these three elements all ready, the law to someone's damage behavior shall be investigated for corresponding responsibility. In order to define the imputation student injury in college sports activities, we have to analyze on the basis of above sorts of different injury types. Specifically:

In terms of student injury caused by the nonfeasance or fault of students, as stated above, most of teachers and college students have reached the age of 16 and are compos mentis, therefore, they can or shall be foreseen that his behavior may cause losses to others and themselves. Due to them cause injury to themselves and others because of against the corresponding obligations, according to liability principle, [7] and it, the responsibility, shall be assumed by them who cause the problem. Although college students as proper civil subjects, owing to most college students' main source of income being not his own labour, civil compensation is generally advanced by supporters of students. If in difficulties, the court may defer the payment by judgment or mediation

For student injury in sports activities caused by the nonfeasance or fault of universities and teachers bearing legal liability is concerned, its essence is that the university or the teacher violate the corresponding obligations. Three kinds of circumstances leading to different imputation can be discussed: (a) Injury is completely caused by the university in breach of duty. In this case, that is no fault

of faculty's, which means the responsibility should be undertaken completely by the college; (b) Individual fault of the teacher. Teachers should be responsible for the student injury; and (c) universities and teachers shall be jointly and severally liable to the joint fault. Students may claim for compensation to the university, the teacher, and any or both party or parties. The apportionment of liability shall be in accordance with their respective extent of fault in internal campus.

For student injury in sports activities caused by joint fault of universities or teachers and students is concerned, shall, on the basis of separate extent of fault of the school or teachers and students, divide their liability. Due to employment relationship between school and teachers, students may require those to undertake joint and several liabilities. Colleges and universities may take indemnity to the teacher after paying the compensation for the teacher.

For student injury in sports activities caused by force majeure is concerned, according to the Article 107 of the *GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA,* civil liability shall not be borne for failure to perform a contract or damage to a third party if it is caused by force majeure, except as otherwise provided by law. Hence, from a legal point of view, colleges or teachers shall not be responsible for student injury to bear civil liability. Though, they can give students suffered an appropriate remedy based on humanitarian reasons.

III. **Further reflection on the disposal of college sports injury**

From the above discussion, it is found that imputation principle for college sports injury is to adhere to the principle of fault. Some athletes, weak in physical strength, stability of joint, control and reaction, and limb freeness, have a higher injury rate than other players in the training and competition. However, tall players in volleyball competition abide by the principle of "no liability without fault".[8] Nevertheless, some problems still exist in this kind of imputation principle, from the characteristics of sports activity itself.

Above all, this imputation principle is unfavorable to the innovation of teachers in the sports activities. Innovation means risk, and risk means that responsibility. Sports activity, in my point of view, is a functional activity on main purpose of training the human body as a subject. The notion of sports is to achieve "self-challenge, self-transcendent, and beyond the limits". This idea requires those engaged in sports activities to have the courage to break through. To the students, they shall dare to issue a challenge to the ultimate; to the teachers, they shall constantly explore new teaching methods, training mode, etc. And this standard of inspecting innovation and breakthrough is to check its effect in the specific sports practice activities. This innovative and breakthrough may suc-

ceed, perhaps fail. But no matter success or failure are likely to bring injury to students. Taken volleyball as an example, the data shows that relative tall players have a unique advantage. In 1960s, famous Japanese "Saito Gymnastics" provided a group of perfect training tall players. It precisely and revolutionarily solved the problem of tall players with special physical ability, and then there had the spectacle of Asian men's volleyball team victory standing on the golden medal podium in the Olympics. To solve this problem requests to break the traditional training methods. It is very likely to injure players in certain degree. [9] If the principle of fault being implemented, teachers will be somewhat responsible to this kind of innovation activities. Obviously, this is not conducive to the teacher to carry on the innovation, which is also disadvantageous to the development of sports enterprise in the long term.

Secondly, in the legal relationship of the student and the university, the college, due to its specialty, is in absolute mighty subject position, no matter in identity or economy, in stead of students. A student under school management, is limited by such conditions, as the graduation or not, selecting cadres and job submission, etc. How hard it is for the students to prove the fault of school! In fact, in such a legal relation of a wide disparity in strength, generally the principle of burden of proof is in reverse, that is, by the strength of subject to prove himself the innocent, if they can not prove their no-fault will have to take responsibility, such as administrative legal relationship, the doctor-patient legal relations, etc.

