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SPORTS SPECIFICITY IN THE WORLD OF DOPING

by *Michele Colucci*[*] and *Felix Majani*[**]

1. Introduction

The world of sport has certain rules established for purposes of organisation and order. Based on their objectives, these rules might not contravene other international laws and it seems a prerequisite that in order for these rules to be compliant with the said international laws, their anti-competitive effects, if any, must be inherent and proportionate to the objectives pursued.

The so-called "specificity of Sport" is quite a vague concept which nevertheless has a significant impact on the application of both the EU law and international laws to the Sports Associations and to those who are registered with them (clubs, players but also coaches and trainers).

Specificity encompasses all the characteristics that make sport special. It includes, for example:

a) the specificity of sporting activities and rules such as separate competitions for men and women,
b) limits on the number of participants in competitions,
c) the principle of promotion and relegation,
d) the principle of a single federation per sport,
e) a pyramid structure of competitions from amateur to professional level,

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f) the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions.

In sports like football, it has extended to a level whereby:

a) clubs pay transfer fees in order to acquire the services of players under contract,
b) clubs pay training compensation and/or solidarity mechanism during transactions with fellow clubs for the transfer of players; and
c) to playing rules such as the offside rule, yellow cards, etc.

It is this specificity which continues to hold certain sports like football aback in as far as the use of video technology[1] is concerned.

These specificities have indeed been recognized under the EU laws, as evidenced in the ECJ judgments and even more so under the Nice Declaration in 2000 which expressly recognizes the right of sports bodies to organize and promote their respective sports, in particular as regards specifically sporting rules.

The aforementioned aspects are taken into account when assessing whether sporting rules comply with the requirements of EU or other international laws, such as antitrust laws, laws safeguarding individuals against invasion of privacy etc. But of all these peculiarities attributed to the specificity of sport, one stands out – sports' anti doping rules.

Sports' anti doping rules and in particular those enshrined under the World Anti Doping Code have over the years raised controversies and been the subject of discussions in relation to contentious provisions and criticisms in as far as they relate to other international laws.

But despite this, the WADA Code has managed to withstand the storm and continues to reign. How is this? How specific are the provisions of sports' anti doping rules to the extent that they have still remained in force regardless of them having the potential of infringing and/or violating other laws? What is so specific about sports and its anti doping rules? What other features or laws are exclusively applied in doping matters?

The first step towards answering these questions is to remind oneself of why sports claims or wants to remain specific. It is obvious that sports is unique. It is not just any other activity. It is nowadays both a social activity and a profession. It is therefore imperative that legal issues be left best and addressed by experts who have vast knowledge and experience of the intricacies of sports; or else we might end up having a wide range of conflicting sports laws and jurisprudence. It is in light of this that the International Olympic Committee, in collaboration with sports´ international federations established the Court of Arbitration for Sport in Lausanne, Switzerland. Its main task is to adjudicate and arbitrate on sports matters at international level, and it is sports´ highest arbitral tribunal.

[1] Despite calls for the introduction of video technology, some quarters in FIFA still advocate for the maintenance of the status quo, arguing that video evidence would take away the "passion" associated with the rules of the game as it is today.

This article explores sports´ specificity in the realm of its anti doping regulations in as far as they relate to antitrust laws, the international privacy law provisions and the laws applicable to doping disputes.

1.1. The anti doping rules and anti trust

Perhaps the greatest challenge yet made to sports´ anti doping rules took place before the European Court of Justice (ECJ) in the famous 2006 case C-*519/04 P, Meca-Medina & Majcen v. Commission*.

In brief, this was a case filed by two professional swimmers who were on 8 august 1999 banned by world swimming governing body the FINA for four years for using a prohibited substance, nandrolone.

They appealed the ban to the CAS but neverthless lost as the CAS upheld the 4 year ban in February 2000.

Soon thereafter, new scientific evidence emerged which exonerated them from 100% blame and on 23 May 2001 the CAS reduced the ban to 2 years.

The swimmers did not give up and took the matter to the ECJ. They challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA and certain practices related to doping control with the Community rules on competition and freedom to provide services.They argued that the anti doping rules contravened the EC treaty rules on competition, and in particular articles 81 and 82[2] thereof. They also alleged that the IOC's adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration (the CAS and the ICAS) which are insufficiently independent of the IOC strengthens the anti-competitive nature of the rules.

What came out of the resulting judgments issued by various levels of the ECJ courts is what today distinguishes sports´ anti doping rules and makes them specific.

The various instances of the ECJ courts dismissed the swimmer´s case and came up with the following precedents:

- The anti-doping rules were pure "sports rules" falling outside the scope of the EU competition law.
- The free movement provisions of the EC Treaty did not apply to pure sports rules (such as the anti-doping provisions) since this kind of rule had nothing to do with economic activity.

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[2] Article 81.1 EC Treaty: *"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings (…) which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…)."*
Article 82.EC Treaty: *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."*

- As long as the anti doping rules remained limited to their proper objective of ensuring fair play, and contained no element of discrimination, then it was not for the Court (or the European Commission) to judge whether or not the rules were "excessive" or "disproportionate".
- Since the anti doping rules in question were "sporting" in nature the matter should be dealt with by the relevant sports dispute resolution bodies.
- The anti-doping provisions concerned the ethical aspects of sport and were not subject to the restrictions imposed under the EC Treaty, even if they had some or other ancillary economic consequences. This was because any economic aspect of the rules was clearly secondary to their sporting aspect.[3]

It can hence be concluded from the *Meca – Medina* judgment that it is safe to say that although the anti doping rules might have some economic impact on athletes, this impact is overridden by the need to ensure the maintenance of fair play in sport – a specific and unique feature of sport. Indeed, the anti doping rules ensure that an athlete's right to compete goes hand in hand with the need to do so in a fair and honest manner.

We can also conclude that doping issues can only be heard before sports dispute resolution bodies and no other *fora*.

1.1.1 The anti doping rules and the right to privacy

In further efforts at combating doping, the WADA requires athletes to:

a) Provide information in relation to their whereabouts and be subject to testing 24 hours a day, 7 days a week, 365 days of the year;
b) Identify their location for each day in the following three months and update it should it change; and
c) Specify one hour each day (between 6am and 11pm) during which they can be located at a specified location for testing.

Failure by an athlete to be found at the place he claims to be constitutes a missed test. Moreover, submission by the athlete of incomplete or inaccurate information constitutes a filing failure. Both missed tests and filing failures constitute Whereabouts failures. Under the WADA Code, three Whereabouts failures in 18 months constitute an anti-doping offence, and consequently may lead to a suspension of a minimum of 12 months, and a maximum of two years.[4]

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[3] For further reading, please see "*Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?"* by Gianni Infantino, UEFA Director of legal affairs.

[4] Under Art.2.4 of the WADA Code "Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation."

These provisions have been stipulated under the WADA International Standard for Testing, which states as follows:

11.1.3 "An Athlete in a Registered Testing Pool is required to make a quarterly Whereabouts Filing that provides accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, so that he/she can be located for Testing at any time during that quarter: see Clause 11.3. A failure to do so amounts to a Filing Failure and therefore a Whereabouts Failure for purposes of Code Article 2.4."

11.1.4 *"An Athlete in a Registered Testing Pool is also required to specify in his/her Whereabouts Filing, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specified location for Testing: see Clause 11.4. This does not limit in any way the Athlete's obligation to be available for Testing at any time and place. Nor does it limit his/her International Standard for Testing, January 2009 42 of 91 obligation to provide the information specified in Clause 11.3 as to his/her whereabouts outside of that 60-minute time slot. However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, and has not updated his/her Whereabouts Filing prior to that 60-minute time slot to provide an alternative time slot/location for that day, that failure shall amount to a Missed Test and shall therefore constitute a Whereabouts Failure for purposes of Code Article 2.4*."

11.1.6 *"An Athlete in a Registered Testing Pool shall be deemed to have committed an anti-doping rule violation under Code Article 2.4 if he/she commits a total of three Whereabouts Failures (which may be any combination of Filing Failures and/or Missed Tests adding up to three in total) within any 18 (eighteen) month period, irrespective of which ADO(s) has/have declared the Whereabouts Failures in question*."

One could possibly argue that these provisions are contrary to international laws, and in particular the Universal Declaration of Human Rights and the European Convention on Human Rights which safeguard an individual against the invasion into the privacy of his life.

Under Article 12 of the Universal Declaration of Human Rights, "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

Furthermore, article 8 of the European Convention on Human Rights provides that:

"1. Everyone has the right for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It is also obvious that the above rights include the right to make decisions about one's own body.

Notwithstanding these provisions, it is evident that the athletes' whereabouts information continues to be enforced and the anti doping provisions prohibiting athletes from taking certain substances do indeed amount to the taking away by WADA, of an individual´s right to make decisions about his/her own body.

These provisions have indeed received support from the CAS advisory opinion in *FIFA v WADA*, which not only offers practical guidance but also identifies the following non-exhaustive obligations on athletes:

a) An obligation to be aware of the actual list of Prohibited Substances;
b) An obligation to closely follow the guidelines and instructions with respect to healthcare and nutrition of the National and International Sports Federations, the NOC's and the National Anti-Doping Organization;
c) An obligation not to take any drugs;
d) An obligation not to take any medication or nutritional supplements without consulting with a competent medical professional;
e) An obligation not to accept any medication or even food from unreliable sources (including online orders by internet);
f) An obligation not to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marijuana).

2. Doping disputes and the law applicable

It is also interesting to observe that doping is another area of sports wherein judicial bodies have advocated for the application of certain regulations in light of the specific nature of sports. This is more prominent in appeals against doping decisions rendered by sports federations which have their domicile outside Switzerland.

In accordance with article R58 of the CAS Code,[5] the CAS is required to apply the sports regulations of the federation which rendered the appealed decision supplemented by the law of the country where the said federation is domiciled.

However, the CAS strives to achieve a consistent and uniform application of the WADA Code despite the different governing laws of the federations.

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[5] Article R58 of the CAS Code "*The panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

A case in example would be an appeal against a doping decision rendered by the International Tennis Federation (ITF), which is based in London, UK. In such situations, the CAS has acknowledged that the dispute would be governed by and construed in accordance with English law. However, since the ITF regulations require the ITF to interpret its programme in compliance with the WADA Code, the CAS would be obliged to apply the WADA Code. And since WADA is based in Switzerland, the CAS would ultimately construe the WADA code in a manner which is consistent with Swiss law as the law which the WADA must comply with. CAS/2006/A/1025 Mariano Puerta v ITF.

To be specific, the Panel which decided the above-mentioned case accepted that "(…) *the ITF programme provides that it is to be governed by and construed in accordance with English law, but that provision in the ITF programme is expressly stated to be subject to the requirement to interpret the programme in a manner that is consistent with the applicable provisions of the code (WADC). The panel interprets those provisions as requiring it to construe the WADC in a manner which is consistent with Swiss law as the law which the WADC must comply…"* para 10.8.

The diversion from the law chosen by the parties however seems to be an exception rather than the norm. Nevertheless, Swiss law has generally been applied in supplementation to the law chosen by the parties or in order to ensure that the awards comply with Swiss public policy.

Conclusion

It seems apparent that the specificity associated with sports means that the anti doping rules are here to stay. True, there will always be critics to these rules but what these critics ultimately need to do perhaps with a view to having the anti doping rules softened is to turn their attention to the root cause of these rules – the athletes.

Campaigns should be aimed at encouraging athletes to believe in their natural talents and abilities. Sports seminars and educational tours should be conducted by the international federations and national federations to endow athletes with good morals – morals which say that sport is merely a competition in which the participants should strive to win fairly and squarely with utmost respect to their fellow professionals, the viewers and to the integrity of the sport itself.

Efforts should also be concerted at finding youngsters of great sporting talent through a planned selection programme.

Thereafter, the athletes should be introduced to rigorous yet intense training to verify their real potential.

Finally, stakeholders should pursue the need to identify "winners" from a psychological point of view, thanks to their resistance to stress, their control of anxiety and very strong motivation.

FAIR PLAY? FOOTBALLERS THE VICTIMS OF CLUBS WHO STRUGGLE FINANCIALLY

by *Johan van Gaalen*[*]

Introduction

Does a Club's relegation or financial difficulties justify early termination of a footballer's fixed term contract of employment? Due to the world wide economic crises, this issue becomes more and more relevant to the football environment.

In this article a general reference will be made to world football, however specific reference will be made to the situation in South Africa and the applicable domestic laws. All reference to case law, is in respect of South African reported cases.

This matter raises the central question, namely:

"Whether Football Clubs may retrench football players whom are contracted on fixed term contract."

Flowing from the question is whether retrenchments for operational requirements are a just cause (gives the respondent the entitlement) for prematurely terminating a football player's fixed term contract.

1. South African Position in Respect of Retrenchments in General

The following legal principles have become solidified and well engrained in the current South African labour law and South African constitutional dispensation (any references to case law, will be South African cases, save where it is expressly indicated otherwise):

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- Consultation in terms of the South African Labour Relations Act means a *bona fide* attempt to reach consensus with an employee before a retrenchment takes place.[1]
- There must be a proper disclosure of information / essential information before adequate consultation can take place and failure to do so renders the retrenchment procedurally unfair.[2]

It has been held that where an employee is employed on a fixed term contract of employment and where such employee was dismissed where such work for which he was employed is still available – in this case the position to play football – and the employee is dismissed for operational reasons, a dismissal is deemed to be unfair.[3] What makes this situation even more ridiculous is that Clubs retrench footballers whilst other football players were in fact recruited at the same time by the Club.

Retrenchment should be the last resort and Clubs must proof that retaining the employee is not feasible.[4] Restructuring should be considered at the very least e.g. footballers should be offered to stay at the Club and play for a lesser salary, until such time the financial situation of the Club has improved.

It is trite in the South African Labour Law that both the employer and the employee must take part in a debate to discuss alternatives.[5] That the process of consultation between Club and footballer must be aimed at genuinely seeking consensus on issues.[6] It is submitted that Clubs abuse the financial excuse in order to get rid of footballers whom either is not fitting in the plans of the coach or does not perform properly. Poor work performance is a total different procedure and the guideline therefore has been laid down in football cases.

The South African Labour Relations Act defines an operational requirement as follows:

- "Operational requirements" means requirements based on the economic, technological, structural or similar needs of the employer.[7]

The South African Code of Good Practice in respect of Dismissals for Operational Requirement clearly stipulates that dismissal as a result of operational requirement should be based on the economic, technological, structural or similar needs of the employer. The Act at Section 213 is clear and unambiguous insofar as the definition of an "operational requirement". As a general rule, economic reasons are those that relate to the financial management of the enterprise. Relegation of a Club, which result in the Club's grants be reduced by its association, could therefore be regarded as a reason. Technological reasons refer to the

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[1] CWIU v Johnson & Johnson (Pty) Ltd [1997] 9 BLLR 1186 (LC).
[2] Chotia v Hall Longmore & Co (Pty) Ltd [1997] 6 BLLR 739 (LC).
[3] Mkhiva v BCS Joint Venture [1997] 8 BLLR 1014 (LC).
[4] Manyaka v Van de Wetering Engineering (Pty) Ltd [1997] 11 BLLR 1458 (LC).
[5] Fletcher v Elna Sewing Machine Centres (Pty) Ltd [2000] 3 BLLR 280 (LC).
[6] Strauss v Plessey (Pty) Ltd [2002] 1 BLLR 105 (LC) AND Alpha Plant and Services (Pty) Ltd v Simmonds & others [2001] 3 BLLR 261 (LAC).
[7] South African Labour Relations Act at Section 213.

introduction of new technology which effects work relationship. With all due respect, it could never be a valid reason in the football environment. The rules of the game of football stipulates that 11 (eleven) players shall start a match on the field and 7 (seven) players shall be on the bench as reserves. Technology can never replace players. Structural reasons relate to the redundancy of post consequent to a restructuring of the employer's enterprise. It would be impossible to justify structural reasons as a reason for retrenchment of players in the football environment, in light of the rules of the game as referred to above in the paragraph supra.

The South African Labour Relations Act requires that the criteria for selection must be either agreed on with the consulting party but if no criteria have been agreed on, then fairness and objectiveness must be used. A criteria that the footballer does not form part of the Club's future plans or the footballer did not perform, must be regarded as a subjective criterion that could in no way be fair and reasonable. Performance could never be justified as a criterion for retrenchments of footballers. A non performing player could not be retrenched in these circumstances and the necessary disciplinary process needs to be followed in order to deal with non performing players. According to the firm jurisprudence of the FIFA DRC, the principle of contractual stability, a contract cannot be dependent on the performances of the player. This is a subjective criterion, which can be easily abused.

2. Retrenchment as a Breach of Contract

It is a common fact that all the footballers are contracted on fixed term contracts. Rule 36 of the South African National Soccer League deals with professional contracts and reads as follows:

"36 PROFESSIONAL CONTRACTS

36.1 Every club employing a professional player must have a written contract with the player.

36.2 Every contract of employment of a professional player shall have a minimum duration of one full season and a maximum duration of five full seasons and shall be consistent with the laws of the Republic of South Africa as well as the Constitution, Rules and Regulations of SAFA.

36.3 The expiry date of a contract may only fall on 30 June in any year. It shall however be allowable for a contract to be terminated before its scheduled expiry date by mutual consent between the player and the club for which he is registered, in which case the player may only be registered by a new club during the next registration period or at and time thereafter."

In terms of the rules of the South African National Soccer League and general practise worldwide, a fixed term contract may only be prematurely

terminated for reasons of just cause. The FIFA regulations[8] prohibit the unilateral termination of a contract during the course of a season in order to ensure contract stability. In terms of the standard fixed term contract, needed to be signed by all footballers playing football in the South African Premier and National First Division, it is stipulated that a contract between footballer and Club may only be terminated as follows under the following circumstances:

18 Termination of Employment:
Notwithstanding the fact that this is a fixed term contract, the Club may terminate this agreement by the giving of 1 (one) month's written notice prior to its expiry if:

18.1 The footballer is found guilty of misconduct justifying dismissal;

18.2 The footballer is found to be incapable of competently fulfilling the job for which he has been employed."

Retrenchments in South Africa are regarded as a no fault dismissals on the part of the employee. The footballer can therefore not be responsible for the unilateral termination of the fixed term employment contract. If no agreement can be reached between a Club and a footballer in respect of the early termination of the footballer's contract and the Club unilaterally enforces such a condition, it will constitute a breach of contract. In terms of a contract, with the same or similar clause of termination as stipulated above, the Club will not be entitled to retrench a footballer and therefore will breach the fixed term contract. Termination of the footballer's contract due to retrenchment in the above circumstances should be regarded as unlawful, without just cause.

The South African Labour Appeal Court[9] has held that an employer may not under any circumstance retrench an employee on a fixed-term contract if the termination occurs before the contract's expiry date, unless the contract provides for termination at an earlier date. Retrenchment in these circumstances will constitute a breach of contract, for which the employee will be entitled in principle to claim compensation for the salary lost during the balance of the contract period. Such termination will therefore be regarded as unlawful. There is no reason why this principle could also be applied in the football environment of South Africa and possible in the world.

It was furthermore held in the Buthelezi matter[10] that in terms of the common law a party to a fixed term contract has no right to terminate such contract in the absence of repudiation or a material breach of the contract by the other party. In other words, the respondent had no right to terminate the applicants' fixed term contract, even on notice unless the terms of the contract provide for such termination, which it did not. Acting Judge Davis in the Buthelezi matter stipulated: *"When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour*

[8] FIFA Regulations on the Status and Transfer of Players, regulation 16.
[9] Nkanyiso Eustace Buthelezi v Municipal Demarcation Board (2005) 26 ILJ 443 (LAC).
[10] Nkanyiso Eustace Buthelezi v Municipal Demarcation Board (2005) 26 ILJ 443 (LAC).

and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things."

In light of the above, a club's argument that the club was relegated or the footballer do not fit in the club's future plans or the applicants did not perform, cannot be accepted as valid and fair reasons for termination of the fixed term contracts. Clubs are taking the risk when concluding a contract for longer than 1 year and therefore a club cannot complain when the risk materializes. In fact, the player and the club both take risks when they enter into a long fixed term contract. The player put himself to risk to bind himself for a certain period at one club, whereas he could have been contracted after one year, maybe to a premier club or any other club for a higher salary. Both parties took risks and made a choice and there is no unfairness in the exercise of the choice, therefore the party in breach, must bear the consequences.

Acting Judge Nugent, in the Wolfaardt matter[11] stipulated that a contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.

The Federation Internationale De Football Association ("FIFA") forms the overarching regulatory body dealing with football internationally. FIFA has complied what is known as the regulations on the status and transfer of players which essentially deal with a variety of regulatory issues governing essentially that which Football is all about namely playing of a game by players and how the status of these players will be determined at various levels regarding various issues. Essentially the regulations laid down global and binding rules concerning the status of players ("Regulations") and their illegibility to participate in organised football and their transfer between clubs belonging to different Associations.[12] The Regulations under the heading "Maintenance of Contractual Stability between Professionals and Clubs" reads as follows:

"*13. Respect of Contract:*
A contract between a professional and a Club may only be terminated upon expiry of the term of the contract or by mutual agreement.

