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Behaviour Clauses in Sports:
Basic Rights of Sportsmen

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List of abbreviations

AAA	American Arbitration Association
ATF	Arbitration Tribunal for Football
BAG	Bundesarbeitsgericht
BGB	Bürgerliches Gesetzbuch - German Civil Code
CAS	Court of Arbitration for Sport
DRC	Dispute Resolution Chamber
ECA	European Club Association
e.g.	<i>exempli gratia</i> , for example
EPFL	European Professional Football Leagues
EU	European Union
FA	Football Association
FAPLAC	Football Association Premier League Appeals Committee
FC	Football Club
FIFA	Fédération Internationale de Football Association
FIFPro	Fédération Internationale des Associations de Footballeurs Professionnels
FIGC	Italian football association
FINA	Fédération Internationale de Natation Amateure
IAAF	International Association of Athletics Federations
ibid.	<i>ibidem</i> – the same place
i.e.	<i>id est</i> , that is
ILO	International Labour Organization
IOC	International Olympic Committee
LAG	Landesarbeitsgericht
NFL	National Football League
p.	page
para.	paragraph
PCP	Personal Conduct Policy
UEFA	Union of European Football Associations
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
WADA	World Anti-Doping Agency

Table of contents

List of abbreviations.....	2
Table of contents.....	3
Introduction	5
Part I Behaviour clauses in sports.....	6
<i>Chapter I Professional sports and law</i>	<i>6</i>
§ 1 Sports law?	6
§ 2 The research topic.....	7
§ 3 Subjects.....	8
§ 4 Sports in the international law	9
§ 5 International law in sports	11
I. International sports law or global sports law?	11
II. Types of rules in sports.....	12
§ 6 Sports and the European Union	13
I. European model of sports?	13
II. The specificity of sports and the European Union	14
III. The Court of Justice of the EU and its perception of specificity.....	15
IV. Specificity of sports in the labour law	16
§ 7 Sports and the national law – legal status of a sportsman	19
I. Influence of the EU Law on national sports law?	19
II. Status of a player in Slovak Republic – player as a self-employed.....	20
III. Status of players in the Western Europe since the 1960s.....	22
<i>Chapter II Behaviour clauses in general</i>	<i>24</i>
§ 1 Legal regulation of behaviour?.....	24
§ 2 The so-called “behaviour clauses”	26
§ 3 The behaviour clauses used in the USA	26
§ 4 The behaviour regulation in the EU	33
I. Germany	33
II. Slovak Republic.....	34
§ 5 The regulated behaviour	34
§ 6 The protected interests.....	35
§ 7 Consequences of misconduct.....	35
<i>Chapter III Behaviour clauses in sports.....</i>	<i>38</i>
§ 1 Sources and the types of clauses	40
I. Law	40
II. Individual (employment) contracts.....	40
A Employment contracts in the USA	40
B Sporting employment contracts in Britain.....	41
C Players’ contracts in the Slovak Republic	41
III. Collective agreements.....	42
A Collective agreements in the USA.....	42
B Collective agreements in the European Union	42
IV. By-laws of sporting federations.....	43
A National by-laws.....	43
1. The British FA rules	43

2.	German practice of autonomous behaviour regulation.....	43
3.	The Slovak regulation of behaviour	44
B	International by-laws (FIFA).....	44
§ 2	Case studies – the types of behaviour regulated.....	45
I.	Lack of performance.....	47
II.	Misconduct in the form of absenteeism.....	49
III.	Termination of a contract considered as misconduct	50
IV.	Mutu case: drug use.....	50
V.	Preventing disciplinary misconduct.....	51
VI.	Comparison: drug abuse and the breach of discipline	52
VII.	Obligation to accept testing for doping	53
§ 3	Discipline and sanctions	54
I.	Sanctions in the law	56
II.	Employment contracts	56
III.	Collective agreements.....	57
IV.	By-laws of sporting organizations.....	57
V.	The termination of contract – different standards of proportionality?	57
A	Termination causes in the USA	58
B	Termination causes in Italy	59
C	Termination causes in the UK	59
Part II	Basic rights of sportsmen	61
<i>Chapter I</i>	<i>Basic rights.....</i>	<i>61</i>
§ 1	Basic rights of sportsmen in international law	61
§ 2	The rights guaranteed by the Council of Europe	62
§ 3	Basic rights of sportsmen in the EU	63
<i>Chapter II</i>	<i>The proportionality of the basic rights limitation</i>	<i>63</i>
<i>Chapter III</i>	<i>Fair trial</i>	<i>66</i>
§ 1	The autonomous dispute resolution competence in sports	67
I.	Autonomy recognized by national law	67
II.	International autonomy.....	68
III.	Collective bargaining and the autonomy in dispute resolution	69
IV.	Contractual autonomy in the dispute resolution	69
§ 2	Dispute resolution in between the courts and arbitration – the procedural aspects... 71	
§ 3	Arbitration bodies in sports	74
Conclusions		78
Bibliography		81
Annexes		91