Thirdly, because most college students do not have a fixed source of income, requirement, of which the student independently bears liability to serious injury incident in the sports activities caused among students, seems not to be accomplished. In that way, this kind of liability must transfer to the parents or guardians. Even transferred, that may be also constrained by economic factors and difficult to performance. A reason is that nowadays the cost of college student cultivation is too high for ordinary people to undertake. After a long term education investment, the savings of a guardian has nearly run out, which is unfavorable for both parties.

Finally, the case of force majeure injury responsibility, although colleges can provide appropriate assistance out of humanitarian principles, the students themselves should bear its main responsibility. This is obviously adverse to suffered students.

Therefore, based on the characteristics of sports activities as well as the issues existed in specific use of the doctrine of liability for wrongs of student injury incidents in the college sports, we should also take the following aspects into consideration:

On the one hand, we can set up a special insurance coverage for college sports activities. In fact, look at the history of legal liability development, the legal

liability bearer of the modern society being shifted from the individual to community, there has being a trend of "socialization responsibility ". This trend will help to reduce the social transaction costs, to improve social awareness of mutual cooperation, and to train security capabilities of the individual. The major manifestation of this trend is insurance. However, review of insurance status of our universities at present, the most popular performance is school liability insurance, which is single and can not protect students in a full range. We can require colleges and universities to participate in school liability insurance, and guarantee student himself or his parents to arrange personal security insurance for students, to take a double insurance in solving student injury compensation. In addition, we also can add a new type of insurance called the student sports activity insurance specifically for students in sports activity accident.

On the other hand, university may set up a sports activity special fund for student injury. The fund shall comprise of social donation, financial allocation, or part of capital from school-run enterprises. The fund is mainly used for major sports injury accident of college students. When injury accident happened, the student should apply for it, submit relevant proof before giving financial assistance, and be verified by the school. Apply for a funded a premise is hurt or being hurt people really unable to pay the necessary medical expenses. The premise of the application of a sum of fund is to make sure that a hurting or hurt student really cannot afford to pay the necessary medical expenses.

SPORT AND SEX DISCRIMINATION - OLYMPIC GAMES CASE STUDIES

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Abstract: *Very foundation of sports and the ideology of Olympism state says that it has to be free from any form of discrimination. Around the world, especially In Europe, the cradle of the Olympic ideology, sport fulfils essential social and cultural roles. It is also an important segment of economic activity. Participation in the ancient Olympic Games was limited to male athletes only. The only way women were able to take part was to enter horses in the equestrian events. Women participation in Olympic Games was increasing continuously though slowly. Against the militant movement of vigorous suffragists in countries in West Europe and Scandinavia, especially in England even Coubertin had to relent. On the background of disputes over Olympic rights for women there was almost the serious split in sport, when spokeswoman of women full of emancipation organized Women International Sports Federation and in 1921 organized in Monte Carlo "Feminine Olympics". Finally there was no drastic split in sport for men and women. However to the present day continues the process of fight for Olympic women's equality. Author in her presentation summarizes the current fight for women rights in the Olympic Movement. This case study describes the topic of women' access to sports, while it is also asking whether a woman in sports is still a 'weaker sex' and if we have legal instruments which can change this image. It goes without saying that current women' involvement in sports is much bigger than it was 50 years ago, but there's a very long ahead to make both genders equal in this aspect.*

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COURT OF ARBITRATION FOR SPORTS (CAS)

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Abestract: *Ingeneral ‹the notion of arbitration defines the way in which a dispute is settled by a third person. Specifically in the context of legal terminology ‹however‹ it «signifies an institution which consists in the settlement of a certain category of disputes by judges who are chosen by the litigants.*

In the context of international law, arbitration acquires a specific but slightly different meaning: arbitration of international law and international arbitration constitute» different juridical categories. «International arbitration is a different institution within the context of which international disputes are settled ,by a judgment of binding force for the litigants, issued by a third party before which the opposing parties have a brought their dispute.

International arbitration can be defined as the method of settlement of international disputes by a judgment of binding force for the opposing parties ,issued by a third part before which the litigants have brought their dispute.

Introduction

The notion of arbitration as an institution has been in existence since antiquity and was already known in Hellenic inter-city law, which, in on sense, "presented very few variations throughout history" and constitutes the first from of dispensing justice.

In the context of international law, the term "arbitration" has a different, a particular meaning. The international institution which is defined by this term, has certain particularities and is therefore differentiated in essence and in from the respective national term.

International arbitration includes all judicial phenomena which do not come within the jurisdiction of the international or the national courts and are characterised by the free choice of the jurisdiction organ by the opposing parties.