14. Terminating a Contract with just cause:
A contract may be terminated by either party without consequences

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[11] *Fedlife Assurance Ltd v HJ Wolfaardt – par 22.*

[12] Introductory provision, para 1 (scope).

of any kind (either payment of compensation or in position of sporting sanctions) where there is a just cause.

16. Restriction on terminating a contract during a season:

A contract cannot be unilaterally terminated during the course of a season."

Even if Clubs can proof that the retrenchment of footballers can be regarded as a valid reason and just cause for termination, the FIFA regulation 16 is clear in that a contract cannot be unilaterally terminated during the course of a season. Retrenchments are regarded as no-fault dismissal on the part of the employee / footballer, and therefore the termination of the contract is unilaterally.

In light of the above South African case law, it is clear that it is prohibited to terminate a fixed term contract without the parties agreeing on the conditions of which such contract can be terminated. In other words, if the parties have not agreed that the fixed contract can be terminated due to retrenchment, any retrenchment of such person will result in an unlawful termination of the contract, meaning a breach of contract occurred. Therefore the manner in which a fixed term contract may be terminated, which will also apply to footballers, should be agreed in terms of the contract and be so regulated. This is fair and reasonable with special reference to the principle of contract stability as prescribed by FIFA and practise in the greater part of the football world.

However, the South African clubs attempt to avoid liability when wanting to retrench, and created a club handbook in which it is stipulated that clubs may retrench footballers. It must be noted that this handbook is unilaterally drafted by the club and enforce on a player joining the club. South African football players are required to sign a standard NSL fixed term contract / a written fixed term contract. The particular contract provides as follows:

"3. Appointment and Duties:

3.1 The Footballer shall perform to the best of his ability all duties and functions (own emphasis) set out in this contract and also in the handbooks and codes of practice issued by the Club and the football rules as amended from time to time which documents are incorporated herein by reference".

The clubs with handbooks rely on the above clause and submit that the handbook is incorporated into the fixed term contract of the player by reference and therefore the club is entitled to retrench a player. With reference to the above clause and clause 18 of the standard NSL contract (stipulated above) is submitted that the handbook of a club incorporated herein only regulates the player's duties and functions and the contract of employment may only be terminated if a player was found guilty of misconduct or if a player was incapable to play. Therefore, despite the clubs prescribing in its handbook that a player's contract may be terminated due to retrenchments, it is submitted that such manner of termination must be unlawful due to the only grounds the club and player agreed upon in respect of termination, is regulated in the fixed term contract. It is clear in terms of the standard NSL football contract that the handbook of a club only regulates

the duties and functions of a player and not the personal rights of a player, such as termination.

3. Sport Specificity Justifies Retrenchment?

A school of thought contents that the nature and the very existence of football gives rise to a term known as sport specificity.Differently put, the school contents the specificity of sport and in particular the game of football allows that a club may retrench based on the decision by a technical team or a head coach to restructure a team to the exclusion of a particular player as in this case of MOKORO[1] and on that basis sports specificity justifies the player's dismissal on the basis of operational requirements.It is submitted that the overarching legislation captured in the South African Labour Relations Act 66 of 1995 (as amended) (South African Labour Relations Act) which amplifies the provisions of the South African Constitution[2] clearly overrides any form or notion or inclination to the term sport specificity. Furthermore, it is with due respect that the term of sport specificity cannot be use when and needed by clubs in order to benefit them, which results in contract instability.

Conclusion

Retrenchments could not be a fair reason to terminate a player's fixed term contract, if the parties have not expressly agreed thereto. No agreement, no entitlement and definitely no just cause. This practise definitely results in unfair play.

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[13] Mokoro vs Ajax Cape Town NSL DRC, SAFA Appeal & SAFA Arbitration

[14] Act 108 of 1996.

PRE-MATURE IMMIGRATION OF AFRICAN ATHLETES: THE PROBABLE LEGAL CATALYSTS AND MECHANISMS FOR CHECKS AND BALANCES

by *Felix Majani*[*] and *Elvis Majani*[**]

1. Introduction

Sports can and does bring joy and happiness to millions around the world. And in particular to the less privileged, it is a ladder to financial success and economic development.

In most developing countries, athletes desire to work hard not only for themselves and their families but also for the pride and ambassadorial benefits their success and images could bring to their native countries. It would therefore be for good cause that the immigration of athletes from Africa to the western world – at the right age, at the right time and through the right channels should be encouraged.

The problem however arises when this departure happens to athletes who have hardly had the mental, physical, cultural experience or preparation of actually

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competing and living outside their home soil.

Whereas age plays a significant role in assessing one's experience, an athlete's inexperience cannot be ruled out merely because he or she is relatively older. And we cannot turn our eyes away from the ills brought about by pre mature immigration of athletes from the developed world. They remain gullible and exposed to various social risks, which include but are not limited to the following:

1.1 Educational interruptions

Constitutions of most African countries provide for the right to education, for instance the Kenyan constitution Article 53(1)(b) states *"Every child has the right to free compulsory basic education"*.[1]

However most athletes and particularly minors run the risk of failing to complete their elementary schooling and educational studies when crossing borders in search of fulfilling their sporting dreams. Although most of them have access to and are offered the chance of continuing their basic education, they generally prefer to abandon their studies thinking that they have or are close to sporting success. The problem is, they have only just begun and most of them do not succeed in their chosen sports, thereafter having little else to look forward to.

1.2 Illegal immigrant status

Players who fail to make it in sports and also happen not to have completed their basic education, are left with little choice but to stay in the streets and try to eke out a living. With expired passports or non-renewable residence cards, they do often end up as illegal immigrants.

Up until 2010, the situation was even worse for Kenyan athletes because Kenya did not allow its citizens to hold dual nationality. It hence meant that Kenyan track and field athletes who wished to compete for other countries had to first surrender their Kenyan passport in order to be eligible to run for their newly adopted countries. The problem would then arise in case the athlete is later dumped or zealously stripped off the citizenship of his newly adopted country on grounds such as contravening the laws of his adopted country. These, of course, are situations athletes hardly envisaged but which have actually happened to a number of immigrating athletes, such as former long distance runner Leonard Mucheru.[2]

1.3 Vulnerability and adaptation complications

Being exposed to totally new environments, cultures and languages, it is quite obvious for these athletes to remain vulnerable due to their ignorance. Language barriers also play a part and they could easily fall prey to fraudsters or fall on the

[1] Constitution of the Kenya Article 53 Specific application of rights on Children.
[2] www.aipsmedia.com/index.php?page=news&cod=677&tp=n.

wrong side of the law without wishing to do so. This is especially the case when the athletes do not receive adequate advice on tax, social security issues etc. This may ultimately end up interfering with their performance and/or integration with the rest of the team, and may lead to their sporting failure.

2. The Legal Laws Catalysing Premature Immigration of Sportsmen

Given these risks, all the bodies governing sports at international levels agree that measures must be taken to curb, check and control this immigration; albeit human trafficking in some instances. They have individually enacted several laws to control this immigration, most of which have been addressed in the latter parts of this article. It is however evident that these laws have proved to be insufficient in their fight against illegal and/or pre mature departure of athletes.

So just where do the lacunae lie in the national laws as well as the international sporting laws such that the said pre mature departures are hastened?

2.1 Frail anti-corruption and antifraud laws

Corruption has and continues to be a medieval nemesis in both sports and other matters around the world. More often than not, sportsmen find themselves having to forge their documents in order to be eligible to take part in certain sporting events which have certain age requirements. Despite the existence of laws which punish those involved in fraud, forgery and/or falsification of documents, Africa's generally low economic status and the lure to quick cash is too much of a temptation for the perpetrators – most of who work in the governments as civil servants – to resist. Needless to say that Africa can only safeguard its sporting future by engaging in anti-corruption campaigns and also enforcing its national anti-corruption laws to the letter.

2.2 Vague Adoption Laws

Taking Kenya as an example, under Section 82 (3) of Kenya's Children Act, custody of a child may be granted to any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application.[3]

This provision has easily acted as a loophole for the illegal or premature immigration of Kenyan minors in the realm of sports. The relatively low economic status of a majority of Kenya's families and the lures offered to them by unscrupulous sports agents have continued to pave the way for the migration of minors. Sadly, the parents or guardians simply consent to or give custody to such agents in exchange for money. Thereafter, the agents have the minor in their custody for three months or more and later make formal applications for adoption.

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[3] See section 82(3) Kenya's Children Act No 8 of 2001.

Upon receiving adoption documents, they begin the process of moving these talented sporting minors to the developed countries.

Going hand in hand with the flawed adoption laws are the marriage laws, which contain loopholes allowing parties to engage in sham marriages for their own interests, most of which are imaged at securing immigrant status.

2.3 The Olympics Eligibility Rules

In addition to national laws, one can also say that a number of international sports regulations could be fosters of athlete immigration.

Under Bye-law to Rule 42 of the Olympic Charter, *"1.A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympics Games, in continental or regional games or in world or regional championships recognized by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality."*[4]

However subsection 2 of rule 42 goes on to provide that such an athlete can represent another country *"provided that at least three years have passed since the competitor last represented his former country"* and that "[t]*his period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board (…)."*

This is a window through which young and inexperienced athletes from the developing countries could potentially exploit and leave their mother countries with the assistance of unscrupulous agents. Many African athletes who have excelled at the world youth championships have taken advantage of this provision by changing their citizenships, only for things not to turn out as expected.

Similar provisions have been enshrined under rule 5.1 of the IAAF Competition Rules 2010-2011 which despite requiring its members to only be represented by Citizens of the Country or Territory which the affiliated Member represents, provides that having once represented a Member in an International Competition an athlete can only thereafter represent another Member in an International Competition after three years following the date of the athlete's acquisition of new citizenship. This period of three years may however be reduced or cancelled:

- to 12 months with the agreement of the Members concerned or;
- in truly exceptional cases by the IAAF Council.

According to the IAAF statistics, the number of athletes who have changed their allegiance for one reason or the other between 1998 and 2008 stands at a staggering 28,584 of whom are from Africa! Interestingly, none of the athletes from the rest of the continents changed their allegiance to Africa.

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[4] See Rule 42 of the olympic charter.

3. The Agents Regulations

The trafficking of sportsmen is the illegal recruitment, transportation, transfer, trade or receipt of Athletes by means of coercion, of fraud, of deception and of taking advantage of these vulnerable boys and girls for the purposes of gaining personal financial profit from such transactions and for exploitation.

Apart from FIFA[5] and the IAAF[6], there appears to be no other sport which contains regulations that seriously govern the activities and operations of sports agents. Although it is safe to say that football and athletics are today's most marketable sports, one cannot turn their eyes away from the fact that the lesser sports such as basketball and volleyball continue to produce unknown talents from Africa. The inadequacy of regulations governing agents involved in these sports continues to pave the way for premature migration of minors.

Young African athletes are usually made to believe that they have the talent to gain a professional career at major clubs, by unscrupulous fake agents. For this their families will often give everything to make sure this dream comes true. These agents usually go missing once they have the money from the athletes and have transferred them to Europe, leaving them without money in a foreign land. One may wonder why these boys and their families go to these lengths, to trust and pay agents money. Here is the answer. It is because they believe that this is the only possible way in which they can hope to lead a privileged western life. The repercussions of this activity are that these fake agents steal resources from these poor families plus their hopes and dreams. Never mind the precarious situations which the children are often left in.

And notwithstanding the tight agents regulations enacted by FIFA and the IAAF, there appear to be loopholes which the agents still use to manipulate the premature departure of an athlete. A couple of countries and Federations in Europe have developed specific regulations for sports agents. However African Nations and Federations have not been so keen in developing legislations that will regulate, monitor and control activities of agents, but instead they have opted to rely solely on the regulations and statutes legislated by international federations. This together with the inability of these international federations to regulate unlicensed agents is the main reason for Sportsmen trafficking.

4. Football's Transfer Compensation System

The FIFA regulations on the status and transfer of players contain mechanisms which allow selling clubs and/or clubs involved in the training and education of players to receive some sort of money (training compensation and/or solidarity contribution) once a player who passed through their system is transferred to a new club.[7]

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[5] Fifa players' Agents Regulation 2008.

[6] IAAF Athletes Representatives Regulations.

[7] See annexes 4 and 5 of the FIFA Regulations on the Status and Transfer of Players.

In particular, training compensation is usually paid for players trained up to the age of 23, unless it is evident that a player has already terminated his football training and education before the age of 21.

In view of the above, most African football clubs continue to strive to ensure that their players leave for Europe as young as they possibly are in order to be guaranteed of receiving training compensation – at least until they attain the age of 23.

Whereas these fees do contribute towards the development of the economies of these African clubs, not all the players make the professional grade and majority end up in the streets.

5. Areas of appraisal

The fight against premature immigration or even the trafficking of minors in sports requires a concerted effort. Collaboration between the legislators of international laws, the national law makers and those charged with the responsibility of enacting the international sports federations' regulations especially in as far as the vices of corruption, fraud and unscrupulous agents are concerned.

Whereas it is important to say that the current legal mechanisms in force do play a role in curbing athlete immigration, it is also fair to say that better mechanisms can be placed to curb this immigration.

5.1 Quotas

Despite being a proponent of the "sports for all" campaign and the free movement of players, sports still needs quotas; especially in as far as the movement of minors is concerned.

FIFA recognizes this as evident under article 19 of the FIFA Regulations on the Status and Transfer of Players, which states that:
"*International transfers of players are only permitted if the player is over the age of 18."* subject to three exceptions:

1. The player's parents move to the country in which the new club is located for reasons not linked to football.
2. The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfill the following minimum obligations:
3. The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighboring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.

In addition, FIFA's subjection of all international transfers of minors to the approval of the subcommittee appointed by the FIFA Players' Status Committee is a good move, as is the right granted to the former association to submit its position in relation to a minor's transfer.

FIFA indeed acknowledges the misfortunes which could befall such minors in case they fail to succeed in football by mandating clubs which sign minors to:

1. Provide the player with an adequate football education and/or training in line with the highest national standards.
2. Guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.
3. Make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).

5.2 The UEFA Homegrown Players Rule

A move in this direction has already been adopted in European football, with the introduction of the UEFA Homegrown Players Rule. This rule has roots from Article 17.08 of the UEFA Champions League Regulations (UCL Regulations) which reads:

"*No club may have more than 25 players on List A during the season. As a minimum, places 18 to 25 on List A (eight places) are reserved exclusively for "locally trained players" and no club may have more than four "association-trained players" listed in places 18 to 25 on List A.*

Under this rule, UEFA requires the squads of all clubs participating in the Champions League and the UEFA Cup to have a minimum number of home-grown players, i.e. players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. This is a minimum of eight home-grown players to be included out of the entire twenty five man squad to be drafted by clubs for all UEFA club competitions.

Questions however linger as to whether these rules curtail the basic societal rights guaranteed by both the EU and football association's laws of engaging in sports as a tool of recreation.[8]

[8] Further reading, see "*Quotas - The Return; an excavation into the legal deficiencies of the FIFA 6+5 Rule and the UEFA Home-Grown Player's Rule*" Asser international sports law journal, by Felix Majani.

5.3 The Pre Bosman Era

There were other international measures which existed and contributed, either directly, indirectly or unintentionally towards curbing athlete migration. One such measure were football's pre Bosman[9] rules under which clubs were allowed to demand a transfer fee from players who were no longer contracted to them, in order to allow them to be eligible to sign for new clubs. Again, prior to the famous Bosman ruling, the national federations of various European countries maintained minimum quotas and restrictions on the number of EU foreign players who were eligible to feature in certain UEFA competitions and European leagues. These rules certainly discouraged athletes from leaving their mother countries as they were not sure they would play in European football.

This was of course until the 1995 Bosman judgment by the Court of Justice of the European Union, ruling out both transfer fees after the expiration of a contract, and the nationality quota rules, that allowed national football associations to limit the number of foreign, but European Union football players a team was fielding.

5.4 The FIFA 6+5 Rule

The contentious Bosman judgment did certainly set the ball rolling and debates have continued to rage over whether quotas should return, in one form or another. Testament to this was the famously proposed yet unpopular FIFA 6 + 5 rule, first proposed in February 2008. It sought to compel all clubs to field, at any given match, a minimum of six local players who would otherwise be eligible to play for the national team of the country in which their club is domiciled.

The EU however swiftly criticized this proposed rule, saying it was contravened labor laws and based on direct discrimination on the grounds of nationality, and thus against one of the fundamental principles of EU law. FIFA hence heeded the EU recommendations and scrapped its plan to implement this rule.

6 Tighter Work Permit Rules

Although aimed at ensuring quality in the standards of the English premier league, the English premier league work permit rules have indirectly acted as a check and comptroller of the immigration of minors in English football.

Under these rules, a player is only eligible to play in the English premier league if he has featured in more than 2/3^{rds} of the international matches played by his country over the last 2 years. These rules also require an English premier

[9] *ASBL v. Jean-Marc Bosman Case C 415/93, ASBL v. Jean-Marc Bosman, ECR I – 4921*. http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61993J0415.

Fleague club to sign a player from a national team which is ranked 70 and above by IFA in order for the player to be eligible for a UK work permit. The said rules have proved to be good in locking out any possible moves by agents to transfer talented yet unprepared players from lower FIFA ranked African countries into the English premier league.

7. Recommendations and Possible Solutions

7.1 Legislations and Regulating Agents

The professionalization of sports must bring with its tranquility in as far as the stakeholders involved in sports are concerned. FIFA and the IAAF have gone a long way in regulating agents involved in their sports. But perhaps all sports should consider having one unified set of agents' regulation governing their conduct and practices. Certain criteria should be established especially in as far as their relationship with minors is concerned.

Implementing rules, laws and legislations governing the activities of sports agents is a difficult proposition; this is mainly because of the international nature of these activities. Rules adopted by National Sports Federations are without doubt those that reflect the specificities of each sport. This is different from the government regulations which are usually more general in nature. There is an exodus of African Athletes to Europe and other continents mainly because of the perceived financial security these leagues present. Legislations with proposed minimum pay for the Athletes in Africa will be sufficient to curb this exodus. More applicable legislations on regulations by sports federations supported by public authorities given the ethical and legal problems to which sports activities can present, particularly in their cross border dimension. An establishment of binding codes of conduct drawn up jointly by sportsmen, sports agents, sports federations, and clubs with the aim of preventing this issue of illegal immigration of African Athletes.

7.2 Amendments to the Eligibility Rules

Could it be for the betterment of the sport and in the interests of safeguarding illegal or premature immigration in sports that the Olympic movement should for example, consider:

- Doing away with the requirement that the 3 year period an athlete is required to wait before being eligible to represent his newly adopted country can be cancelled or reduced with the agreement of the NOCs and IF concerned?
- Extending the aforementioned waiting period, for example, to 5 years? Could these extensions infringe on an athlete´s internationally recognized and protected human rights? To what extent will they deter agents, parents

and the athletes themselves from securing illegal and/or hastened immigration?

Perhaps the answers not only lie in education but also in political, moral and legal correctness.

7.3 Safe Migration Policies

The constitutions of almost countries guarantee their citizens the right to freely move within and outside their borders.

Taking this into account, as well as the reality that people will always migrate for socio-economic reasons, it is clear that the African states should look to put in place measures that promote the safety of their migrants.

One way this can be achieved is by providing the general public with information that would equip potential migrants with the ability to make informed choices on travel and work and subsequently, to protect themselves from the threat of human trafficking and other forms of exploitation. Such information should be comprehensive enough to include: realities, benefits and risks of migration; relevant legal information on migration, labor and basic human rights; and information on mechanisms for seeking protection and redress in abusive situations.

The onus of creating awareness and educating the public on safe migration is obviously not only on the governments but also on the media, civil society organizations, schools, community leaders and the private sector.

Of course, providing information on safe migration is not enough if there are no laws and policies in place to criminalize various forms of exploitative practices inflicted on migrants, including human trafficking. Such laws would only be truly effective if they take into consideration the human rights of migrants, including those who have been trafficked.

Various laws therefore need to be legislated. On top priority should be laws against human trafficking, forced labor, child labor and sexual exploitation.

It is also important to strengthen the capacity of embassies and high commissions abroad so that their mandate goes beyond providing visas and renewing passports. A more important task given the present reality would be to protect the millions of Africans visiting, living, studying and working abroad.

Joint liaison by Africa, through the Africa Union with the European Union and other international organizations should be fostered. Among the regulations adopted by FIFA aimed at ensuring the safe migration of minors is article 19 of the FIFA regulations on the status and transfer of players. Indeed, FIFA has for a long time monitored this provision and through the Court of Arbitration for Sport, recently reiterated that minors can only move from country to country for educational reasons and not for football related reasons.

This was emphasized in *CAS 2008/A/1485 FC Midtjylland A/S v FIFA*.[10]

[10] CAS 2008/A/1485 FC Midtjylland A/S V/ FIFA.

In this matter, in February 2007, Danish club FC Midtylland was reported to FIFA for allegedly and systematically transferring minor Nigerian players contrary to article 19.1 of the FIFA transfer regulations. The scheme involved FC Midtylland registering the Nigerian minors as "students" in its football academy but thereafter granted them resident permits to study in Denmark. The Danish club tried to argue that they had not contravened the FIFA regulations and that the players were amateurs and not professionals.

The CAS held that article 19 applies to both amateurs and professionals. It reiterated that paragraph 1 refers to players in general, not professionals.