Introduction

The problem of athletes' behaviour can be understood and studied in the perspective of basic rights and freedoms such as the freedom of speech (expression), the right to privacy, elimination of forced labour etc. An example could be a sanction of suspension for swearing on-field, introduced lately by the Italian football association.¹ The topic of behaviour regulation thus has to do with the matter of basic rights. While there are rules of conduct which may not be interfering with the basic rights (e.g. rules of the game, fair play), there are also rules infringing the basic rights (ban on swearing as a limitation to the freedom of speech), and finally there might as well be basic rights interferences that have nothing to do with the regulation of athlete's behaviour (e.g. protection of liberty and prohibition of slavery).

The scheme of the research conducted in this thesis could be systematized as follows:

1. The so-called behaviour clauses
2. Athlete's behaviour and
3. Cross-section between the basic rights (freedoms) and the behaviour regulation, together with judicial safeguards of the rights

The structure of the thesis follows basically this scheme, dealing first with the relationship between sports and the law, especially labour law (both on the international and national level), then with the regulation of workers' and specifically athletes' behaviour, followed by a research on the basic rights and freedoms attributable to sportsmen (as human beings, citizens, self-employed or employed workers), as well as on a possible conflict between the behaviour regulation and the basic rights and freedoms. Finally, an overview of procedural safeguards of the rights and freedoms of athletes is offered.

The aim of the thesis is to analyse the current practice of behaviour regulation in sports, trying to find a general pattern of proportionate limitation of basic rights of athletes. In the conclusions, some recommendations to this objective are presented.

The methods used in the thesis comprise the heuristics of sources and literature with the help of electronic databases and of the internet search-engines, followed by analysis and evaluation of both the sources and literature. Method of historic (evolutive) interpretation was used when explaining the background and development of national legislations on status of sportsmen. The basic types of behaviour regulation were identified in general labour law (state law, by-laws, collective agreements and individual contracts) and in sports using a comparative method. Exegesis and critical analysis of these rules of conduct was undertaken, offering a number of practical examples. Due to the aim of the research – namely to uncover the level of respect and limitation of basic rights and freedoms of workers in sports – the subsumption of the behaviour rules under the protected fundamental rights was necessary, leading to an evaluation of the respect for these rights in the behaviour regulation. Based on various case studies, a need of proportionality was identified as a basic condition for any limitation of basic rights and freedoms.

¹ Cf. http://www.fifpro.org/news/news_details/227 (accessed on March 24, 2010).

Part I Behaviour clauses in sports

Chapter I Professional sports and law

§ 1 Sports law?

The relationship of sports and law became a popular topic of legal research.² Different international bodies like Centre for Sport and Law,³ International Association of Sports Law,⁴ International Sport Lawyers Association,⁵ Sports Lawyers Association⁶ and others emerged in the last years. Even an International Encyclopaedia of Sports Law is published within the project of International Encyclopaedia of Laws.⁷ Is sport so specific that it deserves its own legal discipline, a “sports law”? There is a dispute on this, as well as on what constitutes a new legal branch – whether it is a new subject of research or rather the methods of regulation used in that legal area. In the first case, there would be a possibility to proclaim “post law”, “education law”, “housing law” etc. for separate legal disciplines. Should only the method of regulation be taken into account, most probably the result would be the existence of two branches of law only – public law and private law. The whole discussion on legal disciplines is rooted in the 18th and 19th centuries, when the categorization of the system of private law was created, followed by the division of the whole legal system into branches. However, new disciplines of law emerge even in the 20th century – let us mention only labour law, which gained independence from the civil law (and Civil Codes) only in the 20th century. What was the reason for creating this discipline? It was the specificity of subject of regulation, as well as the attempts to introduce public law methods of regulation into this previously purely private relationship. Does not the same happen with the sports? The Court of Justice of the European Union regularly refers to a specificity of sports, just like the Court of Arbitration for Sport.⁸ Is that a reason enough to create new branch of law? The subject is specific, but is the method of regulation specific as well? So far, it seems that the general opinion of lawyers is inclined to claim that the “sports law” is at most a pedagogic discipline, not a scholarly one, as it only represents a collection of approaches from perspectives of different legal branches⁹ (while none of them prevails absolutely so as to justify a

² The Association for the Study of Sport and the European Union can be found at <http://www.sportandeu.com> (accessed on March 17, 2010).

³ http://www.sportlaw.ca/articles/general_restraintoftrade.php (accessed on March 17, 2010). On the Centre’s writings, cf. <http://www.sportlaw.ca/writings.php> (accessed on March 17, 2010).