International arbitration requires the existence of an agreement between the litigants with regard to the settlement of the dispute by a jurisdictional organ, the composition of which is determined by the litigant parties themselves.

The freechoice of the arbitration is followed by the free choice of the procedure .In arbitration, the litigant parties are free to decide about the procedural rules by which they wish to be judgeel.

In the field of the International Olympic Movement and of the Olympic Games, the "supreme arbitration" is the International Olympic Committee (IOC).

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The mission of the IOC exceeds the limits of the Olympic Movement, Including universal sports. It is obvious that such an international organisation will certainly be confronted with disputes, which are often approaching conflicts, either between natural persons or legal entities.

Many of the disputes arising in the Olympic movement and the Olympic Games, come under the provisions of the Olympic charter as well as the rules of other national or international athletic organizations.

The settlement of many disputes that do not belong in the ordinary context of athletic activities and are not considered typically athletic, do not come within the jurisdiction of an organ of the Olympic movement.The nature of these activities seems to have led the IOC to find a solution in order to settle such disputes, both in the restricted field of the "Olympic spirit" and the wider scope of international sports. During the 85th session of the IOC in Rome in 1987, the idea of creating a court of arbitration was developed with the purpose of covering activities "more or less directly connected with sports."

According to the letter and the spirit of the statutes of the court of arbitration for sport "an arbitral institution .known as court of arbitration for sport (CAS) is created from now on, in order to facilitate the settlement of any private contention arising out of athletic exercise as well as all activities related to sport."

The CAS is governed by a set of statutes which includes 76 articles in total, these articles determine the composition and the formation of the court, it is competence, its function, the applicable law, the arbitration agreement and the procedure to be followed.

What is the CAS:

The court of arbitration for sport (CAS) is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world. The CAS is placed under the administrative and financial authority of the international council of arbitration for sport (ICAS).

However, should circumstances so warrant, and after consultation with all parties, the president of the panel or if he has not yet been appointed, the president of the relevant division may decide to hold a hearing in another place and issue the appropriate directions related to such hearing.

Composition and formation of CAS:

The court of arbitration for sport is composed of the president, the executive president, the members of the pivision and the secretariat.

The president of the IOC is also the president of CAS, but the person who assumes the effective and substantial presidency of the CAS is the Executive president ,who is nevertheless, appointed by the president of IOC and the

president of CAS and he sees to the execution of the preliminary acts of the procedure, intervenes whenever it is deemed necessary, in accordance whit the provisions of the statute and of the regulation, regarding the process of the cases from their submission till the issue of the judgment.

The court of Arbitration for sport is composed by 60 members at the maximum. The criteria which govern the choice of the members of the CAS, as shown in the letter and spirit of the statutes are: publicly recognised person ality, legal education and knowledge is the "field of sports".

i. Mission of the CAS

The CAS sets in operation panels which have the task of providing for the resolution by arbitration and mediation of disputes arising within the field of sport. in conformity with the procedural Rules, to this end , the CAS attends to the constitution of panels and the smooth running of the proceedings. It places the necessary infrastructure at the disposal of the parties.

ii. Ovganisation of the CAS

The CAS is composed of two divisions , the ordinary Arbitration division and the appeals Arbitration Division.

A. the ordinary arbitration division: constitutes panels whose task is to resolve disputes submitted to the ordinary Procedure, and performs, through the intermediary of its president or his deputy, all other functions in relation to the smooth running of the proceedings conferred upon it by the procedural Rules.

B. The appeals arbitration division: constitutes panels, whose task is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports- related bodies or a specific agreement so provide. It performs, through the intermediary of its president or his deputy, all other functions in relation to the smooth running of the proceedings conferved upon it by the procedural Rules.

iii. CAS mediation

CAS mediation is anon binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate whit the other party, and with the assistance of a CAS mediator, with a view to settling a sports-related dispute. CAS mediation is provided solely for the resolution of disputes related to the CAS ordinary procedure, All disputes related to disciplinary matters , as well as doping issues, are expressly excluded from CAS mediation.