It added that the word "transfer" from the phrase "international transfers involving minors" is to be linked with the notion of registration, which applies to both amateur and professional players as stipulated under article 5.1 of the FIFA transfer regulations.

Furthermore, the CAS stated that article 19 refers to protection of minors without specific mention of their status. It was hence clear to the CAS that this provision extended to players in general, regardless of whether they were amateur or professional. The CAS also emphasized that if article 19 were solely applicable to professional minors; it would deprive amateur minors off the benefits and protection which these provisions intended to accord them. Even though article 19.2 provides exceptions for the transfer of minors, of which one is studies. However, none of these exceptions applied to the present case because:

Midtylland was found not to have adduced evidence substantiating that the minors relocated for academic reasons.

The CAS went on to study the cooperation agreement between Midtylland and the minors' former Nigerian club, and held that it revealed that the sole reason for the relocation of the minors to Denmark was to enable Midtylland to find new talents in football.

The CAS emphasized that "*even if the transferred player is studying in a public school and is attending a serious and recognized educational program, that does not mean that the relocation of the player was driven by reason of education and not for sporting reasons and as such it is not sufficient for such players to benefit from one or two additional exceptions permitted by FIFA."*

The minors were found to have moved for reasons related to football and not for education.

7.4 Criminal Sanctions

Trafficking of minor athletes is squarely a criminal justice problem. In order to eradicate trafficking of these young athletes, the trafficking agents and managers need to be deterred from engaging in the business. From a legal and economical perspective, optimal deterrence is reached through a sentence or fine which is just greater than the benefit to the criminal. Stiff criminal sanctions should be imposed

on the agents found engaging in this illegal practice. This will require collaboration between International Organizations on Human rights, International Sports Association, National governments and National Sports Federations.

7.5 Public Awareness

Efforts should be made to increase public awareness of the problem of trafficking in sports through public information campaigns, the media and other means. When raising awareness through the media, the perception of trafficking in sports brought forward should include a clear explanation of the phenomenon and a realistic portrayal of the victims. To maximize public knowledge and awareness, these campaigns should be conducted with media professions.

Public awareness campaigns can motivate changes in a number of ways. People might be motivated to join community coalitions advocating for the stop of these practices, donate money for good causes, support law reforms that will help victims as well as prevent future occurrences of these practices, work closely with the police, or may simply be well informed in order to make wiser decisions when faced with similar circumstances.

7.6 Civil Litigation

A victim of sports trafficking has the right to claim material and non-material damages suffered by him or her as a result of these activities carried out by sham agents and managers. When criminal law fails to seek restitution for the victims, civil litigation may provide the means by which victims of sports trafficking maybe made whole, and the litigation can provide forms of relief that may not be available through a restitution order. This method will also discourage sports agents and managers from engaging in this criminal practice of sports trafficking. Through this method, victims will get the opportunity to confront their offenders, which is important in healing and empowerment of the victim.

When considering civil litigation on behalf of the victim, the following factors should be put into consideration;

- Are there potential defendants who can satisfy a good judgment?
- Is the victim ready to testify against the defendant?
- Where are the potential defendants located?
- Is the victim ready to endure the process and years of litigation?
- Are there safety concerns for the victim and his or her family?
- How will the civil litigation impact on the criminal case? (if there is any going on)
- If the civil litigation has any impact on the victim's immigration status.
- Is the criminal case already instituted by the prosecutor on behalf of the victim?
- Depending with the state and/ or Nation where the case is presented, the

lawyers handling it should be well conversant with the procedure and rules of the local courts.

The victim is also entitled to the claim of lost income or lost earnings. The victim's lost income and earnings for purposes of restitution can be calculated according to the time/ period in which the victim was under the control of the agent by salary he or she was presumably supposed to earn back in his country.

Victims also have a right to compensation for any other out of pocket losses they suffered as a result of the crime. The victim should be able to document all expenses incurred. Receipts or other similar documentations are the most effective means in calculating actual losses.

A guilty verdict in a criminal case may be used in a subsequent civil action to prove the facts upon which it was based. However keep in mind that guilty verdicts usually have collateral estoppels on the guilty party.

Conclusion

A contemporary sport is caught between the freedom of movement of athletes on the one side and financial security which is presented as the contractual stability on the other side. FIFA has through its regulations attempted to provide rules and regulations on how to balance these two concepts, contractual stability and international mobility. One of the challenges is diversity of national regulations in sports which has internationalized rapidly. The Dispute Resolution Chambers (DRC) and the Court of Arbitration for Sport (CAS) in their decisions have always insisted on the importance of specificity of sport.

As already presented in the recommendations the rules, laws, and regulations governing transfer of players as well as immigration should be regulated in a uniform manner in order to stop illegal premature immigration of African athletes. Public awareness, aid, and free legal representation to the victims should be the best way of dealing with this matter.

MAJOR SPORTS EVENTS: HOW TO PREVENT AMBUSH MARKETING?

by *Jean-Michel Marmayou*[*]

1. Introduction

It is said that the most repressive systems of thought are fertile ground for innovative and forward-thinking ideas. Equally, "ambush marketing" is only present in the most constraining legals systems that challenge the creativity of advertising executives.

Even so, ambush marketing is not a legal concept. There is no trace of this English term in legal dictionaries or other lexicons. In fact, it is an expression used by specialists in advertising strategies. A certain Jerry Welsh who, in the 80s, was world marketing director for American Express and as such sponsored the national athletics teams for the 1984 Olympic Games,[1] claims to be the inventor of the

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[1] J. WELSH, «*Ambush marketing: what it is, what it isn't*», http://welshmktg.com/WMA_ambushmktg.pdf.

concept. Nowadays, the expression "ambush marketing" has come to mean a marketing strategy that consists in a company hitching a ride on the back of the sponsor of a sports event whose programme of sponsorship is particularly ill-conceived and/or poorly executed. This failing opens the door to ambush marketing. However, this does not constitute improper conduct in its own right but rather a skilful publicity ploy. Even though not a legal concept, ambush marketing could not exist without a legal background.

There has been a substantial increase in ambush marketing since the 1984 games and the IOC, having suffered particularly, has been joined in its misfortune by a growing number of international organizers of major sports events. FIFA is foremost among them since the football world cup is without doubt one of the largest sports events on the planet.

There are too many examples of ambush marketing[2] for them to be recounted here.[3] Therefore this paper will be limited to an overview of its general context.

The term "ambush marketing" has existed since the 1984 games with the concept defined and developed in papers by American analysts.[4] It soon became

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[2] On the major categories of ambush marketing, cf. : T. Meenaghan, «*Ambush Marketing: a threat to corporate sponsorship*», *Sloan Management Review*, fall 1996, 38, 1, 103-13. D. Crow & J. Hoek, «*Ambush marketing: A critical review and some practical advice*», Marketing Bulletin 2003, 14, 1 (http://marketing-bulletin.massey.ac.nz).

[3] Cf. : S. Bearby & B. Siegal, «*From the stadium parking lot to the information superhighway : how to protect your trademarks from infringement?*», *Journal of college and university law*, 2002, 633. C. Pina et A. Gil-Robles, «*Sponsorship of sports events and ambush marketing*», *European Intellectual Property Review*, 2005, 27(3), 93-96.

[4] D.-M. Sandler & D. Shani, «*Olympic sponsorship vs. ambush marketing: who gets the gold?*», *Journal of Advertising Research* 1989, 29, 9-14. J. Mandese, & A. Fahey, «*Sponsors lash Olympic ambushers*», Advertising Age 1992, 63(7), 3, 55. S. McKelvey, «*NHL v. Pepsi-Cola Canada, Uh-Huh ! Legal parameters of sports ambush marketing*», *Entertainment and sport law*, Fall 1993, at. 5. S. McKelvey, «*Atlanta 96 : Olympic countdown to ambush armageddon?*», *Seton Hall journal of sport law* 1994 n° 397, 414. T. Meenaghan, «*Ambush Marketing: immoral or imaginative practice?*», *Journal of Advertising Research* 1994, 34, 5, 77-88. J. Jensen, «*Flaunting the rings cheaply : non-sponsors of Olympic games instead back teams*», *Advertising Age* 1996, 67(28), 4. T. Meenaghan, «*Ambush Marketing: a threat to corporate sponsorship*», *Sloan Management Review*, fall 1996, 38, 1, 103-13. R. N. Davis, «*Ambushing the Olympic games*», *Villanova sports and entertainment law journal* 1996, 423. T. Meenaghan, «*Ambush marketing : corporate strategy and consumer reaction*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 305. M. Payne, «*Ambush marketing : the undeserved advantage*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 323. S. Townley, D. Harrington & N. Couchman, «*The legal and practical prevention of ambush marketing in sports*», *Psychology and Marketing*, vol. 15, n° 4, 1998, 333. P. O'Sullivan & P. Murphy, «*Ambush marketing: the ethical issues*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 349. Shani D. & D.M. Sandler, «*Ambush marketing : is confusion to blame for the flickering of the flame?*», *Psychology & Marketing*, vol. 15, n° 4, 1998, 367. S. R. McDaniel & L. Kinney, «*The implications of recency and gender effects in consumer response to ambush marketing*», Psychology & Marketing, vol. 15, n° 4, 1998, 385. A. C. McAuley, & W. A. Sutton, «*In search of a new defender : the threat of ambush marketing in the global sport arena*», *International journal of sports marketing & sponsorship* 1999, 1, 64-86. D. Shani & D. M. Sandler, «*Counter attack: heading off ambush marketers*», *Marketing News* 1999, 33(2), 10. J. A. Trizodi & M. Sutherland, «*Ambush marketing - An Olympic event*», *Journal Brand Management* 2000, 412. M. Lyberger & L. McCarthy, «*An assessment of consumer*

global.[5] Although many have sought to define it accurately they have all encountered the problem of its legality.

Some consider that it is an illicit business practice by a company trying to create an association between its products and services and a media event, in general a sport, in order to draw a commercial benefit from the reputation of this event, but without being the organizer and without having to obtain the slightest authorization from the organizer. The result is that, in the long term, ambush marketing will diminish the value of the exclusive rights acquired at some cost by the official sponsors of the event. This definition has pleased the legislators in certain countries who, on the request of the organizers of sports events, have incorporated it into their body of standards. For instance, Italy explicitly prohibited ambush marketing for the duration of the 2006 Winter Games by defining it as "*all activities parallel to those of the entities officially authorized by the organizers in order to obtain financial gain*".[6]

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knowledge of, interest in, and perceptions of ambush marketing strategies», *Sport Marketing Quarterly* 2001, 10, 130. A. Moorman, «*Olympic trademarks: Citius Altius Fortius - Faster, higher and stronger trademark protection for the USOC and its protected marks*», *Sport Marketing Quarterly* 2001, 11(1), 202. A. M. Wall, «*The game behind the games*», *Marquette sports law review*, spring 2002, 557. S. A. Bearby, «*Marketing, protection and enforcement of NCAA marks*», *Marquette sports law review*, spring 2002, 543. N. K. Nish, «*How far have we come? A look at the Olympic and Amateur sports Act of 1998, the United States olympic committee, and the Winter olympic games of 2002*», *Seton Hall journal of sport law* 2003, 53. S. McKelvey, «*Unauthorized use of event tickets in promotional campaign may create new legal strategies to combat ambush marketing: NCAA* v. *Coors*», *Sport Marketing Quarterly* 2003, 12(2), 117. J. K. Schmitz, «*Ambush marketing: the off-field competition at the Olympic games*», *Northwestern Journal of Technology and Intellectual Property*, vol. 3, n° 2, 2005, 203. J. Grady & S. McKelvey, «*Ambush marketing the legal battleground for sport marketers*», *Entertainment and Sports Lawyer* 2004, 8, 13. A. M. Moorman & T. C. Greenwell, «*Consumer attitudes of deception and the legality of ambush marketing practices*», *Journal of legal aspects of sport*, summer 2005, 183. E. Vassallo, K. Blemaster & P. Werner, «*An international look at ambush marketing*», *Trademark reporter*, nov-dec. 2005, 1338 (pub. aussi in Intellectual property journal, déc. 2009, 87).

[5] J. Luck, «*Combating ambush marketing in Australia*», Managing intellectual property, may 1998, 17. J. Sebel & D. Gyngell, «*Protecting Olympic gold : ambush marketing and other threats to Olympic symbols and indicia*», University of New South Wales law journal, vol. 22, 1999, 691. C. Kendall & J. Curthoys, «*Ambush marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective*», Murdoch University Electronic Journal of Law, vol. 8, n° 2, 2001, [14]. J. Hoek & P. Gendall, «*Ambush marketing: more than just a commercial irritant?*», Entertainment law, vol. 1, n° 2, summer 2002, 72. C. Garrigues, «*Ambush marketing: robbery or smart advertising?*», European Intellectual Property Review 2002, 24(11), 505-507. L. Misener, «*Safeguarding the olympic insignia: protecting the commercial integrity of the Canadian olympic association*», Journal of legal aspects of sport, winter 2003, 79. A. Pâquet, *Le régime juridique de l'ambush marketing*, Mémoire CEIPI, 2006, (www.ceipi.edu/uploads/media/Memoire_Paquet.pdf). L. Arcelin-Lécuyer, «*De la difficulté d'appréhender l'opportunisme commercial: l'exemple de l'ambush marketing*», D. 2008, 1501. P. Van Den Bulck, «*Quel régime juridique pour l'ambush marketing?*», Comm. com. électr. 2007/10, étude 26. F. Buy, J.-M. Marmayou, D. Poracchia, F. Rizzo, *Droit du sport*, LGDJ 2009, n° 1181 et s. P. Johnson, «*Look out ! It's an ambush!*», International sports law review 2008, 2/3, 24. V. Forti, A. Gentiloni Silveri, J. Figus Diaz et F. Mezzanotte, «*Ambush marketing: una ricerca interdisciplinare sulle tutele*», Riv. Dir. Ec. Sport, 2009, n° 2, 13. I. Cherpillod, «*La protection contre le marketing sauvage (ambush marketing)*»,

Some courts have also adopted such a definition.[7]

Others consider that ambush marketing consists in making use of an opportunity to develop business in a way that is not prohibited on legal grounds. According to this approach there is nothing illegal about ambush marketing. This has been confirmed by certain court judgements. For instance, the Delhi high court in India has stated that the term "ambush marketing" is not part of the legal terminology and the practice does not in its own right constitutes unfair competition, does not seek to mislead the public, but on the contrary is an instrument that uses the opportunity presented by an event to further its own commercial goals.[8] In France, a recent judgement asserted that "*sponsorship cannot deprive another economic player from basing its publicity on a sport provided it does not use the symbols or logos of the federation that organizes the event, nor the image. A sports event belongs to everyone because it constitutes part of current affairs and only its direct or televised showing can be the subject of specific rights acknowledged by article L.333-1 of the Code des Sports [Law on Sports]"*.[9]

Without overlooking the difficulty of finding a legal definition for ambush marketing,[10] we are nevertheless inclined towards a liberal concept, if only because of the protective mechanisms that already exist in the common principles of ordinary law, and especially in the field of intellectual property rights. Indeed, these contain all the restrictions that the art of the "ambusher" is seeking to circumvent.

From a marketing standpoint, the "ambush" therefore consists in exploiting all unprotected business opportunities. On the contrary, those who, like FIFA, suffer from ambush marketing will do their best to make the commercial opportunities around their event as watertight as possible. Although there is no reason why they should not seek the assistance of a country's legislative body (I), neither is there any excuse for them not putting their own house in order (II).

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in Sport et propriété intellectuelle, Bruylant, LGDJ, Shulthess, Université de Genève, 2010, 21. S. Jiew, «*Qatar ! 2022 ! Ambush marketing – stealing the limelight*», AT Law update 2011, 238, 48.

[6] L. n° 167/05, 17 août 2005 (law that expired on 31 Dec. 2006), Misure per la tutela del simbolo olimpico in relazione allo svolgimento dei Giochi invernali « Torino 2006 », *Gazz. Ufficiale* n 194 del 22 agosto 2005.

[7] In France, see: CA Paris, 10 févr. 2012, *Cah. dr. sport* n° 27, 2012, 247, note F. Martin-Bariteau : « *Le fait pour une entreprise de se rendre visible du public lors d'un événement sportif ou culturel afin d'y associer son image tout en évitant de rétribuer les organisateurs et de devenir un supporter officiel constitue une situation d'ambush marketing qui constitue une faute au regard des dispositions de l'article 1382 du code civil* ».

[8] Delhi High court of India, case : *ICC development (Int'l Ltd.) v. Arvee Enterprises & Philips*, 2003 (26) PTC 245 (Del)

[9] TGI Paris, 3e ch., 1ère sect., 30 mars 2010, RG n° 08/07671, *Fédération française de rugby c/ Fiat France, Léo Burnett et autres*, Cah. dr. sport n° 20, 2010, 141, note J.-M. Marmayou.

[10] A. Pâquet, Le *régime juridique de l'ambush marketing*, Mémoire CEIPI, 2006, (www.ceipi.edu/uploads/media/Memoire_Paquet.pdf). L. Arcelin-Lécuyer, «*De la difficulté d'appréhender l'opportunisme commercial: l'exemple de l'ambush marketing*», D. 2008, 1501. P. Van Den Bulck, «*Quel régime juridique pour l'ambush marketing?*», Comm. com. électr. 2007/10, étude 26.

2. Calling in the Lawmaker

Ambush marketing is a transnational phenomenon.[11] Both its use and prevention require the development of analogous legal strategies since this phenomenon is found more especially at major international sports events which, although they take place on the territory of only one country, are broadcast and followed in many others. Therefore, we will examine the various legal techniques used in different countries to try and prevent ambush marketing. The first of these techniques consists in bringing to bear all the resources of ordinary law in order to protect the various aspects of the official sponsoring programme (see A below). Secondly, certainly more effective but also more debatable, is the enactment of an *ad hoc* law (see B below).

3. Applying Common Law Mechanisms

3.1 Intellectual and Industrial Property Law

Intellectual and Industrial Property Law (trademark, copyright, industrial design) is the defence instrument that the victims of ambush marketing first turn to. It is the first recourse that comes to mind due to the worldwide harmonization that characterizes this body of text. It corresponds to both the international dimension of sports events and to the ambush marketing campaigns that develop in their wake.

The harmonization of the various legal instruments, treaties and international agreements between countries means that legal recourse is available against companies that use or imitate works, designs, logos, music, choreographies, trademarks, etc. of another.[12] These well-oiled mechanisms exist in almost all countries of the world and there is no longer any need to demonstrate their effectiveness. However, they are only really effective when used against rather primitive ambushers. To use or imitate the trademark or the logo of another is a stupid and malicious infringement of intellectual property rights. It is not ambush marketing. Those who refer to a sports event without using "*either the trademarks, logos or insignia of the organizers or the images and sounds that represent the event*" only "*use the freedom to create publicity based on a current affairs event, even though this is a sport*".[13]

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[11] See: Association internationale pour la protection de la propriété intellectuelle: «*The protection of major sports events and associated commercial activities through trademark*», Q 210 (www.aippi.fr).

[12] Ex multis : Belgique : G. Sorreaux, «*Ambush marketing: trop beau pour être honnête?*», ICIP-Ing.-Cons., 2008, n° 2, 149. G. Sorreaux, «*Ambush marketing : too smart to be good ? Should certain ambush marketing practices be declared illegal and if yes, which ones and under what conditions?*», Rapport belge de la Ligue Internationale du Droit de la Concurrence, 2007.

[13] TGI Paris, 3e ch., 1ère sect., 30 mars 2010, RG n° 08/07671, *Fédération française de rugby c/ Fiat France, Léo Burnett et autres*, Cah. dr. sport n° 20, 2010, 141, note J.-M. Marmayou.

The law on trademarks is currently ill-adapted to prevent ambush marketing. It requires that the victim demonstrates the use of signs identical or similar to those that it has registered for identical or similar products and services. Moreover, in the event of a relatively basic similarity, an ambush marketing campaign of publicity can only be brought to an end by demonstrating that there is a risk of confusion in the public's mind, and damages obtained only by a convincing demonstration of an effective confusion between the products. The intelligent ambusher will avoid any risks of confusion in the public's mind by accompanying his campaign with messages stating that he is not an official sponsor of the event.[14]

Even so, it has to be stressed that in the field of trademark law, the simple association of two trademarks in the public's mind through their semantic content is not sufficient in its own right to conclude that there is possible confusion. On this point, as on the others, there is no difference between for instance European law[15] and American law.[16]

Moreover, it has to be underlined that trademarks relating to major sports events cannot be protected by trademark law alone. In fact, the insignia and symbols concerning major sports events are often insufficiently distinctive and this may compromise their registration in some countries.

For instance, although FIFA registered the community trademark "WM 2006"[17] with the Office for Harmonization on the Internal Market, it was not able to register "Fussball WM 2006" nor "WM 2006" in Germany insofar as the German Trademarks Office regarded these signs as descriptions of the event and hence not capable of protection. This was confirmed by the Supreme court of Germany.[18]

The same general principle was applied by the Delhi High Court which considered the "World Cup" and "Cricket World Cup" to be generic and as such not capable of protection as trademarks.[19]

In this context, it is easier to understand why the International Olympics Committee requires that the National Olympics Committees and Games steering committees ensure that their emblems contain a distinctive component and do not simply limit themselves to just the name of the ONC country in question.[20]

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[14] In many countries, this type of precaution will easily release the ambuser from liability under the trademark laws, cf. L.-L. Bean, «*Ambush marketing : sports sponsorship confusion and the Lanham act*», Boston University law review, sept. 1995, 1099. J.-M. Marmayou, chron. «*Un an de sport dans le droit de la communication*», Comm. com. électr. 2008/11, chron. 10, n° 4.