⁴ <http://iasl.org/pages/en.php> (accessed on March 17, 2010).

⁵ http://www.isla-int.com/html_seiten/index_engl.htm (accessed on March 17, 2010).

⁶ <http://www.sportslaw.org/> (accessed on March 17, 2010).

⁷ Cf. <http://www.ielaws.com/sport.htm> (accessed on April 21, 2010).

⁸ PARRISH, Richard: The Birth of European Union Sports Law. In: *Entertainment and Sports Law Journal*, Vol.2, No. 2, Summer 2003, pp. 21-22. Available online:

<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf> (accessed on March 17, 2010).

⁹ Cf. JELLINGHAUS, S.F.H.: Een kennismaking met het sport(en)recht. In: *Sport en Recht: Buiten Rechten of Buiten Spel?* Ed. S.F.H. Jellinghaus. Zutphen : Paris, 2008. He considers sports law to be a discipline on its own, in the process of development (p. 17) and realizes there are many legal questions implied in sports (p. 13) – labour law vs. freedom of association, disciplinary rules vs. criminal law, legal responsibility vs. rules of game (boxing). Further labour law element (p. 15) is the possibility of clubs to decide on prolonging a fixed term contract (option right). In Germany, the option right was considered as null and void. Cf. <http://www.ratgeberrecht.eu/arbeitsr-aktuell/muster-spielervertrag-des-dfb-ungueltig.html> (accessed on March 16, 2010). Based on the decision 3 Ca 244/08 Arbeitsgericht Ulm.

subsumption of sports law under one of these disciplines). This certainly is true, but the same could be claimed about the attempts of the labour lawyers to regulate and research fundamental rights of a human being (employee) within the employment relationship. Is that not a dominion of constitutional law, or international public law? In every branch of law, there is an overlapping of different approaches of various legal disciplines. For a creation of a legal branch it is mainly important that the subject of research is coherent and that a certain specialization is necessary in order to be able to concentrate on the subject of research.

My point here is the following: Has not the legal thinking evolved since the 19th century, if it still needs to think in categories of legal disciplines, created in that period? Does not the current life prove the naivety of an attempt to categorize the world into ideal “packages”? This is, however, not the proper place to answer this question. Therefore, at this point, I will set the problem of sports law as a coherent body of rules aside to concentrate rather on my research topic within this thesis.

§ 2 The research topic

My aim is to conduct a research on the right to privacy (and other basic rights) of sportsmen, both in-duty as well as in their private off-duty lives, since their employment contracts often impose limits on this part of their life. The prohibition to drink alcohol, or to use (abuse, misuse) controlled substances (drugs), or to say one’s own opinion in public certainly represent an interference with the right to privacy and the freedom of speech. Here, one could claim again, this is a matter of constitutional law, rather than labour law or sports law. However, the connection with the employment relationship can not be refuted.

To make my research complete and contextualized, it is therefore necessary to set my topic of “behaviour clauses” (contractual or statutory clauses prohibiting or commanding certain conduct) into the context of basic rights and freedoms guaranteed to a sportsman as a human being and a citizen by the international and national legal instruments.¹⁰ Moreover, the safeguards for enforcement of these rights need to be mentioned as well – in the form of a right to a fair trial, which also represents a fundamental right both on the international as well as on the national level. The topic therefore may seem interdisciplinary, but still remains focused on one problem – whether an employer has the right to regulate the conduct of his employee, to what extent this is possible, and what are the safeguards of not interfering unproportionately with the fundamental rights of the employee. Further in the text, I will also address the question whether the sportsmen are to be considered as employees at all.¹¹ This is namely not the case in some countries (I will concentrate on Slovak Republic in this respect).

¹⁰ Cf. European Parliament (European Parliament resolution of 8 May 2008 on the White Paper on Sport (2007/2261(INI)) in para. 95: “*Considers it undesirable for professional athletes to have fewer rights than other contracted workers and therefore considers it important that professional athletes have as broad and transparent a range of rights as other workers, including the right to enter or refuse to enter into collective agreements and membership of professional trade unions and to have recourse to ordinary courts of law...*”

¹¹ BLACKSHAW, Ian: The Professional Athlete - Employee or Entrepreneur? In: *International Sports Law Journal*, 2006, 3-4, p. 91. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id115_1_ISLJ_2006_3-4_DEF.pdf (accessed on March 17, 2010).

§ 3 Subjects

First, I need to address a basic question: Who are the main subjects in this thesis, or the players in the game? On the side of the employees these are the individual sportsmen – both in collective and in individual sports. However, in my thesis I will mostly concentrate on the collective sports, especially on football, being the most popular and most profitable sport in Europe. The sportsmen may be associated in their trade unions. On the other hand, the employers, clubs, are associated in leagues. The leagues and the trade unions may enter into social dialogue,¹² or more specifically, into collective bargaining with a possible outcome in the form of a collective agreement. The clubs are at the same time members of national sporting associations, which are the members of international federations (in football, this is the FIFA with its regional international unions, such as the UEFA). On the top of the pyramid, there is the International Olympic Committee (IOC).