THE RESEARCH ON ARBITRABILITY OF ON-THE-SPOT PENALTIES-TECHNICAL SPECIFICATIONS

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Abstract: *On the sports arbitration practice, on-the-spot penalties and technical specification have been invoking the international conventions "not arbitration or not to review", for which have the great significance and effects on maintaining of the normal order of sports activities, and to promoting the sports movement. Nevertheless, in the modern high level sports, the applicable rules of sports frequently bring the enormous impacts to the parties' properties or the economic aspects, or even likely to have the serious effects on personality rights. Therefore, whether the application of such rules should be reviewed by the ruling institution caused the great controversy in sports circles of both theory and practice.*

In order to propose the reasonable solutions, this paper is proceeding from analyzing the relationship between the definition of on-the-spot penalties and technical specification, combined with typical cases, to present the comprehensive and in-depth analysis of the arbitrability of on-the-spot penalties & technical specification.

Introduction

The fact that on-the-spot penalties and technical specification is not arbitrable has been a fundamental principle in sports arbitration. It is even confirmed by a series of cases arbitrated by Court of Arbitration for Sport (CAS). Scholars also call it "on-the-spot penalties not-to-review" or "technical specification not to review". However, the arbitration cases towards on-the-spot penalties and technical specification have never stopped, and the number of the cases is on the increase.

Therefore, many scholars questioned the two principles and even regard them as unreasonable and unjustice because they not only ignore athletes' rights but also becomes the protective umbrella of "Black Whistle". So the voice of altering these principles tends to be louder. Thus, whether on-the-spot penalties and technical specification are arbitrable? Should CAS investigate or not? And are on-the-spot penalties and technical specification the same question or not? Figuring out these questions in the perspective of legal theory is of important theoretical and practical significance undoubtedly, because it not only relates to identifying the scope of sports arbitration, but also relates to the future development direction of sports arbitration.

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1. The Relationship between on-the-spot penalties and Technical Specification

Academically, there is no strict distinction between on-the-spot penalties and technical specification. Some scholars use the former, some use the latter while others use the two at the same time. In CAS's arbitration practices, arbitration court sometimes uses "on-the-spot penalties", sometimes says "technical specification" and sometimes mentions the two at the same time.

The author believes that in theory, on-the-spot penalties and technical specification are two totally different questions. They have their own limit and scope and are distinguished from each other strictly. For instance, the referee judges an athelete with a false start, this generally belongs to a judgment of fact and does not involve technical problems, so it is a typical on-the-spot penalties. As to the dispute of whether conjoined twin swimsuit could be used in swimming competitions, this is more involved with technical problems rather than on-the-spot penalties.

Therefore, the "non-intervention principle" of international sports practices actually contains both "on-the-spot penalties" and "technical specification" which can be tell from the causes of "non-intervention principle". The non-intervention of on-the-spot penalties is based on "sports competitions should not be stopped by continously disturbances". As for technical specifications, the courts apply the "non-intervention principle" mainly because, compared to specific sports organizations, the former does not equip with the expertise and authority. But it is undeniable that in specific sports practices, most applications of technical specifications and sports rules will be represented by referee's on-the-spot penalties. In other words, the referee's on-the-spot penalties usually include the applications of technical specifications. So "on-the-spot penalties" would often overlap with technical specification in sports games. Thus we understand in CAS's sports arbitration practices, why some cases apply "on-the-spot penalties not to review" principle while others tend to apply "technical specification not to review" principle. There are even circumstances that the two principles are mentioned at the same time. Naturally, it is quite normal that scholars conduct their research from diferent perspecives. However, the author still believes that clarifying the relationship between the two principles, i.e. different but overlapped, has great influence both on deeper theoretical research and sports arbitration practices.

2. The Arbitrabilty Analysis of "on-the-spot penalties" and "technical specification"

Generally speaking, disputes of business or property rights are arbitrable, i.e., whether the parties' disputes can be reconciliated or mediated is the boundary

to judge the arbitrability of disputes. "Whether relevant parties have the right of reconciliation is recognized as the touchstone of arbitrability."[1]

However, in sports arbitation, not only sports relevant business disputes are arbitrable but also sports relevant disputes which could not be reconciliated can be arbitrated. For instance, disputes of whether athletes taking dope or whether athletes have the entry qualification can be solved by arbitration. "This means that the traditional recognized standard of judging arbitrability has been broke up and the arbitration scope is largely expanded."[2] The author thinks that the reason for "on-the-spot penalties" and technical specification's exclusion from sports arbitration lies on "Not-to-Review" principle of the international sports convention, rather than themselves' arbitrability. The reason why "on-the-spot penalties" should not be reviewed is because "sports should not be interupted continously by appealing to judges or arbitrators". And compared to sports organizations, judges and arbitrators has no say on applying the specific sports rules, so courts have no power to interview.[3] Though we now do not discuss whether the excuses of "not-to-review" are reasonable or not, apparently we can see the two excuses have no direct link to arbitrability. People see from many CAS's "not-to-review" cases that the arbitration courts emphasize "unless referee's decision are influenced by dishonesty" or "unless proof shows that referee's decision are bribed or something like that" or "relevant sports organization has made vicious, dogmatical, wrong decisions or legal mistakes" many times when they elaborating the exucuses of "not-to-review". And this on the other hand illustrates that "on-the-spot penalties" and technical specification are ordinarily not to be reviewed rather than they aren't arbitrable. Under certain circumstances, they would still be reviewed or be arbitrated, in other words.