[15] CJCE, 11 nov. 1997, aff. C-251/95, *Sabel BV c/ Puma AG, Rudolf Dassler sport*, Rec. CJCE, I, 6191. – CJCE, 22 juin 2000, aff. C-425/98, *Marca Mode CV c/ Adidas AG et Adidas Benelux BV*, Rec. CJCE, I, 4861.

[16] L.-L. Bean, «*Ambush marketing: sports sponsorship confusion and the Lanham act*», préc.

[17] OHMI, division d'annulation, 28 *oct*. 2005, *Ferrero oHGmbh / FIFA* (réf. 969C 002155521).

[18] Bundesgerichtshof, 27 avr. 2006 (2 arrêts), I, ZB 96/05 (*Fussball WM 2006*) et I, ZB 97/05 (*WM 2006*) (www.bundesgerichtshof.de/). Adde : C. Rutz, «*Germany: trade marks – football World cup 2006 Merchandising*», *European intellectual property review* 2007, 29(4), n° 63-64.

[19] Delhi High court of India, case: *ICC development (Int'l Ltd.) v. Arvee Enterprises & Philips*, 2003 (26) PTC 245 (Del).

[20] Art. 4.4 and thereafter of the text of application of articles 7 to 14 of the Olympic Charter.

Moreover, the Olympic movement has sufficient power to ensure that states implement enhanced protection of its brands and insignia. In many countries, the protection offered by the local law on trademarks is exceptional and derogates substantially from ordinary law.

The first aspect of this process involves the States, many of whom have certified the Nairobi Agreement[21] granting a legal assignment to the National Olympics Committees. As a result, they do not need to register trademarks, mottos, anthems or names associated with the Olympic Games. In France for instance, the protection of Olympics insignia in favour of the CNOSF has been carved in stone since the law 2000-627 dated 16 July 2000. This has now been incorporated in article L.141-5 of the Code du Sport. In China, a 2002 decree assigns the Olympic insignia to the Beijing Games Steering Committee (BOCOG).[22] In Canada, the Trade-Marks Act[23] grants the National Olympics Committee the exclusive rights to use Olympics insignia and emblems. In the United Kingdom, this protection takes the form of the Olympics Symbol etc. Protection Act of 1995.[24] In the United States, it is the 1978 Amateur Sports Act,[25] in New-Zealand, a 1994 law,[26] in Argentina, a 1996 law;[27] in Brazil, the so-called *Pelé* law of 1998;[28] and in Greece the 1994 law on trademarks.[29]

The second aspect is that the assigned rights are not subject to normal rules of trademark law. In France, the Court of Cassation considers that it follows from article L.141-5 of the Code du Sport that "*no person is authorized to register a trademark, copy, imitate, affix, remove or modify emblems, mottos, anthems, symbols and terms for purposes other than information and criticism without the authorization of the French National Olympic and Sporting Committee*", from which it follows that "*article L.141-5 of the Code du Sport has instituted a separate and independent system of protection*".[30] In China, automatic

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[21] The Nairobi Treaty of 26 Sept. 1981 covers the protection of Olympic insignia, (www.wipo.int/treaties/en/ip/nairobi/) was signed by 46 countries (France did not sign).

[22] Decree 345 passed by the Council of State of the PRC, 4 Feb. 2002, (http://fr.beijing2008.cn/bocog/ipr/n214072517.shtml). Cf.: A. M. Wall, «*Intellectual property protection in China: enforcing trademark rights*», *Marquette sports law review*, fall 2006, 341. J. L. Donatuti, «*Can China protect the Olympics, or should the Olympics be protected from China*», *Journal of intellectuel property law*, fall 2007, 203. F. Mendel & C. Yijin, «*Protecting Olympic intellectual property* », 17 *China Law & Practice* 33-34, May 1, 2003. D. E. Long, «*Trademarks and the Beijing Olympics: gold medal challenges*», *John Marshall review of intellectual property law*, spring 2008, 433.

[23] Trade-marks Act, Unfair Competition and Prohibited Marks, R.S.C., ch. T-13, § 9 (2001).

[24] Olympic symbol etc. protection Act (c. 32), 19 sept. 1995, S.I. 1995/2472, art. 2.

[25] Amateur Sports Act, Pub. L. 95-606, § 1(b), 92 Stat. 3048 (1978), codified at 36 U.S.C. § 380(a) (1994).

[26] Fair Trading Amendment Act 1994, n°124 modifiant the Fair Trading Act 1986.

[27] Ley proteccion de simbolos y designaciones olimpicas, n°24.664, 16 julio 1996,

[28] Art. 87, L. n° 9.615, 24 mars 1998 – DOU 25/3/98 – (Lei Pelé).

[29] L. n° 2239, 16 sept. 1994.

[30] Cass. com. 15 septembre 2009, n° 08-15418, Bull. civ. IV, n°113; Cah. dr. sport n°18, 2009, 131, note J.-M. Marmayou; *Ibid*, 135, note V. Forti; Contrats, concu., consom. 2009/11, comm. 271, obs. M. Malaurie-Vignal; Comm. com. électr. 2009/11, comm. 99, note C. Caron; LPA 30 mars

protection is assigned to six categories of signs and enables the BOCOG to prohibit even non-commercial uses. In the United Kingdom, the simple association of ideas with Olympics insignia is regarded as an infringement. In the USA, the USOC, that is to say the National Olympics Committee, does not need to demonstrate a risk of confusion. It has the powers to prohibit certain uses, even non-commercial. Furthermore, any third party guilty of breaching this rule is not allowed to claim exemption on grounds of good faith. All these points are widely discussed in jurisprudence.[31]

In New-Zealand, a third party that uses Olympics signs is presumed to have checked the confusion aspect and the burden is therefore on the user to prove that there is no possible confusion. Conversely, in Canada and in Argentina, protection of Olympics insignia comes under the ordinary law system of trademark protection.

Brazil stands apart from all these countries. Its so-called *Pelé* law differs from the others in that it is applied not only to the Olympics Committee but to all the sports instances and organizers whose names and symbols are fully protected on their own territory for an unspecified period of time, without there being any need to register them.[32]

This enhanced protection of sports insignia helps to ensure that they fall outside the realm of intellectual property rights and are brought closer to a system of real ownership.

3.2 Property Rights

In France, specific provisions have been enacted conferring monopoly intellectual property rights on certain organizers of both non-sports and sports events (those designated by the Code du Sport). Infringing this right, that law 2010-476 of 12 May 2010 on games of chance extended to betting, is automatically sanctioned without it being necessary to call o**n** article 1382 of the Civil Code.[33] There is no doubting the effectiveness of this legal provision in the fight to prevent ambush marketing since it allows any breach of monopoly rights over sports events to be penalized without any need to show bad faith or a prejudice suffered by the holder

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2010, 13, obs. J.-M. Marmayou. Contra: CA Paris, 2, 21 janv. 2011, RG n° 09/20261, *PI* avril 2011, n° 39, 227, obs. M. Sabatier; *Comm. com. électr*. 2011/11, 26, n° 10, obs. G. Rabu.

[31] E. M. Batcha, «*Who are the real competitors in the Olympic games? Dual olympic battles: trademark infringement and ambush marketing harm corporate sponsors*», *Seton Hall Journal of sport Law* 1998, 229. S. McKelvey & J. Grady, «*An analysis of the ongoing global efforts to combat ambush marketing: will corporate marketers take the gold in Greece?*», *Journal of Legal Aspects of Sport*, Summer 2004, 191.

[32] Art. 87, L. n° 9.615, 24 mars 1998 – DOU 25/3/98 – (Lei Pelé).

[33] Although there may still remain doubts, cf. : TGI Paris, 3e ch., 1ère sect., 30 mars 2010, RG n° 08/07671, *Fédération française de rugby c/ Fiat France, Léo Burnett et autres*, according to which the infringement to the rights to make use of «*are to be analysed according to the principles of tortious liability governed by article 1382 of the Civil Code and cannot therefore give rise to a second prejudice founded on the same acts that were rejected on the same legal grounds*» (Cah. dr. sport n° 20, 2010, 141, note J.-M. Marmayou).

of the rights. However, although badly defined by the law,[34] its fundamental purpose of covering competition or sports event remains no less real.

These are general rules concerning intellectual property that are used so that they are remarkably effective against certain ambush marketing practices. Article 905 of the BGB (German civil code) lays down that the rights of the owner of a sports ground cover (as in France) not only its surface but extend vertically upwards and downwards within the boundaries of its use. This article enables the owners of stadia to prevent, for instance, the distribution of competitors' marketing objects within these boundaries.[35]

3.3 Consumer Law

Ambush marketing is a publicity technique that targets consumers. It is not surprising therefore that its victims seek to use publicity and consumer legislation to sanction its perpetrators.

Many countries share the desire to protect their consumers from the harmful effects of misleading publicity. In France for instance, article L.121-1 of the Code de la Consommation, Spain with its 1988 law,[36] the United Kingdom with its 1988 law,[37] Canada with its law on competition dated 1985,[38] the United States through the "Lanham Act".[39] In any event, it is covered in European Union countries by European directive 2005/29/EC, dated 11 May 2005 concerning the unfair business practices of manufacturers with respect to consumers.[40]

These types of legal instrument are undoubtedly effective. Even though there are intended more to protect consumers, they nevertheless contribute to creating a civil liability over publicity that not only misleads consumers but also destabilises a competitive market.

However, the legislation on misleading publicity only targets those cases where the company makes an assertion or uses a symbol to pretend that the professional or product benefits from direct or indirect sponsorship. In fact, if practised intelligently, ambush marketing will take care not to make an assertion that could mislead the consumer.

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[34] Above all concerning international competitions. On this point, cf.: G. Lebon et T. Verbiest, «*Le droit au pari vs l'internationalité du sport: faites vos jeux!*», Cah. dr. sport n° 20, 2010, 11.

[35] LIDC, Rapport international sur la question B, préc., 40.

[36] L. n° 34/1988, 11 nov. 1988, (BOE n° 274 de 15/11/1988), réf. 1988/26156. (www.boe.es/g/es/).

[37] The Control of Misleading Advertisements Regulations 1988 (Statutory Instrument 1988 n°915) 23 mai 1988.

[38] Competition Act (R.S., 1985, c. C-34).

[39] This is its popular name. In fact it is the Trademark Act, L. n° 489, 60, stat. 427 (1946), enacted in US Code, Title 15, chapt. 22. et spéc. sub-chapt. 3, §1125

[40] Only transposed into French law on 3 Jan. 2008 (law 2008-3) although it should have been at the lastest by 12 June 2007.

3.4 Prevention of Unfair Competition

Almost all countries have a body of legal texts that condemn unfair competitive practices. In France, unfair competition is covered by the very general laws on civil liability (art. 1382 and 1383 of the Civil Code). This is also the case in the Netherlands or in Italy.[41] In other countries too, an appropriate text prohibits unfair competition by drawing up lists of acts that are to be considered illegal. However, these texts are generally preceded by a prohibition that is expressed in general terms. This is the case for instance in Brazil,[42] Switzerland,[43] Germany,[44] Austria, Belgium, and Poland.

In common law countries, there is no principle that places a general prohibition on unfair competition. On the other hand, legal doctrine gathers together, under the generic expression of "*unfair competition*", a certain number of offences such as "*passing off*", "*injurious falsehood*", "*inducement to breach a contract*" and "*breach of confidence*".

In international treaties, the Paris Convention for the Protection of Industrial Property contains provisions concerning unfair competition.[45]

Although these devices can be effective to some extent against clumsy ambush marketing operations, evidence has shown that they do not constitute an insurmountable obstacle.

Indeed, in France, the sanctioning of unfair competition places the burden of proving this unfairness on the victim. This requirement will be formulated differently from one country to another but always exists. In France, the term "fault" is used because the victim will seek an injunction under article 1382 of the Civil Code. In Belgium, the term "act contrary to honest business practices[46]" is used. In Germany, as in Poland, it is an act "contrary to moral practices". In Spain, business practices that are objectively "contrary to the principle of good faith".[47] In Italy, it is "an act that does not conform to the principles of correct professional behaviour". In Switzerland, it is misleading behaviour or acting in bad faith to influence the relationship between competitors and between suppliers and customers. The Paris Convention itself speaks of an act contrary to honest practice in industrial and commercial matters. In each case it is always a question of illicit behaviour. The problem is to know precisely whether ambush marketing itself is or is not illicit and thereby constitutes a fault.

In addition to this general clause against unfair competition, certain countries

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[41] Art. 2598 du Code civil italien.

[42] Art. 195, Lei n° 9279, 14 mai 1996 (www.glin.gov/search.action, ID du GLIN : 139720).

[43] Loi fédérale du 19 déc. 1986 contre la concurrence déloyale (LCD).

[44] Art. § 3, Gesetz gegen den unlauteren Wettbewerb UWG (Loi contre la concurrence malhonnête), 3 juill. 2004, BGBl. I S. 1414 (http://dejure.org/gesetze/UWG).

[45] Art. 1 et 10, CUP, 20 mars 1883.

[46] Art. 94-3, L. 14 juill. 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur (www.ejustice.just.fgov.be/loi/loi.htm).

[47] L. n°3/1991, 10 janv. 1991 (*BOE* n°10 de 11/1/1991), réf. 1991/00628 (www.boe.es/g/es).

have developed more detailed provisions which list practices that are judged to be unfair in principle. However, in most cases, it consists in misleading consumers (Germany[48]), imitation (Belgium[49]), appropriating the qualities of a competitor (Italy[50]), or confusion (Spain[51]). Although effective, these provisions only apply within the defined limits and conditions.

In certain countries (for instance Brazil, Germany, Italy and Austria[52]), the systems developed to prevent unfair competition can only be applied between competitors. In fact, ambush marketing reflects a situation in which there is not necessarily any competition between the victim and the ambusher.

In this respect, it would appear that finally France seems to be the best equipped with its "free-riding" theory (*parasitisme*). According to this theory, "free-riding" is defined as "*any behaviour according to which an economic player uses the reputation of another in order to benefit, without cost, from the other's efforts and expertise*".[53] This corresponds fairly closely to what is understood by ambush marketing. Even so, this theory, also based on article 1382 of the Civil Code, requires that a fault has been proven to be at the origin of a prejudice.

However, it has already been seen that ambush marketing cannot be considered a fault as a matter of principle since it is also stipulated that it is extremely difficult to prove that a direct, actual and unquestionable prejudice has been suffered by the organizer. Of course, the "ambusher" seeks neither to harm the image nor the reputation of the event. Moreover, in general he does not divert customers since the "ambusher" and the victim are working on different markets.

Above all, an action for "free-riding" will be admissible only if there is no recourse available to the victim via another specific legal option. It results from this that although it is possible in theory to cumulate an action founded on privative right (such as trademark law), with an action based on unfair competition or the

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[48] Art. § 5, Gesetz gegen den unlauteren Wettbewerb UWG (Loi contre la concurrence malhonnête), 3 juill. 2004, *BGBl*. I S. 1414 (http://dejure.org/gesetze/UWG).

[49] Art. 94-1, L. 14 juill. 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur (www.ejustice.just.fgov.be/loi/loi.htm).

[50] Decreto Legislativo 25 fevr. 2000, n°67, «Attuazione della direttiva 97/55/CE, che modifica la direttiva 84/450/CEE, *in* materia di pubblicita'ingannevole e comparativa», *Gaz. Ufficiale* n°72, 27 mars 2000 (http://banchedati.camera.it). – V. aussi art. 2598 du Code civil italien.

[51] Art. 6, L. n°3/1991, 10 janv. 1991 (BOE n°10 de 11/1/1991), réf. 1991/00628. (www.boe.es/g/es).

[52] LIDC, Rapport international sur la question B : le marketing sauvage est-il trop beau pour être honnête ? Faudrait-il déclarer certaines pratiques de marketing sauvage illégales, et si oui, lesquelles et sous quelles conditions ? (http://www.ligue.org/fr/homepage/).

[53] P. Le Tourneau, « *Le parasitisme dans tous ses états* », D. 1993, chr., 310, spéc. 312, n°13. – P. Le Tourneau, *Parasitisme – notion de parasitisme*, J.-Cl. Conc. Consom., Fasc. 227. – P. Le Tourneau, *Le parasitisme*, Litec, 1998. G. Courtieu, *Droit à réparation – Concurrence déloyale – Applications pratiques : confusion et parasitisme*, J. Cl. Civil Code, Fasc. 132-30. Lamy Droit économique 2009, spéc. n° 2799. P. Le Tourneau, « *Le bon vent du parasitisme* », Contrats, conc., consom., chron. 2001, n° 1. P. Le Tourneau, « *Retour sur le parasitisme* », Cah. D. aff. 2000, chr., 403. – P. Le Tourneau, « *De la modernité du parasitisme* », Gaz. Pal. 2001, doct., 4.

theory of free-riding, this is on the prerequisite and an essential condition that the two actions rely on separate acts.[54] As regards ambush marketing, unsuccessful claims by victims under the trademark laws are in fact always associated with claims on the grounds of "free-riding".

Even so, common law countries have all developed their own special actions to sanction an "*inducement to breach a contract*", "*interference with contractual relations*" or, a kind of variation of the two, the "*interference with prospective economic advantages*". These actions, although little used, may have some effect in the fight against ambush marketing. They require that knowledge of a contract is proven, that benefits are expected from these contractual relationships and there is an intention to force a party to break off and therefore abandon the expected benefits.[55]

4. Ad hoc Legislation

4.1 Examples

Finding that the traditional legal instruments are of limited effect, the organizers of leading sports events persuade their legislatures have *ad hoc* legal texts enacted specially designed to fight marketing practices that are not sanctioned by any ordinary law instruments. The Olympics movement is obviously to the fore in this approach and the adoption of *ad hoc* legal instruments has become an essential condition when choosing a host city. Most of the countries that have recently hosted or been selected to host a major international event have been persuaded of the need to adopt a special law to prevent ambush marketing. This is the case for Australia (2000 summer games),[56] Portugal (Euro 2004),[57] Greece (2004 summer

[54] C. Anadon, « *Conditions d'exercice de l'action en concurrence déloyale parallèlement à une action en contrefaçon accueillie* », Rev. Lamy Droit des affaires, avril 2009, n°37, 39-41. – M. Malaurie-Vignal, « *Rapports entre contrefaçon et concurrence déloyale* », Contrats, conc., consom. n°5, mai 2009, 30-31. – Adde M. Chagny, « *Quelle concurrence pour l'action en concurrence déloyale et l'action en contrefaçon ?* », Rev. Lamy de la concurrence n°21, 2009, 87-89. – C. Caron, « *L'articulation de l'action en contrefaçon et de l'action en concurrence déloyale ou parasitisme* », JCP G, n°8, février 2010, 442, n° 235.

[55] About this action, cf. : E. Vassallo, K. Blemaster & P. Werner, « *An international look at ambush marketing* », Trademark reporter, nov-dec. 2005, 1338 (pub. aussi in *Intellectual property journal*, déc. 2009, 87*)*.

[56] Olympic Insignia Protection Act 1987 – Olympic arrangement Act 2000, n°1/2000. Sydney 2000 Games (indicia and images) protection Act 1996, n°22/1996. – Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005. – Cf. : G. Orr, « *Marketing games : the regulation of Olympic indicia and images in Australia* », European intellectual property review 1997, 19(9), 504-508. – Le Gouvernement australien a pris la peine de mesure les effets de sa loi *ad hoc*, cf. : « Ambush marketing legislation review », 2007, prepared for IP Australia and the Department of communications, information technology and the arts (www.ipaustralia.gov.au/pdfs/news/Ambush%20Marketing%20Legislation%20Review.pdf).

[57] Decreto-Lei 86/2004, de 17 de abril, que estabelece o regime de protecção jurídica a que ficam sujeitas as designações do Campeonato Europeu de Futebol de 2004 e reforça os mecanismos de

games),[58] Italy (2006 winter games),[59] China (2008 summer games),[60] Canada (2010 winter games),[61] New-Zealand (Rugby World Cup 2011 and Cricket World Cup 2015),[62] the United Kingdom (2012 summer games),[63] Brazil (2014 Football world cup and 2016 summer games).[64]

Nor is FIFA backward in this respect, witness the example of the World Cup held in South Africa.

Indeed, South Africa has shown remarkable understanding towards the interests of sports organizers and hence FIFA by reinforcing its laws in order to penalize ambush marketing practices against the interests of sports events.[65]

This led to the Trade Practices Act[66] that prohibits third parties from publishing or posting declarations or communications which represent, imply or suggest a contractual or other relationship or association between this entity and the event, or the entity officially appointed to sponsor the event.

Based on this same general principle, the Merchandise Marks Act,[67] amended

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combate a qualquer forma de aproveitamento ilícito dos benefícios decorrentes daquele acontecimiento desportivo.

[58] L. n°3254, 22 juill. 2004.

[59] L. n°167/05, 17 août 2005 (la loi expirait le 31 déc. 2006), Misure per la tutela del simbolo olimpico *in* relazione allo svolgimento dei Giochi invernali "Torino 2006", Gazz. Ufficiale n°194 del 22 agosto 2005.

[60] Décret n°345 du Conseil d'État de la République Populaire de Chine, 4 févr. 2002, (http://en.beijing2008.cn/98/69/article 211986998.shtml) et Décret n°65 du Gouvernement du peuple de Pékin, 11 oct. 2001. – cf : I. Blackshaw, « *Beijing. – Introduces Ambush Marketing law for 2008 Olympics* », International Sports Law Journal 2003/1, 29.

[61] Olympic and paralympic Marks Act, Bill C-47, 2007. Cf. : J. Strawczynski, « *Is Canada ready for the Vancouver winter games ?* », University of Toronto of law review, spring 2004, 213. – N. A. Miller, « *Ambush marketing and the 2010 Vancouver- whistler Olympic games : a prospective view* », Intellectual property journal, déc. 2009, 75.

[62] Major Events Management Act 2007 (07/35), Bill n°99-2 et Bill n°99-1 (www.parliament.nz/en-NZ). See : S. Corbett & Y. van Roy, « *The Major Events Management Act 2007* », New Zealand Law Journal, June 2008, 211. – L. Longdin, « *Major event regulation : lessons for and from New Zealand* », Australia and New Zealand Sports law Journal, 2008, 3(1), 5. – S. Corbett & Y. van Roy, « *Events management in New Zealand : one law to rule them all ?* », Journal of business law 2010, 4, 338.

[63] London Olympic Bill, Bill n°45, 14 juill. 2005 et London Olympic games and paralympic games Act (LOGA), 30 mars 2006, (c.12). - Cf. : R. Montagnon & J. Smith, « *Intellectual property : the London Olympic bill* », European intellectual property review 2006, 28(1), N11. – H. Padley, « *London 2012 : five years, nine month and counting* », European intellectual property review 2006, 28(11), 586-590. – P. D. Sheridan, « *An olympic solution to ambush marketing : how the London olympics show the way to more effective trademark law* », Sports Lawyers Journal, spring 2010, 27.

[64] The law is in project for the football world cup (Projeto de lei do Senado, n°00394, 03/09/2009). The law is effective for the 2016 summer games (Lei n°12.035 (01/10/2009).

[65] This is the 2003 Cricket World Cup organisation the formed the background to this enhancement.

[66] Trade Practices Act n°76, 1976 (art. d. § 9), modifié par Trade Practices Amendment Bill n°26, 2001 (www.gov.za/).

[67] Merchandise Marks Amendment Act n°61, 2002 modifiant le Merchandise Marks Act n°17, 1941 (art. 15A) (http://www.gov.za/). See : I. Blackshaw, « *Court Kick off* », European lawyer 2010, 94, 13.

in 2002, enabled the Minister for Business and Industry to designate a sports event as specially protected under the Act for a limited period when this event is of interest to the public, and when, although financed by commercial sponsors, it guarantees that small companies are allowed sufficient advertising space, especially the "*formerly handicapped communities*". The South African government designated the 2010 football World Cup as such an event.[68] The Merchandise Marks Act enhanced the protection given to official sponsors by prohibiting third parties from using their trademarks directly or indirectly by visual or sound means in order to create a relationship between themselves and the protected event without the authorization of the organizer, and thereby gain a commercial advantage from the event. These restrictions on the use of trademarks and insignias are accompanied by heavy penalties of 5 years imprisonment, to which may be added additional penalties such as the confiscation of the products in question.[69]

Moreover, for the purposes of the 2010 World Cup, South Africa passed two special laws, certain aspects of which concern the fight against ambush marketing.[70] These laws formed the basis of a group of young women being accused of wearing clothing with the same colours as a brand of beer, itself not an official partner of the World Cup. This was in contravention of the trade and business restrictions in the "excluded zones" that introduced unauthorized commercial products into these zones. These special texts also formed the basis of the South African government's decision to prohibit the resale of tickets as promotional special offers, promotional sales, hospitality packs, etc., without the written authorization of FIFA and on risk of a penal sentence of up to five years imprisonment[71] for non-compliance.

Candidate countries for future major events are for the same reasons seeking to extend their body of legislation in this area.[72] For instance, for the purposes of the 2014 World Cup, Brazil is preparing an *ad hoc* text[73] that is roughly

[68] Notice 683 of 2006, Staatskoerant, 25 mei 2006, n°28877, p.3. - D'autres événements ont été désignés : Coupe du Monde de cricket 2007 (Notice 1141 of 2007 - Staatskoerant, 11 sept. 2007, n°30289, p.3) ; Cape Argus Pick'n Pay Cycle Tour (Notice 374 of 2006 - Staatskoerant, 2 maart 2006, n°28589, p.3) ; British and Irish Lions Tour (Notice 906 of 2009 - Staatskoerant, 22 junie 2009, n°32340, p.3).

[69] To see an example of the application: North Gauteng High Court (Pretoria), 1 oct. 2009, *FIFA* v. *Metcash Trading Africa (Pty) Ltd*, case n°53304/07 (ZAGPPHC 123) (cf. : in ISLJ 2010/1-2, p.140 – South Africa 2010 World cup : FIFA wins landmark'ambush marketing case). – Adde : L. Arcelin-Lécuyer, « *Coupe du monde de football 2010 : L'embuscade des Bavaria Grils…* », JCP E 2010, 1741.

[70] 2010 FIFA World cup South-Africa special measures Act (Act n°11 of 2006, Gov. gaz. Vol 495, 7 sept. 2006, n°29198). - Second 2010 FIFA World cup South-Africa special measures Act (Act n°12 of 2006, Gov. gaz. Vol 495, 7 sept. 2006, n°29199).

[71] Notice 383 of 2009, Staatskoerant, 14 april 2009, n°32123, p.3

[72] Hungary, candidate for Euro 2012, abandonned its project when the event was awarded to Poland and Ukraine.

[73] Projeto de lei do Senado, n°00394, de 03/09/2009, Dispõe sobre a utilização de espaços publicitários, denominações, bandeiras, lemas, hinos, marcas, logotipos e símbolos relativos à Copa do Mundo da Federação Internacional de Futebol (FIFA) 2014 e à Copa das Confederações da FIFA Brasil 2013,

identical[74] to the one adopted by South Africa.[75] It will contain a special provision according to which the association of products or intellectual services with names, flags, slogans, anthems, insignias, logos or symbols relating to the World Cup will be prohibited. It is stipulated that such an association will be characterized by the use of the aforesaid signs, even unforeseen, whereas this use will be accompanied by a mention such as "*non official*" or "*unauthorized*".

4.2 Classifications

The *ad hoc* texts that international sports authorities manage to have enacted through lobbying their legislators differ. Even though their purpose is the same, ie to ostracize ambush operations that consist in suggesting the existence of an association or link between the protected event and a non associated company, there may be notable differences from one system to another.

Many of these laws reserve the use of insignias to the organizing committee. The list of protected insignias, mottos, logos and so on may be more or less extensive. However, it is never restrictive and releases the organizer from any need to register the insignias, mottos, etc. Some laws allow local government authorities to add other words to the list, and even expressions or sentences mentioning the field in which the event takes place. This ensures that the organizers have enhanced protection but lose in the area of legal certitude. Moreover, they offer the authorities charged with having them applied (often by the sports association) discretionary powers of prosecution that might be considered unreasonable.

Although some of these laws concerned a single event and are limited to its duration,[76] others have been developed to apply to all major competitions held on the territory in question.[77] These are considered "umbrella" laws because they offer the local government authority the right to designate a particular event as governed by the special text.

Lastly, countries such as Greece, South Africa or New-Zealand have chosen to move ambush marketing from the civil courts to the criminal courts by envisaging not only fines for infringements but also prison sentences, in addition to any damages that may be awarded against the ambushers.

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assim como a organizadores, mantenedores dos direitos da FIFA, seleções e atletas participantes (www.lexml.gov.br/).

[74] The draft law gave the right to fix the nature of the sanctions in the event of ambush marketing.

[75] The law for the 2016 Olympics in Rio has already been passed: Lei n°12.035 (01/10/2009) Institui o Ato Olímpico, no âmbito da administração pública federal, com a finalidade de assegurar garantias à candidatura da cidade do Rio de Janeiro a sede dos Jogos Olímpicos e Paraolímpicos de 2016 e de estabelecer regras especiais para a sua realização, condicionada a aplicação desta Lei à confirmação da escolha da referida cidade pelo Comitê Olímpico Internacional (Diário Oficial, Seção extra, 01/10/2009, 1).

[76] For instance in Italy.

[77] Example of South Africa or New Zealand.

4.3 Negative Aspects

Switzerland, the organizer of Euro 2008, refused to bend before the lobbying of the sports authorities.[78] Perhaps it was considered that these special texts, obviously effective since set up for that purpose, are only effective at the cost of significant attacks on the freedom to do business, the principle of free competition and freedom of expression.[79]

It has to be said that in order to target ambush marketing, on the one hand these laws enhance the rights of the holders of registered trademarks who can thus oppose the use of insignias that express only a simple association of ideas, and on the other hand stigmatize those practices that seek to benefit from the reputation of the event. However, this line of action tends to consolidate monopolies that did not necessarily need it in order to cover as many free-riding acts as possible by using relatively vague concepts that do not guarantee the legal certainty of the operators. There remains a doubt as to whether these texts are altogether compliant with the rules of free competition, whether European[80] or otherwise.[81]

Moreover, by prohibiting any form of publicity that does not match the rights conferred on the organizers, these special laws are prejudicial (in a manner that is not altogether adequate) to the freedom of expression of citizens and enterprises.[82] This criticism may not be without consequences. For instance, the constitutional court in South Africa has considered that insofar as the right to freedom of expression could not be *"disproportionately limited"*, the Trademark Act had to be "*restrictively interpreted"*.[83]

In particular, many of them have stigmatized ambush marketing as a criminal offence whereas the interests protected by this kind of law imply that at worst this is a tort,[84] even in the most serious cases.

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[78] Cf. : Résultats de la procédure de consultation concernant l'adaptation de la Loi fédérale contre la concurrence déloyale (LCD) en vue du championnat d'Europe de football 2008 (www.seco.admin.ch). – see also: D. Hufschmid, « *Switzerland : new legislative steps against ambush marketing* », *International sports law review* 2006, 3, 77.

[79] See : TGI Paris, 30 mars 2010, *Cah. dr. sport* n°20, 2010, 141, note J.-M. Marmayou : « *le parrainage ne peut avoir pour effet de priver tout autre acteur économique de fonder sa publicité autour d'un sport pour autant qu'il ne s'approprie pas les symboles et logos de la fédération qui organise les matches ni les images. L'événement sportif appartient à tout un chacun car il fait également partie de l'actualité, seule sa représentation en direct ou télévisée fait l'objet de droits particuliers reconnus par l'article L.333-1 du Code des sports* ».

[80] Cf. : V. Forti, A. Gentiloni Silveri, J. Figus Diaz et F. Mezzanotte, « *Ambush marketing : una ricerca interdisciplinare sulle tutele* », *Riv. Dir. Ec. Sport*, 2009, n°2, 13.

[81] J. A. Fortunato & J. Richards, « *Reconciling sports sponsorship exclusivity with antitrust law* », T*exas review of entertainment & sports law*, Spring 2007, 33.

[82] A. Soldner, « *Ambush marketing and the 2010 World Cup* », in *German South African lawyers association newsletter*, August 2006.

[83] Const. court of S.-A., 27 may 2005, Case CCT 42/04, *Laugh it out Promotions CC vs. South Africa Breweries International and Another* (www.constitutionalcourt.org.za).

[84] L. Leone, « *Ambush marketing : criminal offence or free enterprise ?* », *International sports law journal* 2008/3-4, 75.

5. Search for a Solution

The prevention of ambush marketing is a lost cause when entrusted exclusively to lawyers. It is also a cause lost in advance when carried out only by marketing specialists. On the contrary, the effective prevention of ambush marketing requires close collaboration between lawyers and advertising executives, between the event organizer and its sponsors. Only then will the most appropriate contractual technique (see A below) be combined with the most effective actions in the field (see B below).

5.1 Contractual Approaches

Contractual freedom provides two ways of seeking protection against ambush marketing. They both make use of a prevention strategy. The first consists in the organizer of an event binding its partners to a tight web of precise obligations so as to protect all aspects of its marketing programme. The second consists in developing a corpus of legal texts that sets out the rights and precise marketing obligations, texts which are then submitted to the members of a given professional body for adoption.

5.2 Individual Contracts

The organization of a sports or similar event implies that many contracts will be signed with service providers, subcontractors, spectators, participants, volunteers, media, sponsors, etc. In addition to the usual obligations that are determined by the nature of the event in question, the organizers place the burden of compliance with positive or negative contractual obligations on its partners in order to close any loopholes that might have been left that an ambusher could exploit.

A holder of rights over an event will frequently restrict contractually the freedom of the organization in charge of the audio-visual broadcasting of the event to choose its own partners. This action is taken in order to minimize the risk of ambush marketing. Three types of clauses are used: those under which the organizer forces the broadcaster to grant official sponsors a right of first refusal to sponsor audio-visual broadcasting of the event, those under which the broadcaster undertakes not to authorize a competitor of an official sponsor to itself sponsor the broadcasting of the event,[85] and those under which the broadcaster is committed not to affix any virtual publicity generated by computer means on the images broadcast.

The organizer is also able to impose a certain number of rules on a host city requiring it to take measures to control the publicity around the competition venues.[86] This would lead it to impose in the contract a "*clean site*" or "*clean venue*" clause

[85] Mémorandum de l'European Broadcasting Union (EBU) sur la publicité virtuelle, 25 Mai 2000 (www.ebu.ch/CMSimages/fr/leg_virtual_advertising_fr_tcm7-4386.pdf).

[86] Ex multis : www.olympic.org/host-city-elections/documents-reports-studies-publications.

by which it ensures that the stadia and the surroundings of official venues are free from any advertising that is not under its control.

The organizer may further require that participating competitors comply with certain obligations concerning the visibility of their own sponsors.

The organizer may also use the tickets to prohibit spectators from any form of advertising by non official sponsors by imposing a particular "*dress code*" on them. More broadly, it may prohibit any holder of a ticket from reselling it, offering it in the context of a sales campaign, programme of hospitality or lottery.

Most sports events include event-specific regulations which exclude some or all forms of advertising within the venue. Rule 50 of the Olympics Charter states that no form of publicity will be permitted in and above stadia or other places of competition that are considered part of the Olympics venues. This results in very precise control of athlete's equipment which states: "*No form of publicity or propaganda, commercial or otherwise, may appear on persons, on sportswear, accessories or, more generally, on any article of clothing or equipment whatsoever worn or used by the athletes or other participants in the Olympic Games, except for the identification – as defined in paragraph 8 below – of the manufacturer of the article or equipment concerned, provided that such identification shall not be marked conspicuously for advertising purposes. The identification of the manufacturer shall not appear more than once per item of clothing and equipment. (….),*" etc.

Moreover, the effects of partnership or sponsoring contracts signed by sports organizations and other groups which prohibit the use by employees, subcontractors, representatives of these groups of products or the services of competing brands must be mentioned. For example, the internal rules governing the French football team adopt the terms of a partnership contract signed by the French football federation with an equipment supplier. These rules prohibit all selected players from wearing the equipment of another brand during the official periods of selection, even those brands they are already under contract with. Trademark law cannot be used to prevent the use of these restrictions. Indeed, although they affect the value of the brands indirectly and its function as an advertising medium, they do perform the essential function of the brand name which is to guarantee the origin of the product and thus identify the manufacturer. On the other hand, these restrictions may be criticised on the grounds that they hamper free competition and are equivalent to an illegal business arrangement.[87]

Moreover, as the parties who practise ambush marketing on certain events may be the official partners on other events,[88] the event organizers may find it beneficial to incorporate in their contracts, clauses that specifically prohibit occasional

[87] Cass. com., 2 déc. 1997, n°95-19753, 95-19820 et 95-19814, *Bull. civ.* IV, n°316, p.272, *Rev. Lamy dr. aff.* 1998, n°2, n°67, note G. Montégudet.

[88] Or worst, of the same event, cf. : District Court for the Southern District of New York, 23 mars 1994, *Mastercard international Inc.* v. *Sprint communications Co.*, n°94 Civ. 1051 (Westlaw : 30 U.S.P.Q.2d 1963).

partners from pursuing ambush marketing actions against any sports event organizer in the future.

5.3 Codes of Conduct

All confirmed or potential contractors or sponsors belong to representative groups, chambers of commerce, clubs, and more or less institutionalised networks. A collective discipline based on a code of conduct has been developed within these groups in order to limit the freedom of advertising and marketing by its members.

The example of the consolidated code of the International Chamber of Commerce on publicity practices and marketing communication[89] is an example of this self regulation.[90] It is not the only one. The British Institute of Sports Sponsorship has established a code of conduct for sponsors that contain in particular measures to prevent ambush marketing practices.[91] But of even greater interest is the decision taken by South Africa for the 2010 World Cup to create a special authority, the Advertising Standard Authority of South Africa (ASA)[92] which published a code of advertising practices and a sponsorship code containing a series of rules intended to prevent ambush marketing.[93]

The role of such professional codes of conduct is sometimes recognized in a country's legal system, thereby lending them an additional force. Article 6 of directive 2005/29/EC, defines unfair practices as business practices by companies that "*do not comply with the undertakings contained in the codes of conduct by which it has agreed to abide, when such undertakings are firm, and that their author has declared that it is bound by such codes*".

5.4 Limits of the Contractual Techniques

The question then arises as to whether the contractual techniques will close all the loopholes left by the countries' applicable laws. The answer to this is negative. It is impossible for these techniques to cover every inch of space.

A contract's effectiveness will depend on the rights that the organizer is able to assert. However, although article L.333-1 of the French Code du Sport confers monopoly powers on French events (which are not unlimited), not all countries have formally acknowledged this right.

Moreover, the relative effect of contracts prevents third parties from imposing obligations by agreements when they are not a party to such agreements. In this respect, it has been observed that the ambushers make sure that they avoid

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[89] Consolited Code ICC of Advertising and Marketing Communication Practice (1er juin 2006), doc. n°240-46/330 (www.iccwbo.org).

[90] The members of the European Sponsorship Association (ESA) have to abide by this code (www.sponsorship.org).

[91] UK Sponsorship Code, 8 Euromarketing, Oct. 4, 1994, n°4.

[92] www.asasa.org.za.

[93] Cf. art. 3.7 et 11.

establishing a relationship with the organizers of events.

Lastly, the freedom to sign contracts cannot satisfy all the circumstances that could arise. It has to take account of the basic freedoms and rights of the legal profession and especially the different actors in the economy: freedom of expression, right of information, freedom of trade and industry, free movement of workers, services and capital, etc. In this respect, article L.333-4 of the French Code du Sport which sets out that "*the sport federations, the sports companies and the organizers of sports events cannot, in their capacity as holders of a concession, impose on sports persons taking part in an event or a competition an obligation that breaches their freedom of expression*".[94]

The space around the sports event that an organizer may reserve for its own use or use by its partners is limited and this has had the effect of increasing the space left for other economic actors who, rather than devote considerable sums to obtaining the title of official sponsor of a sports event, prefer to concentrate their intelligence, and a smaller budget, on developing ingenious business operations.

6 On-site Interventions

6.1 Enhance exclusiveness

A lawyer's contribution to the prevention of ambush marketing does not necessarily reside in his/her field of legal expertise (trademark law, contract law, etc.) when applied to combating ambush operations. It is more a method of reasoning which initially consists in taking on the mantel of his adversary in order to better counter his arguments.

The organizers of events and their official sponsors must examine the position adopted by an ambusher in order to identify the weaknesses in their own strategies and ensure that they are remedied. To do this, it will have to understand the publicity potential that has to be protected.

Ensuring the exclusiveness of its official sponsors means that the organizer must from the outset occupy all the display and communication space. To do this, his first step is to draw up as comprehensive as possible a list of all the marketing space. This requires knowledge of the most recent examples of ambushing. The organizer will even go so far as to identify the space available on hotel key rings allocated to the official delegations. Once this list has been prepared, a sufficiently watertight contractual strategy will be set up to ensure that it benefits itself either directly, or its official sponsors benefit from the use of these spaces. All the publicity openings offered by large audio-visual broadcasters will have to have been bought up as soon as the decision is taken to organize an event on a particular date. Failing this, organizers should obtain a commitment from broadcasters to offer priority to

[94] It remains to be decided whether the freedom of expression that arises here concerns commercial advertising or not (CEDH, 20 nov. 1989, *Markt Intern Verlag Gmbh c/ Allemagne*, n°10572/83, Rec. Série A, 165. – Cass. crim. 19 nov. 1997, D. 1998, p.613, note J.-C. Galloux).

the official sponsors. All billboards inside and outside the stadia, all available spaces, whether public or private, that could be used in the areas surrounding the venues (roadside billboards, building frontages, etc.), will have to be reserved.

Obviously, the organizers will have to set up a policy of sufficiently dense and international registration of trademarks and brands to complete any reservations granted by an ad hoc local law, but this concerns the least sophisticated ambushers.

6.2 Enhance Sponsorship Programme Activation

The organizer also has to convince his sponsors of the need to implement important advertising campaigns to accompany the one directly related to the exclusiveness granted. The aim is to convince the public that the sponsor is indeed an official sponsor.