Analyzing from arbitrability, traditional view argues that sports activities shall not be disturbed by arbitration or judiciary and only those sport activities which "badly hurt atheletes' bodies or properties" shall be reviewed by court or arbitation institution. However, along with the commercialization, in high level sports activities, applications of both "on-the-spot penalties" and sports rules will affect athletes' health and property. It is not only inappropriate but also will do harm to sport activities' healthy development if people still stubbornly stick to the "non-intervention principle" in sports.

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[1]Song Lianbin:Research on Internatioanl Business Arbitration's Jurisdiction, Law Press, P131; Huang Jin:Arbitration Law, CUPL Press, 2002, P22

[2]Huang Jin: Exploration of Sports Disputes and Sports Arbitration, Harmonious Olympics and Effective Legal System, CUPL Press, Jun 2008, P174

[3]Huang Shixi:Olympics Games' Disputes and Arbitration, Law Press, Oct 2005, P52-53

Based on the analysis listed above, the author believes that disputes of "on-the-spot penalties" and technical specification are arbitrable because they not only involve relevant parties' personality right or personal right but also connect with relevant parties' properties and economical benefits directly. In order to adapt to the modern high-level sports development, more constraint and change shall be imposed on the traditional "not to review" principle.

3. The Application on the Exception of "not-to-review" Principle

Although the author thinks that "on-the-spot penalties" and "technical specification" are arbitrable, the author does not agree with overthrowing the traditional view of "not-to-review" on sports activities. The emergence and existence of "not-to-review" principle has its rationality and it fits with the development of sports' rules. Imagine that if all those on the spot penalties and technical specifications would face with the investigation by judicial or arbitration authorities, then sport activities would be suspended at any time and referees would be afraid of be caught into lawsuits every minute. And sports activities will eventually lose their own charm and independence. Moreover, based on the angle and position in the sports field and limited by his physical strength and capability, it is reasonable, understandable and acceptable that referee makes wrong judges toward offenses and fouls in competition. Even the wrong and missing judges are the proper parts of the games and the charm of sports activities lies in it. So, as long as the referee is honest and kind when he makes the judges, "not-to-review principle" should be sticked to. Only in this way can we safeguard the normal order of sports activities.

However, as things would have two sides, "not-to-review" principle has inherent defects: it tends to be took advantage of by "black whistle" or vicious referee. Unjustice and vicious false judgments would seriously affect relevant parties' competition results and economical benefits. More worryingly, this may deprive the fighting spirit and fairness doctrine from sports and the audience will gradually lose the enthusiasm and interest in sports. All these would definitely have a negative impact on the healthy development of the competitive sports.[4] Therefore the reasonable exceptions of "not-to-review principle" should exist. Actually CAS's arbitration practices are always sticking to this, i.e. investigations are carried out on dishonest and vicious judgments or dogmatic and false ones. Question is how to correctly apply the practices of "the exceptions of not-to-review principle" can we truly correct those vicious judgments? From the view of the current arbitration practices of CAS, there are barely applications of

[4]Zhu Wenying: Discussing Referee's Legal Liability, Xiao Jinming, Huang Shixi: Sports Law Review(Voulme 2), ShanDong University Press, Apr 2009, P118

similar cases. Investigations over vicious judgements remain on paper. Why? It is because applications on exceptions of "not-to-review principle" lack supports from both theory and practice, and many words which are mentioned by CAS are quite vague and cannot be illustrated by practices. As a result, in order to truly review the malicious judgments, there's still a long way to explore.