Obviously, the programme of sponsorship established by the organizer has to minimize the potential for ambush-operations. Exclusivenesses that are too expensive may persuade a potential sponsor to stick to ambush actions rather than pay the required price. Too many categories of sponsors or too many official sponsors may lead to certain confusion in the public's mind, confusion the ambushers will soon exploit.

Whenever possible, the organizer will resort to *naming* the competition. If set up and implemented correctly, this kind of sponsorship programme prevents officially sponsored competitors from associating their trademark with the event.

As marketing specialists have shown,[95] the organizer has every interest in undertaking actions known as "public information" (websites, media campaigns, distribution of leaflets, etc.) through which it informs the spectators and the consumers that ambush marketing practices jeopardize the lasting funding of events and thus the events themselves. The aim is to encourage spectators to react negatively against those brands that are guilty of ambush marketing. The official sponsors are also guaranteed that their official status will be recognized by the public. These actions must also be combined with public awareness programmes that target local companies in order to inform them of what they can and cannot do. There is a cost involved in these actions but they enhance the exclusiveness granted and thus their value.

6.3 Human Means

The organizer must also set up sufficiently trained human means[96] whose role is to ensure that the contractual obligations contained in the tickets sold to spectators are complied with both inside and around the competition venues. It is pointless

[95] Cf. : D. Crow & J. Hoek, « *Ambush marketing : A critical review and some practical advice* », Marketing Bulletin 2003, 14, p.1 (http:// marketing-bulletin.massey.ac.nz) and the quoted references.
[96] The officials have to be capable, in compliance with the fundamental rights of citizens, to distinguish between an ambush marketing operation and the individual behavior of an ordinary spectator.

imposing a "*dress code*" on persons when no one at the entrance to the venue ensures that this "*dress code*" is correctly observed.

Furthermore, the creation of a "*clean venue strategy*" requires that employees are dedicated to identifying any counterfeit products sold around the stadia as well as eliminating any flyposting by ambushers. These practices by a "*dedicated task force*", or "*mystery shopping surveillance operation*" or "*ambush policing*" have proved to be effective in the past.[97] Similarly, the staff has to inform the ambushers that their acts may contravene a certain number of legal provisions. Experience has shown that a simple telephone call or just a letter may dissuade small ambushers from pursuing their operations.

Lastly, the organizers have to coordinate their actions with the local authorities since interventions in the public area cannot take place without the policing powers provided by appointed persons.

[97] See the FIFA programme: « *Marketing fair-play : la FIFA en guerre contre le marketing sauvage* **» :** http://fr.fifa.com/aboutfifa/marketing/marketing/rightsprotection/index.html.

INTERVIEW WITH SPORTS LAW GURU PROF. IAN BLACKSHAW

interview by *Samuel Muthomi*[*]

Profile

An International Sports Lawyer and holds a number of visiting Professorships in UK, European and South African Universities. He is a member of the Court of Arbitration for Sport (CAS) and of the Arbitration and Mediation Panels of the UK Sports Dispute Resolution Panel. He has practised widely, both nationally and internationally, and written many articles in British and Foreign Legal Journals on sports marketing issues and the resolving of international sports disputes by mediation amongst many other major publications.

1. What attracted you to pursuing a career in sports law bearing in mind that this is a relatively new discipline and has only started emerging maybe in the last 20 years?

   Many years ago, I joined The Coca-Cola Company in London as the in-house legal counsel for Northern Europe. I was appointed because of my expertise and practice in intellectual property law. Evidently, Coca-Cola has been a pioneer in the field of sports sponsorship, sponsoring many major sports events, including the Olympic Games, of which it is one of the top sponsors. This experience gave me the opportunity to become professionally involved in the field of sports marketing at the national, regional and international levels. I naturally developed and maintained an interest in, and have kept abreast with legal developments in this field. In fact, I have been a pioneer myself - in many ways - in the development and evolution of international sports law as a legal discipline, which, as you quite rightly state, has gathered momentum in the last twenty years or so, particularly spearheaded by the work of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, founded in 1983 and operational in 1984, of which I am a member.

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[*] Sports Lawyer, Nairobi. Date: 24/5/2011.

2. What is the role of a sports lawyer in the relatively unchartered African terrain?
The role of a sports lawyer in Africa is the same as elsewhere in the world - sport is a global phenomenon. A sport lawyer therefore has a duty to represent sports bodies and sports persons in their legal affairs, which embrace contracts, regulatory, disciplinary, intellectual property rights, broadcasting and new media, sponsorship and other forms of sports marketing of sports events, sports teams and individuals. I must add that sports law is wide, evolving and exciting field of legal practice, as sport has become a global industry in its own right worth more than 3% of world trade. In other words, mega bucks!

3. How has Africa contributed to the Sports Law jurisprudence?
To my knowledge, this is through a number of cases brought before and decided by the CAS, which, over its more than twenty-six years of operation, is contributing to a discreet body of sports law – a so-called '*Lex Sportiva*'.

4. Hosting major sporting events in Africa requires enormous government support. What role can the government play in terms of enacting and implementing sports (events) related legislation?
The role of governments generally, is to create the legislative framework in which businesses can be established and flourish, and this also applies - in no small measure - to the business of sport. The legal climate has to be sports-friendly and supportive. The political will has to be there and also public financial resources have to be allocated to the promotion of sport, especially in a social and health context.

5. Issues of misconduct and safety concerns have reared its ugly head in the African sporting scene. What's your take especially in the case of football hooliganism?
Football hooliganism is contrary to the aims and enjoyment of sport and minorities engaging in such anti-social and unsporting activities should not be allowed to undermine the integrity of sport. Strong legal measures supported by the state are needed.

6. Doping is a common occurrence in the sporting realm. What is the role of sports bodies in a rather unguarded realm?
Their aim is quite clear: to work towards drug-free sport, especially through the World Anti Doping Agency, whose motto is: 'play true'!

7. Sporting disputes in Africa and government interference are more often than not the norm of the African sporting scene. Is self-regulation of sports in Africa a rather far-fetched idea?

No, like everything else in life, this is something which takes time and persistence in this cause will ultimately be rewarded.

8. Many of the rich oil nations in the Arab world have in the recent past tapped into the wealth of talent in Africa by giving monetary incentives in exchange for sports men and women to change their nationalities and represent them. What is the best way to curb such practices?
Sport, as I mentioned earlier, is now big business, and market economics will always prevail, so, in my view, it is difficult, if not impossible, to do anything to stop these trends, other than, perhaps, providing equivalent or better financial conditions at home for local athletes. Funding is always a problem.

9. What is the best approach in creating sound financial management in African sporting institutions bearing in mind that most are not self-sustaining?
Maybe through national lotteries and the distribution and allocation of their incomes to 'good causes', such as sport. The UK national lottery is contributing substantially towards the costs of staging the 2012 Olympics in London.

10. Sports related lotteries have been touted as a potential means of raising funds to run sports bodies and events. What are the dangers and how can we learn and nurture such opportunities?
See my answer to the previous question and perhaps take a leaf out of the UK's book.

11. What is the correlation between tax waivers and sporting events and what other incentive can African states give in attracting and hosting international sporting events?
Major sports bodies, such as FIFA, require complete tax waivers from countries as one of the criteria for awarding the bids to countries to host their events, such as the World Cup. Also, legislation needs to be passed to protect the intellectual property rights of sports bodies in their events from infringers, especially so-called 'ambush marketers'.

12. What is the role of WIPO and National Governing Bodies (NGBs) in protecting intellectual property rights in the sporting realm? What would you propose is the best way forward?
National Sports Governing Bodies are charged with the responsibility of safeguarding the intellectual property rights in their sports and sporting events. Likewise, WIPO, through its Arbitration and Mediation Centre, based in Geneva, Switzerland, of which I am also a member, can protect sports-related intellectual property rights, especially in relation to sports domain name disputes, particularly so-called cases of 'cyber squatting'. See www.wipo.int**.**

13. Why is it that most African sports personalities have not been able to exploit their image rights?
I really am not in a position to answer that question. Perhaps, there is a lack of commercial awareness and legal expertise in this area.

14. Is the time ripe for the African continent to set up a sports council (similar to the Sports Minister's Council under the European model) under the umbrella of the African Union? What are the potential implications of setting up the sports council?
It would seem so. But, as mentioned above, there has to be political will and funding supporting such a venture, if it is to be successful.

15. Is it feasible for Africa to develop a sports model and what are the advantage and disadvantages of such an approach in relation to other models such as the European Model?
The European pyramidical model of sport seems to be working well, but depends on the autonomy of the sports bodies for its success, which, in turn, depend upon their sustainable financing. Of course, this is also a cultural matter.

16. What is the role of arbitration in resolving sports disputes as seen by the Court of Arbitration of Sport (CAS)? Should the local courts be the courts of first instance or should CAS be seen as the court of last result?
Both the ordinary courts, especially where injunctive relief is required, and the CAS have a role to play in the settlement of sports-related disputes. For the sporting world, the CAS is fast becoming what its founders intended it to be: 'the supreme court of world sport'.

17. Being an author of many books and articles, what is your advice to aspiring sports lawyers?
Do what you have done and take a master's degree in sport; and also continue researching, writing and practising in this exciting and ever-evolving field of sports law!

SPORTS MANAGEMENT AND GOVERNMENT INTERFERENCE IN AFRICA

by *Elvis Majani*[*] and *Nick Osoro*[**]

SUMMARY: Introduction – 1. International Recognition – 2. Autonomy of Sports – 2.1 International Olympic Committee (IOC) – 2.2 FIFA – 2.3 The International Cricket Council (ICC) – 3. National Politics and Government Interference in Sports – 4. National Courts – 5. Stadium Disaster – 6. Management and Corruption

Introduction

Sport management involves any combination of skills related to organizing, controlling, directing, budgeting, planning, evaluating and leading within the context of an organization or department whose primary objective is related to the development of sport.

Governments must be seen to be making a positive impact in sports management for its sportsmen and the entire sports federation at large. It would be fool hardy for the government to sit back on its laurels and expect sportsmen to self sustain their careers and the sports fraternity at large.

It should be again said that sports in Africa has suffered a setback as a result of poor management and interference by movement officials. Such can be attributed to:

Poor policies in place by the government, such policies include lack of proper ticketing procedure or crowd management in case of violence in stadiums.

General abandonment of sportsmen by government departments as is the case being witnessed by the lone Olympic boxer, the Kenyan police Benson Gacheru,

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[1] See Article on Kenya police to get hefty pay rise posted by Administrator on November 5, 2009 NAIROBI, Kenya, Nov 5 – The final Task Force report on police reforms handed to the President of the Republic of Kenya on Tuesday recommends a substantial pay increase for all police officers by July next year.www.capitalfm.co.ke.

who has had to pay from his own income to train while in Cuba, while it is a settled fact that Kenyan police are paid meagerly[1] thus expecting a police officer to foot his bills in a foreign country while representing his own country would be expecting too much from the young lad.

Thirdly is the case of government interference into the sports fraternity, this is where corruption and underhand dealings surface leading to missed opportunities and chances. Corruption cannot be underscored owing to the fact that it is seen as a necessary evil not just in sports corridors but in virtually every facet of our lives.[2] While Kenya is well known as a sporting nation, this success is not reflected in the football sector, which has been particularly prone to squabbling and corruption.

Corruption in sports is not new. There are concerns the world over about the lack of transparency and accountability in sports and the resultant social and economic impact. The risk of corruption has increased dramatically as commercial influences grow.

Fourthly, political interference of sports is an issue that has bedeviled the sports fraternity for a long time now; this is more especially where politicians try to use sportsmen to further their careers. Well someone may say there is nothing wrong with this set of facts as normally these are adults of sound mind. However, politics should be separated from sports owing to the fact that over the past, politicians have used their positions in government to undermine sportsmen by ensuring that only their own rise to the helm in management positions some have promised the upcoming lad heaven yet they have failed to deliver simple roof tops, leading to despair and discouragement.

Despite all these, African sports men are resilient people who despite all odds somehow find a way to triumph and win the gold, silver and bronze as Kenyans are well known for in the 3000m steeplechase.

The Swahili have a saying *"mgala muue na haki umpe"* which means give the man his blame but give him his right as well. Therefore, African governments have in the past done useful work in boosting the morale of its sportsmen. Through the ministry of sports in various countries governments have tried to harness the talents of young men and women trying to come up a case in point are the success of the Kenyans in Olympics where through their umbrella body Athletics Kenya, have managed to propel Kenyan athletes to great heights in sports.

1. International Recognition

The value that sports brings to countries cannot be underscored. For example

[2] *See* the article by Gladwell Otieno Executive Director Africa Centre for Open Governance" The crisis of football management in Kenya 2010" Some of these proposals lean on recommendations made by an All Party Parliamentary Football Group in the UK Parliament, which conducted an inquiry into the governance of English football. See "English Football and its Governance, All Party Parliamentary Football Group, London, April 2009.

Kenyans are so well known in athletics[3] such that any Kenyan walking along the streets of Berlin or any country in the world could easily be mistaken for an athlete, simply due to their exemplary performance at the races.

Sports has also earned Africa numerous revenue collection, as the prize monies collected at the events won by our sportsmen is usually brought back to the country and used within Africa. Such money is eventually taxed by government in turn being used in building roads, schools hospitals among others.

Sports personalities have been used in times of conflict to mediate and create a lasting solution that promotes peace and prosperity in the society.[4] This was evidenced in Ivory Coast where the sports icon Didier Drogba has been instrumental in quelling the violence that had been witnessed in that country for a long time. George Weah is another example of a sports icon that has played a crucial role in bringing stability in times of war within the African continent.

2. Autonomy of Sports

Autonomy of sports is basically the independence of sport organizations all over the world to run their own activities without fear, and free from manipulation and interference from outside. Over the years sport has evolved from a fun activity for a few people to a social movement for billions of people all around the world. Sport is now a major global, social, economic and political phenomenon.

Autonomy is vital for sports movement, as it preserves the values of sport and the integrity of competitions, thus providing participants and volunteers with motivation and not forgetting the education of young people and their contribution to the well-being for women, men and children, thereby contributing to credibility and legitimacy of sports. In brief, autonomy in sports is the self-regulation and self-management without any interference and manipulation. However this independence does not mean that sports management is beyond law but that in certain areas of sport a regulating autonomy must be taken into account and respected.

Most Sports Federations have always advocated for independence and ways of preserving and maintaining their autonomy and resisting outside interference from other organizations.

2.1 International Olympic Committee (IOC)

The Olympic Charter governs the Olympic movement together with the affairs of the International Olympic Committee (IOC) and it specifically protects the independence of IOC from any interference from the Government and any other

[3] *See* the performance of Kenyan athletes in the 2008 Olympics and Marathons across different countries.

[4] Tegla Loroupe the Kenyan marathon champion has initiated the Tegla Loroupe Marathon to promote peace among the pokot community who are always in conflict.

organization in the running of its affairs. This is expressly provided in ***Chapter 2 Rule 16 (1.5)*** which states that:
"Members of the IOC will not accept from governments, organizations, or other parties, any mandate or instructions liable to interfere with the freedom of their action and vote".[5]
Chapter 4, Rule 26.6 of the charter advocates that the NOCs maintain their autonomy and resist any kind of governmental manipulation and interference. *"The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter".*[6]

2.2 FIFA

FIFA in its statutes has done everything possible to protect its members from outside interference and manipulation. This also includes government interference on the affairs and management of football in countries accepted by FIFA as members. To ensure that such rules are respected by its members and any other association, FIFA has placed sanctions for violation or infringements of these rules.

FIFA statutes Article 13 Para (1) g expressly provides for the independence and autonomy of its members: *"FIFA members have the following obligations; To manage their affairs independently and ensure that their own affairs are not influenced by any third parties".*[7]

Article 13.2 and 13.3 of the of FIFA statutes provides that FIFA can sanction any Federation that violates any of the obligations provided by FIFA in Article 13.

Article 13.2 states;"*Violation of the above mentioned obligations by any member may lead to sanctions provided for in these statutes".*[8]

Article 13.3 shows the concern FIFA has with the autonomy of its members and also the zero tolerance FIFA has over outside manipulation and interference of its members. This paragraph provides that FIFA will sanction its members when there is an outside interference in the running of its affairs, regardless of whose fault it is, *"Violation of paragraph 1(g) may lead to sanctions even if the third party influence was not the fault of the member concerned".*[9]

Article 14 of the Statute gives FIFA the power to suspend any member who violates the obligations provided in Article 13. It also states the procedure that FIFA will use to sanction its member.

[5] See Olympic charter chapter 2 Rule 16(1.5).
[6] See Olympic charter chapter 4 Rule 26.6.
[7] See FIFA statutes Article 13 paragraph (1)g.
[8] See FIFA statutes Article 13 paragraph 2.
[9] See FIFA statutes Article 13 paragraph 3.

2.3 The International Cricket Council (ICC)

As other International Sports Federations, the International Cricket Conference (ICC) has surrounded itself with rules and regulations aimed at protecting itself from government manipulation. The International Cricket Conference (ICC) recently fine-tuned its rules and regulations to further protect it. In its rules governments are barred from influencing, directly or indirectly, and among other things, the day-to-day decisions of the administration, the staging of cricket matches, the dates of such matches, and the process or outcome of any disciplinary enquiries.

However these regulations have taken great pain to explain instances where the role of government is accepted. These regulations have provided the government with the freedom to provide financial assistance, such as loans and grants, to national federations and thus giving it the power to attach conditions to that financial assistance provided it does not contravene its rule on interference with the game. Furthermore a government has the right to investigate the affairs of a Member Board in order to ascertain whether any criminal offence has been committed, including fraud, dereliction of directors' duties (including fiduciary duties) or contravention of any relevant legislation.

Similarly, there may be circumstances where a government (or any ministry thereof) rightfully seeks to intervene in the event that a Member Board is dysfunctional. However the ICC Governance Review Committee has allowed this by stating it is a question of accountability, not interference. Unlike FIFA and IOC, the ICC has given room for government interference which some legal analysts see as a very risky move.

3. National Politics and Government Interference in Sports

Some people argue that sports and politics should be and in fact are completely separate entities. However, evidence portrays a completely different picture. The laws, rules and regulations governing sports are mostly derived from practical state laws; sport in sports loving nations is always a very vital tool for politics, sport can be used as a means to attain peace and harmony, it can also be used as nation-building instrument and for purposes of international image-branding and marketing. Modern sport in sports loving States has seldom been free of politics thus providing the facts that sport and politics are increasingly becoming inseparable in many ways. At times politics and Sports often team up to good effect when it comes to regime change. Take for instance the fight against apartheid which eventually resulted to the ban on South African sports teams from international competitions.

The importance of sports has varied over time, because of the growth of nationalism which has revived the idea of using sport for promoting harmony, peace, patriotism and national integration. Today, sport and politics are intertwined and often work together to demonstrate social, economic, or political superiority

over other nations. Individuals usually use sports to achieve their political goals and to maintain their political power.

Some African national leaders get into power through leading some sports Federations. However, autonomy in sports suggests that sports and sporting events should not be under direct or indirect influence or manipulation from any other institution other than the sport federation which is recognized by the mother international Sport federation, for example, in football the National Football Federation recognized by FIFA is the only institution allowed to run football affairs of that state.

Similar to most International Sports Federations, football's governing body FIFA has made it clear that no government interference with regards to running of national federations would be tolerated. Article 13 Para (1) g of the FIFA Statutes states that national federations are obligated, *"To manage their affairs independently and ensure that their own affairs are not influenced by any third parties"*.

The Article further states in Paragraphs 2 and 3, that the federation can face sanctions from FIFA for infringing Para 1(g) even if the infringement is not the fault of the federation. Article 14[10] gives FIFA the power to suspend any organization which is in breach of any obligations under the FIFA Statutes. Despite the perceived strength of this rules and regulations by international Sports Federations, they have not been able to stop interference. For this reason many African Nations have been severally sanctioned over the rules by FIFA due to Governments or third party interference, this will be discussed in detail later on in this article.

The Olympic Charter Chapter 2 Rule 16 (1.5) states that the running of the IOC itself should be free from Government Interference, the proviso goes "*Members of the IOC will not accept from governments, organizations, or other parties, any mandate or instructions liable to interfere with the freedom of their action and vote."* Chapter 4, Rule 26.6 of the charter provides*" The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter"*. It is clear that the NOCs needs to maintain their autonomy and resist governmental interference.

The Charter under Chapter 4 Rule 9 expressly seeks to stop governmental interference in the operations of a NOC by providing: *"Apart from the measures and sanctions provided in the case of infringement of the Olympic Charter, the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered. The IOC Executive Board shall offer such NOC an opportunity to be heard before any such decision is taken"*.

[10] Article 14 of the FIFA statutes reads: "T*he Executive Committee may (…) suspend a Member that seriously violates its obligations as a Member with immediate effect*".

The main concern for these strict guidelines is to ensure the freedom and autonomy of members, in order for them to remain free of any political manipulation. There are instances where the IOC used the powers available to it under the Charter and banned some of its members for what the IOC considered to be political manipulation.

The International Cricket Council (ICC) has also enacted in rules and regulations that seek to protect member boards from political or government interference. The ICC has given member boards a period of two years up to 2013 to come in line with the new regulations or risk sanctions. Members who fail to comply with the new requirements risk immediate suspension from the membership of the ICC.

These are but a few International Sports Federations that strictly forbid any kind of outside interference or manipulation by any organization to its members. FIFA specifically has shown zero tolerance to outside interference by organizations to its members.

FIFA has in some instances suspended and banned some African national teams from participating and competing in FIFA organized tournaments and competitions due to outside interference especially from the government. In November 2006, Kenya was suspended by FIFA for government interference in football and failing to abide with Article 13 of FIFA Statutes.

The suspension came after the then Kenya sports minister dissolved the Kenyan Football Federation (KFF) and replaced it with a government-appointed caretaker committee. FIFA took the decision to suspend the Kenya Football Federation (KFF) after the same was recommended by the Confederation of African Football (CAF) and requested by the president and interim of the KFF, due to repeated government interference in local football affairs and non-compliance with the agreement reached with FIFA on fundamental sporting principles such as the integrity of competitions and the principle of promotion and relegation.

In 2010 FIFA suspended Nigerian soccer's governing body for government interference. Several developments led to the suspension, including court actions against elected members of the Nigerian Football Federation executive committee, the federation's general secretary stepping down on orders from the government-run National Sports Commission, and the decision of the sports minister to start the Nigerian league without relegation from the previous season.

4. National Courts

The development in African football has over the years been astonishing and rather controversial. For the sports lawyer and other interested parties, this is a remarkable opportunity to examine and critically analyze further the perennial battle between state regulation and self-regulation. It is a well established fact that FIFA and CAF regulations prohibits attempts to seek remedies before national courts in matters which is of purely sporting nature and by pursuing this one risks violating specific

FIFA regulations. The general position is that national courts are usually reluctant to interfere with cases of a sporting nature as the sports associations are private bodies as opposed to public bodies. Courts cannot intervene in matters conducted by private associations, however when a matter is presented in court against a private association the courts will nevertheless go ahead with the hearing of the matter.

This on the hand translates to a violation of FIFA and CAF regulations thus raising some questions;

a. Whether decisions made by a quasi-judicial arm of the sports associations can be reviewed by the national courts
b. Whether the National courts can overturn or quash an unfair decision made in a game
c. Whether the National courts can solve a dispute involving members of a sports federation
d. What happens to a decision made by a national court in a matter of purely sporting matter?
e. If disciplinary action were taken against an athlete or a national team by the highest decision making organ of the game, barring them from participating in international sporting events, whether such an aggrieved person or team can appeal to a national court by seeking judicial review orders

FIFA take a different view of clubs taking recourse to ordinary courts of law rather than taking the matter to the impartial courts of arbitration, such as the Court of Arbitration for Sport (CAS). Article 64 paragraph 2 of the FIFA statutes provides: "Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations"[11] subsequently paragraph 3 states that the Member 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.

Article 76 of FIFA disciplinary code states that "FIFA Disciplinary committee is authorized to sanction any breach of FIFA regulations which does not come under the jurisdiction of another body".[12]

African federations have on a couple of times been in trouble with FIFA for violating the provisions of Article 64.2 of the FIFA statutes, thus leading to sanctions from FIFA. Kenya, Nigeria and Ghana have either been warned by FIFA against taking sports matters to ordinary courts or have been suspended for doing that.

In May 2012 the Football of Kenya Limited (FKL) Chairman disapproved of sporting matters and wrangles from being taken to ordinary courts. The Chairman insisted football related disputes must be brought before an independent arbitration

[11] See Article 64 para. 2 of the FIFA statutes.
[12] See Article 76 of FIFA disciplinary Code.

tribunal who are mandated to resolve such kind of disputes. Ordinary courts lack the jurisdiction to rule on matters of sporting nature.[13]

In the year 2010 FIFA suspended the Nigeria Football Federation (NFF) on account of government interference and by also allowing football matters to be taken to local courts.[14]

5. Stadium Disaster

Stadium disasters whether they are caused by stampedes, fan violence,[15] collapsing stadium structures or other reasons have been an unfortunate part of soccer in all parts of the world for over a century.[16] Sports management includes managing fans at stadiums during various sports events; this is the core of any success in sports management. The fans should be made to feel safe while enjoying the games.

Article 67 of the FIFA disciplinary code 2011 edition places all responsibilities and liabilities to the home association for any improper conduct which includes any form of violence, and insults that can bring the game to disrepute. *Article 67.3* states *"Improper conduct includes violence towards persons or objects, letting off incendiary devices, throwing missiles, displaying insulting or political slogans in any form, uttering insulting words or sounds, or invading the pitch"*.[17]

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[13] Ibid 15.

[14] The Statement from FIFA read in part *"The FIFA Emergency Committee decided today, 4 October 2010, to suspend the Nigeria Football Federation (NFF) with immediate effect on account of government interference. This decision follows the latest events linked to the NFF, such as the court actions against elected members of the NFF Executive Committee preventing them from exercising their functions and duties, the stepping down of the acting NFF General Secretary on the instructions of the National Sports Commission, the decision of the Minister of Sports to have the Nigerian League start without relegation from the previous season, and the fact that the NFF Executive Committee cannot work properly due to this interference. The suspension will be maintained until the court actions have ceased and the duly elected NFF Executive Committee is able to work without any interference.*

[15] Violence on the football fields in Africa is very common. With a few exceptions, violence is not organized but rather spontaneous. Most of the anger is directed at the referee and the players, coaches and officials of the opponent team. There are towns in Ghana where away teams never leave without a few bruises, or worse. The general rule is that you cannot win away matches. There is so much pride and politics involved that losing a home match is not an option. This is true for top league matches as well as village matches. Good infrastruc-tures and security personnel are mostly absent in the villages, increasing levels of violence. Sometimes things get out of hand. Two of Africa's worst stadium disasters happened in 2001, first in South Africa, then in Ghana. Every year many supporters die in stadiums in Africa. Researchers argue that inadequate infrastructures, contempt for spectator safety on the part of the administrators and non-professional security personnel are the prime causes. Mismanagement worsens the situation (people are allowed in when the venue is already full.

[16] *See the Article on* Ivory Coast Disaster Exhibits Safety Deficiencies in African Stadiums April 02, 2009 07:30 AM by Denis Cummings in brief *(Sunday's deadly stadium stampede in the Ivory Coast is the ninth soccer stadium disaster this decade in Africa, where stadium security and safety protocols are often lacking).*

[17] See Article 67 of FIFA disciplinary code 2011 Edition.

Therefore to avoid stampedes and/or fan violence various countries have adopted different strategies. Dr. Prince Pambo, a sports medical director with the national sports authority, who made the call at a workshop on stadium security, said most crowd troubles recorded at stadiums could be chiefly credited to football fans' intake of alcoholic stuff which impaired their sense of judgment "Promotion and sale of alcoholic beverages should be stopped at the stadium".[18]

As much as alcohol intake should be controlled some stadium disaster occur because of lack of awareness among the fans on sports rules, for example when a player is reprimanded for a foul, this may cause fan trouble basically because they fail to understand the sport, moreover how the authorities choose to calm the situation is another area that should be looked at, during the disaster in Accra police officers fired tear gas into the stands in their efforts to control rioting fans after Hearts overturned a one-goal deficit to lead 2-1, resulting in a stampede which ended the lives of 127 fans as they attempted to escape.
There should be clear guidelines on how authorities handle such incidences to prevent more chaos as it was witnessed above.

Further as learnt from the Ellis park disaster whereby during the early evening of Wednesday 11 April 2001 a large crowd of people descended onto the Ellis Park Stadium, Johannesburg, to watch a soccer match between Kaizer Chiefs Football Club (Kaizer Chiefs) and Orlando Pirates Football Club (Orlando Pirates) a stampede ensued. At the end of it all, 43 people had lost their lives and scores had sustained injuries of varying degrees.[19]

The policies that can be adopted to prevent stadium disaster as recommended by the Ellis park commission and which I agree with are:

a) Entry points into the stadium should as far as possible be kept clear of immobile crowd, this will allow quick exit in case of emergencies
b) There should be a mechanism to count the number of people entering at various points, which information should instantaneously and continuously be fed into a central point this would enable those in charge to notice quickly when the stadium becomes full.
c) Timeous opening of the gates, to ensure that fans are well organized in time for the games.
d) Effective ticket design. The designs must be such that the tickets would be difficult to be counterfeited, yet easy to process in order to avoid congestions.
e) Essential information should be given to the spectators on emergency exits, emergency paths, and emergency telephone contact numbers (evidence has shown that some of the spectators carry mobile telephones). Some of the information may be printed onto the tickets.

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[18] See speeches made at the ACCRA workshop during the commemoration of the 11th anniversary of Ghana's May 9 stadium disaster where more than 127 soccer fans died on May 9, 2001, in a tragic incident at the Accra sports stadium in the capital during a local premier league match between arch rivals Accra Hearts of Oak and Kumasi Asante Kotoko.

[19] See Final report of the Commission of inquiry into the Ellis park Stadium soccer disaster of 11 April

a) The sale of tickets by unauthorized persons (ticket touting) should be prohibited and made an offence; inter alia, provision should be made for the confiscation of any ticket sought to be sold in such a manner.

b) The designation of certain conduct on the part of the spectators as criminal.[20] Closely related to the previous measure, would be the designation of certain conduct as a criminal offence; for example:
   - entering without a ticket;
   - entering with dangerous objects or alcohol;
   - invading the pitch;
   - failure to obey orders of safety officials;

This would enable effective crowd control and minimizing chaos and or injuries in our stadiums.

The following list illustrates other stadium disasters that have befallen African Sports over the years:

June 16, 1996 — Lusaka, Zambia: Nine soccer fans lost their lives and 78 others injured during a stampede.

April 6, 1997 — Lagos, Nigeria: five fans lost their lives and more than a dozen injured when crowd heads for exits to find most of them locked.

April 23, 2000 — Monrovia, Liberia: Three people suffocated to death and others were injured as thousands of fans forced their way into an overcrowded stadium.

July 9, 2000 — Harare, Zimbabwe: 13 fans were killed after police fired tear gas into a crowd estimated at 50,000 to quell growing unruliness.

April 11, 2001 — Johannesburg, South Africa: 43 people were killed and 155 injured as fans try to push into an overcrowded stadium.

April 29, 2001 — Lubumbashi, Congo: seven people are crushed to death in a stampede after police fired tear gas into unruly crowd.

May 9, 2001 — Accra, Ghana: at least 123 people died in a stampede after police fired tear gas into the stands in response to fans who threw bottles and chairs on the field. The worst stadium disaster in Africa.

Oct. 11, 2004 — Lome, Togo: four people are killed and another eight injured during a stampede at the end of a World Cup qualifier between Togo and Mali. A power outage shut down the lights and prompted panicking fans to run for the exits.

June 3, 2007 — Lusaka, Zambia: 12 fans are crushed to death as a crowd rushes from the stadium after Zambia's victory in an African Cup qualifier against Republic of Congo.

March 29, 2009 — Abidjan, Ivory Coast: thousands of fans pushing to get into a

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2001 Chairperson: the Hon. Mr. Justice B M Ngoepe Judge President: Transvaal provincial division of the High court of South Africa.

[20] In 2011 during a league match between Masry and Ahly in Egypt at least 74 fans lost their lives after riots erupted the match ended and the home fans invaded the pitch. Questions were raised over the role of police and security personnel's, who did not seem to act decisively. It was reported that some fans entered the stadium with knives and other dangerous weapons.

game between Ivory Coast and Malawi set off a stampede that killed 19 people and injured more than 100.
February 2012 – Cairo Egypt: at least 74 fans lost their lives after riots erupted the match ended and the home fans invaded the pitch.

6. Management and Corruption

Leadership and management in sports is all about steering the sector into a productive direction where the sportsmen/women enjoy the game while benefiting from the same as well as the fans enjoying the daily happenings in the sports sector without hiccups of mismanagement of funds and/or disquiet among players for not being paid their allowances. The persons given the opportunity to lead the various sports sectors should be persons of integrity who will be able to promote the ideals of the sports in which they lead.

Mismanagement and corruption is a common thing in Africa and it is always referred by many names: a "little something", a "gift", a "motivation", an "envelop" or a "dash". Most of them refer to eating – corruption entails officials using public money for their own personal benefits. Some African nations call it 'sharing the national cake' which tells you that the practice is to some extent legitimized. Indeed, corruption is institutionalized in the majority of African countries.

One of the main problems with African football is that the sector lacks accountability and transparency in terms of income and expenditures.

Conclusion

Good governance at the global and national levels secures resources: it facilitates prudent management of often scarce local resources, such as gate collections; attracts local corporate sponsorship; and also attracts international sponsorship, such as those from FIFA. In turn, adequate resources provide impetus for sustained good governance. These circumstances create the environment to fully exploit football's capacity for leisure and employment, and offer avenues to enhance national cohesion and development.

The government and the entire football fraternity would do well to espouse good governance framework for African football incorporating the many valuable proposals made in "For the Good of the Game" and other similar initiatives.

Manipulation of sports results has taken on worrying proportions. The considerable sums of money involved in sports betting have encouraged the development of new forms of corruption, providing criminal organizations with a source of illicit profits and a means of laundering money from other illegal activities. As a result, this phenomenon not only taints the values of sport and harms the interests of the sports movement and betting operators, but is also a threat to public order and the rule of law.

Africa needs football infrastructures at a grassroots level. Large stadiums are useful a few times a year, but well-maintained training facilities throughout the country are more beneficial to the development of the game. One thing to remember is that poor infrastructures increase levels of intimidation and violence. League centers in villages and small towns commonly lack inner perimeters which make it easy for spectators to enter the field of play. Violence against the referees, unfortunately, happens on a structural basis.

THE PROBLEM OF THE SPORTS LAW BRANCH DISSOCIATION IN UKRAINE

by *Tihonova M.A.*[*]

SUMMARY: 1. Sports Law in Ukraine – 2. Branches of Law in USSR – 3. Methods Legal Regulation – 4. Sports Law As An Independent Branch of Law

The author notes that the theory of law provides two kinds of system formation: the system of law and the law branch. The author substantiates sports law as a complex area of the legislation.

KEY WORDS: system of law, law branch, complex area of law, sports law.

1. Sports Law in Ukraine

Nowadays, there is a very fashionable concept of "Sports Law" both in Russian and Ukrainian literature. Textbooks on sports law,[1] on international sports law[2] are published, people work in the field of sports law, there is a vocabulary of sports law terms,[3] the forms of sports disputes consideration are researched[4] etc. This movement has not gained such a revolution in Ukraine, but the closer we are to 2012, the more and more we will face this new and not quite clear term "sports law".

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[1] Alekseev S.V. Sports Law in Russia. Legal Basis of Physical Culture and Sports: A textbook for university students studying in the field 021,100 "Law" and 022,300 "Physical Culture and Sports" / Editer by Prof. P.V. Krashennikov. - M.: UNITY-DANA, Law and Order, 2005 - 671 p.

[2] Alekseev S.V. International sports law. Textbook / S.V. Alekseev - M.: Law and Order, UNITY-DANA, 2008. - 895 p.

[3] Bordyuhova A. Glossary for sports rights / [Compiled by Anna Y. Bordyuhova] K.: Justinian, 2007. 144 p.

[4] Pogosyan E.V. Forms of the resolution of sports disputes: monograph / E.V. Pogosyan, Preface V. Yarkov. - M.: Wolters Kluwer, 2011. – 160 p. - (Series "The Civil and the arbitration process: a modern view").

The purpose of this article is an attempt to understand whether it is necessary and possible to dissociate sports law as a separate branch of law or a complex law branch or a complex legislation branch.

2. Branches of Law in USSR

There are two kinds of system formations in the theory of law: law branch and legislation branch.

S.S. Alekseev defined law branch as: "the main branch of law system which is characterized by a specific regime of legal regulation, affecting entire areas of similar public relations".[5] "…Law as a unified legal system of the USSR (which includes the legal subsystems of Republics) composed of this kind of large, isolated from each other parts, which are called law branches".[6] Skakun O.F. defines the law branch as a relatively independent set of legal norms regulating the quality of similar sphere of social relations by specific method of legal regulation.[7]

Each law branch has several features that distinguish one from another. Each branch has a subject, i.e. a special sphere of social life, a special kind of similar social relations (constitutional, labor, land, relations of social guaranteeing, etc.). Each branch has "its legislation" – generally independent codes, and other codified statutes. Thus, the criminal law branch corresponds to criminal legislation with the Criminal Code; the civil law branch to civil legislation with the Civil Code, etc.

The main feature of each law branch is the existence of a special legal regime ("the method of regulation"), which characterizes how (by permissions, prohibitions, and obligations) legal regulation is realized. For example, civil law, labor law regulates permission, criminal law regulates prohibitions, and administrative law regulates obligations. A qualified legal practitioner knows that the designation of legal, criminal, labor, family affairs suggests that in this case there is a special legal order, which is typical for the branch with a "name" which denotes the case.[8]

Thus, the presence of its subject and its own method allows us to assert that this system of legal norms, institutions regulating similar social relations, constitute separate law branch. This is the classic formula of law branch.

3. Methods Legal Regulation

Under the subject of legal regulation we understand actual relations of people, which objectively need legal mediation. Their range is wide enough and various –

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[5] Alekseyev S.S. Right. Alphabet. Theory. Philosophy. Experience of complex research. - M.: Norma Publishing Group - INFRA M, 1998, p. 48.

[6] Alekseyev S.S. The structure of Soviet law / Alekseyev S.S. M. Law Literature, 1975, p. 161.

[7] Skakun O.F. Theory of State and Law: A Textbook. Kharkov: Konsum, University of internal affairs, 2000, p. 266.

[8] Alekseyev S.S. Right. Alphabet. Theory. Philosophy. Experience of complex research. - M.: Norma Publishing Group - INFRA M, 1998, p. 48.

labour, administrative, property, land, family and some other relations. The following features are inherent to them: 1) vital relations for the person and his/her associations, 2) strong-willed, purposeful (reasonable) relations, 3) steady, repeating and typical relations; 4) behavioral relations, which can be supervised (for example, by jurisdiction departments).[9]

Under the method of legal regulation we understand a set of legal techniques that influence people behavior developed as a result of prolonged human relationship. Regulating public relations various methods are used: imperative and permission, alternative and recommendatory, encouragements and punishments. Their use depends on the contents of relations, the discretion of the legislator, the developed legal practice, a level of legal culture of the population. The named methods can operate independently and in aggregate, in interaction with each other.

The most widespread and polar under their characteristics are imperative and permission methods. The imperative method is constructed on relations of a subordination of some legal subjects to others. It is typical to administrative, criminal and executive law. The permission method assumes equality of the parties and is applied in branches of private law (civil, labour, family).[10]

4. Sports Law As An Independent Branch of Law

Certainly, we cannot allocate either a separate subject or a separate method in sports law. Serdjukov O.V., correctly has noted in this occasion that weakness of the approach to the sports law as to independent law branch is found out because of impossibility to allocate special methods of the legal regulation inherent in the sports law. And absence of a special branch mode which assumes, that the norms behind its limits are inapplicable to the relations adjustable by law branch.[11]

Generally the problem of allocation of separate law branches exists for a long time. Nowadays, there are much more separate law branches than methods of legal regulation (economic law, medical law, tax law, budget law, information law, land law, environmental law, maritime law, commercial law, etc.).

V.G.Beljaev suggested accepting an independent kind of the legal responsibility as a criterion of allocation of law branch. In his opinion "…it is possible to allocate law branch by the most strong attribute - the presence or absence of institute of own branch responsibility".[12] This criterion could promote to allocate new law branches. It is possible to allocate such kind of the responsibility as sports disqualification - disqualifying a sportsman from participation in sports

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[9] Alekseyev S.S., Arkhipov S.I., Korelsky V.M. and others. Theory of law. Textbook / Editer by S.S. Alekseev. – M. 1998, - p. 270.

[10] Alekseyev S.S., Arkhipov S.I., Korelsky V.M. and others. Theory of law. Textbook / Editer by S.S. Alekseev. – M. 1998, - p. 270.

[11] A.V. Serdyukov. Sports law as a complex branch of legislation. Abstract of dissertation for the degree of Candidate of Legal Sciences. - Moscow, 2000. -p. 18.

[12] I.A Ivannikov. Actual problems of development of branches of Russian law // www.journal-nio.com/index.php?option=com_content&view=article&id=149%3Apubl&catid=38&Itemid=77.

competitions carried out by the sports organization for infringement of rules of a kind of sports, regulations (rules) of sports competitions, for use of the means (dope) forbidden in sports and (or) methods, infringement of the norms approved by the international sports organizations. V.A. Tarhov said: «... Law branches and branch of the legislation should coincide».[13]

The branch of the legislation is big associations of legal acts, laws of the certain spheres of legal regulation of public relations which are characterized by unity of the contents, the form and have system communications among them... In some cases the branch of the legislation coincides with law branch (criminal, civil), in others with law subbranches (the author's, water legislation). Even law institutes (for example: inheritance in civil law) have the legislation. There is also a complex legislation (economic, transport, military, etc.), containing norms of several law branches regulating various kinds of public relations and consequently has no own subject and method.[14] Legal features of the social norms entering into a complex branch are divided into two locations. By the main parameters (method and the mechanism of legal regulation) they belong to this or that basic branch, are submitted to its common norms, principles, positions. Their structural attributes, features of a method and mechanism of regulation are expressed in these common norms, principles and positions. Hence, it is possible to define absolutely precisely in each concrete case, which basic branch this special norm concerns to.[15]

S.V.Alekseev defines the sports law as a specialized complex law branch which represents the system connected by internal unity interconnected legal and also corporate norms which fix the main principles, forms and the order of sports activity.[16]

The problem of legal existence of complex law branches and complex branches of the legislation is rather old. Many scientists support the first thesis, but there are many of those who consider impossible the existence of complex law branch and consider that the complex branch can be only a branch of the legislation [16]. We support S.S. Alekseev's point of view which in 1961 wrote, that all those sets of norms which are concerned to complex branches in the literature (the law of shipping, maritime law, insurance law, banking law, etc.), actually are not divisions of objectively existing law systems. All of them can be concerned as to branches of the legislation or to branches of a legal science[17] (though S.S. Alekseev has changed

[13] I.A Ivannikov. Actual problems of development of branches of Russian law // www.journal-nio.com/index.php?option=com_content&view=article&id=149%3Apubl&catid=38&Itemid=77.