The author suggests that the applications of "exceptions of not-to-review principle" can be improved from the following aspects:

First, conditions of review. From the expressions of related arbitration cases of CAS, terms such as "bribe taking", "malpractice", "dishonest" "vicious", "dogmatic", "reckless" and "legal mistakes" are used to define the conditions of review. Here, we do not discuss the vagueness of these terms, but focus on the difficulties in their application. Words especially like "malicious" "arbitrary" "reckless" "dishonesty" etc. are strongly subjective and it is difficult to judge from the external performance. As to "bribe taking", relevent parties would never admit it voluntarily, and it would usually take years to be exposed based on some accidental factors. Thus except for those descriptive words, the author thinks that the conditions of review can be properly enlarged. We can introduce the concept of "tolerability" when clarifying the judgements. As long as the referee is honest and kind, despite the false judgments, his or her mistake should be tolerated; on the contrary, it would not be tolerated. And the interview should be carried out if false judgments are obvious and elementary.

Second, burden of proof. Without exceptions, now arbitration courts request applicants to provide relevant proof like "bribe-taking" and "malpractice" to prove the referee's malicious judge, only by doing this can courts investigate. Clearly this burden of proof is unfair. As previously mentioned, "dogmatic" and 'malicious" are quite subjective and "bribe-taking" and "malpractice" can be concealed easily. It is difficult even for state apparatuses to investigate. How can we ask the athletes to search for evidences? Although in civil and commercial cases burden distribution principle is "who propose, who burden", people need to know that in these cases relevant parties are on the equal legal position no matter they are natural person or legal person. But in sports disputes, athletes are facing with strong International Sports Federation and what's worse, asking athletes to prove referee's bribe-taking or viciousness does not belong to the category of civil and commercial proof, but almost equals to the scope of criminal evidences and for atheletes, those burdens of proof means zero posibility of winning. This may be the real reason of why up till now there are no exception cases of "not-to-review principle". So the author suggests that applicants just have to prove that the referee's judgment is obviously wrong or unfair, which is the basic prove obligation of applicants and viciousness or bribe-taking proof of the referee are not needed.

Third, limits of investigation. The arbitrtion court shall investigate the case immediately if it finds obvious false or unfairness in "on-the-spot" penalty. Besides investigating viciousness and bribe-taking of the referee, more importantly, arbitration court shall investigate whether there are substantive or procedural mistakes in applying the sports rules. From the very beginning, CAS has been adhering to principles of "no jurisdiction on technical specifications" or "not-to-review". No doubt, each International Sports Federation is more authoritative in the formulation and application of sports rules and arbitration courts have no right to formulate or change these rules. But for the applications of existing rules the author thinks that arbitration courts have the right to investigate on whether the applications are reasonable. After all, in this sphere legal experts are more authoritative than those referees and sports officials. At the same time, investigations of sports rules' application would contribute to the further improvement of the relevant sports rules.

Fourth, relief measures. Based on the particularity of the sport, often the afterwards jurisdiction or arbitration cannot change competition results and this is one of the reasons of why "not-to-review principle" is established. During the applications of "exceptions of not-to-review principle", if there is a possibility to change the competition results, courts can change the result by withdrawing gold medals or approving candidates to enter into next round if obvious mistakes truly exist; appropriate economical compensation should be paid to the innocent party if competition results cannot be changed. Money may not fully compensate the relevant litigant's loss, but it is still a powerful solace to the applicant and a necessary warning to the related referee. Although these measures cannot completely eliminate or eradicate the false judgments, they still contribute to prevent vicious judgments.

In conclusion, the author persists that both "on-the-spot penalties" and technical specification are arbitrable. However, due to the particularity of the sport, "not-to-review principle" over them should still be stick to. Whereas, in order to prevent the abuse of this principle and protect the fairness of sport competitions, exceptions of this principle have to exist. Unfortunately, appropriate applications on exception of "not-to-review principle" remain to be enriched and developed both theoretically and practically.

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He has participated in the Organization of many Scientific Conferences - Congresses-Seminars - Symposiums, covering the Sports Science and Sports Law. He is the author and editor of several scientific books and monographies and has published over 200 scientific studies in Greek and International scientific journals. He has also been an invited lecturer on subjects concerning Sports Law and Lex Sportiva, in many universities and sports Law Centres. The author has received several awards and honours, such as "The Distinguished Service to Humankind Award in the arena of Sports law" (2010), "Person of the Year in Law" Award (2009) and International Award "Aisimnitis" (2005).

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Author's recent books

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- The Study on Legal Issues of School's Sports Accidents (2008)
- Taking off "the Veil" for Conducts of Ambush Marketing (2007)
- The Study on Legal Issues of Conflicts between "Student's Physical Health Standard and Law of Higher Education" (2006)
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