[14] Skakun O.F. Theory of State and Law: A Textbook. Kharkov: Konsum, University of internal affairs, 2000, p. 273.

[15] Bratanovsky S.N. Sports Law as a branch of the Russian Law // www.justicemaker.ru/view-article.php?id=26&art=1164

[16] Alekseev S.V. Sports Law in Russia. Legal Basis of Physical Culture and Sports: A textbook for university students studying in the field 021,100 "Law" and 022,300 "Physical Culture and Sports" / Editer by Prof. P.V. Krashennikov. - M.: UNITY-DANA, Law and Order, 2005 - p. 133

[17] Polenina S.V. Complex legal institutions and the establishment of new branches of the right // Legal - 1975. - N° 3. - p. 73.

his opinion during the last years[18]).

The complex branch of the legislation is characterized that it includes norms of several law branches regulating various rules under the specific contents of public relations, making rather independent the sphere of a public life. A subject of regulation of complex branches of the legislation unlike law branches is not the kind, but the sphere of public relations uniting their various kinds. Being a subject of regulation of norms of several law branches, they at the same time have the unity caused by a generality of circuits and tasks of human activity. The unity and interosculation of branch groups of public relations define a generality and interrelation of law norms regulating them.

E.V. Pogosjan correctly adds that we should talk about complex character of the legal norms regulating sports relations.[19] Alongside with norms of the civil law, defining a legal status and activity of the organizations in the sphere of professional and amateur (it is added by me - M.A.Tihonova) sports, the norms of the labour law fixing a legal status of the sportsman, the trainer, the attendants and other participants of relations in the sphere of physical culture and sports (is added by me - M.A.Tihonova), norms of the administrative, tax law, concern the state management in the field of sports... However, on the other hand, sports relations are regulated also by the internal rules established within the limits of the sports organizations, both on national, and on international levels. First of all, these rules concern the order of carrying out sports competitions, i.e. the norms regulating sports relations are dispersed under various legal acts.[20]

S.V. Alekseev understands an organic complex of the public relations arising in the sphere of physical training and sports as a subject of the sports law - labour and social guaranteeing, state and administrative, financial and resource maintenance, economic (enterprise), criminal and legal, in the field of sports traumatology and counteraction to dope abuse, international, and also remedial (concerning settlement of sports disputes).[21] But S.V. Alekseev has not allocated also property and personal non-property relations of subjects of the sports law, and organizational relations about which O.A. Krasavchikov has mentioned.[22] Participants of sports relations can also be subjects of intellectual property law. So, we consider that a subject of the sports law is the actual relations of people developed in the sphere of physical training and sports.

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[18] Alekseyev S.S. Problems of the theory of law. A course of lectures in two volumes. Volume 1. - Sverdlovsk, 1972. - p. 143-152.

[19] Pogosyan E.V. Forms of the resolution of sports disputes: monograph / E.V. Pogosyan, Preface V. Yarkov. - M.: Wolters Kluwer, 2011. –p. 3 - (Series “The Civil and the arbitration process: a modern view”).

[20] Pogosyan E.V. Forms of the resolution of sports disputes: monograph / E.V. Pogosyan, Preface V. Yarkov. - M.: Wolters Kluwer, 2011. –p. 3 - (Series “The Civil and the arbitration process: a modern view”).

[21] Alekseev S.V. Sports Law in Russia. Legal Basis of Physical Culture and Sports: A textbook for university students studying in the field 021,100 “Law” and 022,300 “Physical Culture and Sports” / Editer by Prof. P.V. Krashennikov. - M.: UNITY-DANA, Law and Order, 2005 - p. 131

[22] Krasavchikov O.A Civil legal organizational relations // Soviet State and Law, 1966, № 10, - p.53-57.

Besides the proof of validity that the sports law should be considered as a complex branch of the legislation is the fact that it has all necessary attributes:

- Presence of a single subject of legal regulation - specific relations in sports;
- Presence of a basic document - the Law of Ukraine "On Physical Culture and Sport";
- Presence of a large number of sources of sports law at various levels, their consistency with each other and their continuous development;
- Presence of the special representative of executive power that carries out the function of normative regulation of the Physical Culture and Sport - Ministry of Ukraine for Family, Youth and Sports;
- Presence of institutes of the sports law which are not characteristic for other structural parts of systems of law and legislation (for example, Institute of the International Olympic Law);
- The modern state policy and regulation in the field of physical training and sports, provides reduction of all files of "sports" normative legal acts harmonous system in view of understanding of the sports law as a complex branch of the legislation.

As to the foreign states in the light of a problem of allocation of the sports law as a separate law branch is not present unequivocal opinion and among the western scientists. Though under the legislation of the majority of European states the sports law represents a special complex branch of universal and obligatory norms, which are formed by the state and a civil society, which covers applications of law norms in the sports environment and legal regulation of relations between participants of sports movement and sports activity (spectators, sportsmen, trainers, the sports organizations, etc.).[23]

In Wikipedia sports law is defined in the following way sports law is an umbrella term used to describe the legal issues at work in the world of both amateur and professional sports. Sports law overlaps substantially with labor law, contract law, antitrust law, and tort law. Issues like defamation and privacy rights are also an integral aspect of sports law. The area of law was established as a separate and important entity only a few decades ago, coinciding with the rise of player-agents and increased media scrutiny of sports law topics.[24] A similar definition was given by lawyers from Cornell University - the sports law in the unique image combines antimonopoly, contractual, the law of torts, that show a variety of the relations developing in sphere of sports.[25]

On site T.M.C. Asser Institute it is said that sports law is a fast expanding and developing area of legal debate and inquiry. It is both an area of significant

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[23] Pogosyan E.V. Forms of the resolution of sports disputes: monograph / E.V. Pogosyan, Preface V. Yarkov. - M.: Wolters Kluwer, 2011. – p. 4 - (Series "The Civil and the arbitration process: a modern view").

[24] Sports law http://en.wikipedia.org/wiki/Sports_law.

[25] Pogosyan E.V. Forms of the resolution of sports disputes: monograph / E.V. Pogosyan, Preface V. Yarkov. - M.: Wolters Kluwer, 2011. – p. 4-5 - (Series "The Civil and the arbitration process: a modern view").

practitioner activity and of increasing academic analysis. Of course, the private rules of the national and international sports world itself form the backbone of sports law. However, sports activities are as much influenced by ordinary rules of public law. These can even be rules of public international law as the famous Bosman verdict of the European Court of Justice, leading to the reform of the transfer system in professional football, made very dear. Sports law is essentially an applied area of law, with sport the context within which the law operates, and it potentially includes the whole spectrum of traditional legal scholarship.[26]

Edward Grejson (one of the first-ever experts under the relations arising in the sphere of sports[27]) considers, that there is no such legal discipline as the sports law, at it is not present a legal ground as either the common law or equity have not created the concept of the legal discipline concerning the sphere of sports. Each law branch anyhow regulates sports-legal questions, but it does not create new branch of the law.[28]

And it is possible to agree with this opinion. It is impossible to allocate the sports law in a complex branch of the law.[29] But a complex branch of the legislation the sports law has already occurred. So, the sports law is a complex branch of the legislation which has the developed structure of the statutory acts regulating public relations, developing between participants in the sphere of physical training and sports.

[26] The International Sports Law Centre at the T.M.C. Asser Institute: from National Project to International Centre www.asser.nl/default.aspx?site_id=11&level1=13906&level2=13943.

[27] Edward Grayson: barrister and specialist on sport and the law // www.timesonline.co.uk/tol/comment/obituaries/article4855567.ece.

[28] Pogosyan E.V. Forms of the resolution of sports disputes: monograph / E.V. Pogosyan, Preface V. Yarkov. - M.: Wolters Kluwer, 2011. – p. 5 - (Series “The Civil and the arbitration process: a modern view”).

[29] SS Alekseev said: “In most cases, when the branch of the legislation is historically formed, it simultaneously means, that there is a formation of a special law branch… It is connected by the fact that isolation of this or that area of the legislation already means transformation in the legal matter [19, 148-149].

THE LEGAL FRAMEWORK FOR SPORTS DEVELOPMENT IN NIGERIA

by *Kelvin Omuojine, Esq.*[*]

Introduction

Sports literature usually commence with an allusion to the extent to which sport has grown in the past few decades. This growth is obvious and it has heralded the development of sports as a commercial brand. Sporting events and programmes have now become huge brands wielding significant economic interest. Consequently, many persons who engage in sporting activity do so not merely for leisure or the physical wellbeing it portends but as a full-fledged career or with this aim. There is no escape from the fact that the huge commercial significance that sport has amassed over the years brings with it heightened legal interests and concerns, especially for stakeholders who invest resources in the industry. Apart from those who seek to protect their legal and commercial interests in sports, there is also the government interest – promoting social ideals in an atmosphere of law and order. Governments all over the world have acknowledged sport as a veritable tool in the attainment of governmental objectives both at internal and international levels. This is why proactive governments have taken concrete steps to fashion, adopt and implement a policy aimed at the development of sports. Perhaps it may be of value at this point to acknowledge the varying contexts in which the terms 'sport' and 'recreation' are sometimes used. Sport generally embodies different forms of physical activity which may be practiced for leisure or as an amateur, distinct from the practice of it as an income-yielding profession; on the other hand, recreation basically refers to the practice of sport for non-professional purposes and includes other forms of leisure apart from sport. The separate use of both terms is a common feature in many sports policy documents. The term 'sport' is used herein in a very broad context.

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In Nigeria, sport has had an appreciable impact on national development and there is the unquenchable desire to keep up with past successes. The national narrative however, is that a lot more needs to be done in terms of administration and providing the enabling environment for sport to thrive. With population growth and lapse of time, there is the need for provision and maintenance of more sporting and recreational facilities. Also, with the global advancement in professional sport, there is the need for improved technical competence. From the investment in sporting facilities in the wake of the oil boom to the African Nations Cup successes in 1980 and 1994, Olympic gold medals in 1996, sport has frequently been regarded as perhaps the most potent unifying factor in the multi-ethnic country. With the recent failures in sports competitions, there have been calls for a revamp of sports administration. This includes a clear-cut government policy on sports development. This article takes a look at the South African and the European Union examples, and then analyzes the position in Nigeria before concluding with recommendations, all from a legal perspective.ss

1. The Position in South Africa

Like other countries, post-apartheid South Africa realized the social and economic potential inherent in sports. Having hosted and won the African Cup of Nations in 1998, won the Rugby World Cup in 1995 and 2007 and hosted the FIFA World Cup in 2010, there was the intention to harness this potential on the back of these successes. In 2011, the final draft of the White Paper on Sport and Recreation was produced after consultation with stakeholders. The White Paper embodied the policy framework for sports development in the country. A National Sport and Recreation Plan was also formulated as the machinery to implement the policy statement contained in the White Paper.

The legal framework within which the South African sports policy was to be implemented comprised enabling laws and statutorily recognized organizations. The National Sport and Recreation Act[1] had identified the Sports Commission as the overall co-coordinating body for the promotion and development of sport and recreation in South Africa, although it recognizes the distinct mandate of the NOCSA.[2] Presently however, the responsibility of the Sports Commission is now vested in the Department for Sport and Recreation with the disestablishment of the Sports Commission.[3] In the White Paper, Sport and Recreation South Africa is the body charged with implementing the constitutional ideals hinged on the democratic values of human dignity, equality and freedom. The objective is to develop and implement national policies and programmes using sport and recreation to address those issues, even though the constitution did not make express provisions for the development of sport and recreation. Despite the absence of express constitutional provisions on

[1] No. 110 of 1998, as amended.
[2] National Olympic Committee of South Africa.
[3] South African Sports Commission Repeal Act, No. 8 of 2005.

sports development, there is no dearth of relevant and enabling national legislation on the subject. Such include the National Sport and Recreation Act, the South African Institute for Drug-Free Sport Act[4] and the South African Boxing Act.[5]

The implication is that there is a legal basis upon which the initiative of promoting and developing sport and recreation and the co-ordination of the relationships between relevant agencies can be carried out. Roles are clearly mapped out and funding can be properly channeled. Also, in recognition of the growing number of sporting disputes, the Department for Sport and Recreation is, by virtue of the National Sport and Recreation Act, responsible for dispute resolution mechanisms.

2. The Position in the European Union

Since the inception of the European Union (EU) in 1992,[6] it was not until 2007 that the European Commission (EC) published a White Paper on Sport. The Introduction to the White Paper described it as "the first time that the Commission is addressing sport-related issues in a comprehensive manner". Previously, the EU had no express competence with regard to sports development since none of the pre-existing treaties contained any direct provisions in relation to sport. The only way out was through provisions in declarations, treaties or policies that had some bearing on sports. For instance, provisions for health and wellness could involve the provision of swimming pools, which not only fosters health but also promotes the sport of swimming. Therefore, although Europe was home to the biggest advancement in sports, as a body, the EU had no competence to contribute directly to its development. Nonetheless, the European Court of Justice played a significant role in the emergence of sports jurisprudence in its adjudicatory capacity, with landmark rulings such as the popular Bosman[7] decision of 1995 that changed the face of football.

Pursuant to the White Paper on Sport, the Lisbon Treaty[8] emerged as the first EU treaty containing provisions with regard to sport. Article 165 of the Lisbon Treaty provides that:

(1) The Union shall contribute to the promotion of European sporting issues, while taking into account the specific nature of sport, its structures based on voluntary activity and its social and educational function.

(2) Union action shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions, promoting cooperation between bodies responsible for sport, and

[4] No. 14 of 1997.

[5] No. 11 of 2001.

[6] The Maastricht Treaty created the EU in its current form; signed on 7 February 1992 and came into force on 1 November 1993.

[7] Union Royale Belge des Societes de Football Association (Asbl) and Others v. Jean-Marc Bosman, Case No. C-415/93.

[8] Signed on 13 December 2007 and came into force on 1 December 2009.

protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

(3) The Union and member States shall foster cooperation with third countries and the component international organizations in the field of education and sport, in particular the Council of Europe.

The above provisions have been regarded as giving the EC institutions a "soft competence" for sport while leaving major policy control to and recognizing the distinct jurisdictions of member states.[9] The article further provides that the Union institutions shall adopt incentive measures and recommendations, excluding any harmonization of the laws and regulations of the Member States. The impact of this treaty is that at the EU level, sports-specific programmes can be initiated and funded directly.

3. The Position in Nigeria

A timeline of sports policy development in Nigeria would commence with the Sports Development Policy of 1989. Although this policy statement never attracted any fame, it vested in the then Federal Ministry of Sports and Social Development the responsibility for the development and organization of sports and physical fitness in Nigeria. This responsibility was to include co-ordination of and co-operation with other sports bodies/groups as well as financial assistance. Together with the subsequent National Sports Policy of 2009, both policy documents represent government initiative and efforts towards sports development. It is not unjust to conclude that neither has attained any success in terms of implementation or even publicity.

Nigeria now operates under the 1999 Constitution which, like the South African Constitution, does not make express provision for sports governance or development. As stated above, the situation in South Africa is remedied by relying on relevant constitutional provisions as well as other legislation recognizing organizations with specific mandate for sports development. Chapter II of the Nigerian Constitution outlines Fundamental Objectives and Directive Principles of State Policy and although the government responsibilities therein are not legally enforceable,[10] a viable sports development policy can be hinged thereon as with the South African example in the White Paper. Under the fundamental objectives and directive principles there are political, economic and social objectives which can be harnessed for sports development as follows:

- Political objectives include the encouragement of national integration and the prohibition of discrimination.[11] As stated earlier sport is a major source of national integration and the promotion of sports competition and

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[9] Culture, Media and Sport Committee, House of Commons, *Report on the European Commission White Paper on Sport*, published on 14 May 2008.

[10] Section 6(6) (c) 1999 Constitution.

[11] Section 15(2).

participation would help in the attainment of this goal.

- Economic objectives include the promotion of national prosperity and an efficient, a dynamic and self-reliant economy.[12] The advancement of sport means that not only is it a source of livelihood for sports men and women, but also for those involved in coaching/education, infrastructure provision and maintenance and other allied endeavor. It also promotes industries such as media and merchandising. Summarily, the development of sport has widespread economic benefits.
- Social objectives include the provision of adequate facilities for leisure, medical and health purposes. As highlighted earlier, the promotion of sports development includes recreation and leisure, which ultimately promote health and general wellbeing.

A perusal of federal legislation in Nigeria reveals a shortage of legislation geared towards sports development. The federal laws which have a bearing on sport are the National Institute for Sports Act,[13] Social Development Act[14] and Nigeria Football Association Act.[15] Despite the number, none of these statutes provides a comprehensive platform from which sports development can be pursued. The NIS Act establishes the National Institute for Sports, the objectives of which are basically geared towards the advancement of learning in specialized areas of sports development, conducting professional coaching courses, seminars, workshops, including the advancement of sports knowledge and skill.[16] This is basically a school for the administrators, coaches and technical advancement, without catering for the need for facilities and programmes aimed at directly promoting and funding actual participation and involvement in sports. The SD Act establishes a Social Development Division of the Federal Ministry of Employment, Labor and Productivity. With the aim of advancing social welfare, one of the numerous duties of the Department is the development of sports.[17] The NFA Act is the most elaborate effort in terms of sports development; however it is limited to football. Notwithstanding the calls for its amendment to suit the desires of the football world governing body - FIFA and the legally flawed metamorphosis of the NFA into NFF,[18] the statute established the Nigeria Football Association and vested it with the responsibility to encourage the development of all forms of amateur and professional football as well as provide source of funding for the game in Nigeria and encourage participation.

The above represents the legal framework governing sports administration and development in Nigeria. This current framework is deficient because not only

[12] Section 16(1)(a).
[13] Cap. N52, Vol.14, Laws of the Federation of Nigeria 2004.
[14] Cap. S7, Vol.14, Laws of the Federation of Nigeria 2004.
[15] Cap N110, Vol.12, Laws of the Federation of Nigeria 2004.
[16] Section 5 of the National Institute for Sports Act.
[17] Section 2(l) of the Social Development Act.
[18] The Federal High Court ruled in suit number FHC/ABJ/CS/179/10 that the national law recognizes only the Nigeria Football Association under the NFA Act, and not the Nigeria Football Federation.

is there no statutorily-recognized body vested with a primary duty of sports development but there is the absence of a mechanism for the resolution of sports disputes. With no efficient sport-specific dispute resolution body, sporting disputes so often find their way to the civil courts and are encumbered with the inimical features of litigation in the country. The National Sports Commission (NSC) – headed by the Minister of Sports - is viewed as the government body responsible for promoting physical fitness and developing sporting activities nationally and up to international competition level. However, the NSC is not one of the Federal Commissions and Councils created by section 153 of the Constitution. Nonetheless, the Constitution empowers the President to establish offices of Ministers[19] and to assign to them responsibility for any business of the Federation, including the administration of any department of government.[20]

Conclusion/Recommendations

There is, in Nigeria, an inadequate legal framework of existing legislation for the development of sports. However, the provisions in Chapter II of the Constitution are such that can be built upon. There is the need for a statutorily-recognized government agency with specific statutory functions and responsibility for the development of sport in Nigeria.
The following are recommended:

a) There should be a practical sports policy document comprising the input of a wide variety of sports stakeholders. Such a policy statement must reflect the socio-political peculiarities and involve all tiers of government including the local governments which have the constitutional responsibility for grassroots development.

b) In addition to the National Institute for Sports, there should be a department of government with statutory functions in terms of funding and developing sports in the country. This government body would also have the sole responsibility of coordinating efforts of other sports authorities at the national and sub-national levels. For what it lacks in statutory backing, the National Sports Commission makes up for it in terms of structure with departments such as Grassroots Sports; Facilities and Stadia Management; Sports Planning, Research and Documentation; Sports Medicine; National Sports Federations and Elite Athletes; and Human Resources Management and Finance.

c) There should be some form of legislation geared towards sports development. For instance, the availability of certain sporting/recreational facilities could be made a statutory prerequisite for the grant of certain types of educational, leisure/recreational etc licenses.

[19] Section 147.
[20] Section 148(1).

d) There should be an independent sport-specific dispute resolution mechanism. The recurrence of football disputes being dragged to civil courts has had an adverse effect on the development of the sport and if the trend is not checked, it will stifle the development of other sports. In UK, for instance, Sport Resolutions UK is an independent organization established by the principal sports bodies to provide specialized dispute resolution.