Both on the employer as well as on the employee level, there is an attempt to bring the social dialogue to a higher – international level. Therefore, international trade unions (such as FIFPro in professional football) and international employers' associations may be created. In the general sporting sector, on a European level, there is e.g. the European Association of Sport Employers, with a seat in France¹³ and sportsmen are represented by the UNI europa, or to be more precise, EURO-MEI (the Media, Entertainment, Arts and Sports sector of UNI europa).¹⁴ Together, they were trying to establish a sectoral social dialogue committee within the system of European social dialogue, but so far they were not successful.¹⁵

The first European social-dialogue committee in the sport sector dealing with the professional football was established by different organizations in Paris on July 1, 2008.¹⁶ It brings together the International Federation of Professional Footballers' Associations-Division

¹² On potential topics of social dialogue in sports cf. Study into the identification of themes and issues which can be dealt with in a social dialogue in the European professional football sector, 2008, http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id116_1_SOCIAL%20DIALOGUE%20080521.pdf (accessed on March 18, 2010). However, in eight out of twenty eight countries studied in 2006, professional footballers were not represented by any organization. This is also a case in Slovak Republic and Czech Republic, where the professional sportsmen are not considered employees but rather self-employed and therefore have not created their trade unions. PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*. The Hague : T.M.C. ASSER Instituut, 2008, p. 47-48. Cf. a T.M.C. ASSER study *Promoting the Social Dialogue in European Professional Football (Candidate EU Member States)*. The Hague : T.M.C. ASSER Institute, 2004.

¹³ http://www.easesport.org/ease/fichiers/File/statutes/ease_bye-laws_091217.pdf (accessed on March 17, 2010). It created a database of national social partners in sporting: <http://www.easesport.eu/ease/rbt-db/index.php> (accessed on March 17, 2010).

¹⁴ <http://www.easesport.org/art.php?id=3210> (accessed on March 17, 2010), http://www.uniglobalunion.org/Apps/iportal.nsf/pages/sec_sportEn (accessed on April 18, 2010). See also the list of employer organizations involved in sports on the national level: http://www.easesport.org/ease/fichiers/File/social-dialogue/employer_organisations.pdf (accessed on March 17, 2010) and workers organizations in this sector: http://www.easesport.org/ease/fichiers/File/social-dialogue/workers_organisations.pdf (accessed on March 17, 2010). On the national level, some collective agreements are offered online at: <http://www.euathletes.info/collective-bargaining-agreements/> (accessed on March 17, 2010).

¹⁵ <http://www.union-network.org/Apps/UNINews.nsf/vwLkpById/9BAB63402F777949C1257547004F3BE7> (accessed on April 18, 2010).

¹⁶ Created at the joint request of FIFPro and EPFL: http://www.spins-sindikat.si/pages/dokumenti/RULES_OF_PROCEDURE_European_SSDC_football.pdf (accessed on March 17, 2010).

Europe (FIFPro) and the Association of European Professional Football Leagues (EPFL).¹⁷ On the employers' side, there is also the European Club Association (ECA).

The social dialogue on the national as well as on the international level remains specific due to the presence of a third party – with the strongest position in fact – the national sporting organization, or international federation or union. In the mentioned case of the European social dialogue in football, UEFA was invited to join and even to chair the meetings.¹⁸

Therefore, a specific triangular (or maybe even tripartite?) relationship emerges, both on the national and international level. To not have enough of triangular shapes, a pyramid structure of sport will also be mentioned later in the text, meaning a hierarchical organization of sporting, with the monopolistic powers of the higher levels of the pyramid above the lower levels. This constitutes one of the aspects of the specificity of sports – the extralegal power relationships with an unfortunate possibility to enforce own will even against the decision of a regular court, what should be refused already at this point of the thesis (examples will be offered below).

This is but one type of specificity of sports. There is also another specificity: a problem to discern between sporting rules that are not reviewable by a court and other rules that can have a legal (and economic) impact, and could potentially be in breach of the national or international law. This problem emerged on the European level in the well-known Bosman case, with problems discerning sporting and economic aspects of the sports.¹⁹ These are, however, matters of the EU law, which will be dealt with only after a short analysis of specificity of sports in the international law.

§ 4 Sports in the international law

Sport appears in various aspects in the international instruments. For example, on the level of the Council of Europe, in 1967, the Committee of Ministers adopted a Resolution (67) 12 on the doping of athletes, followed by a Recommendation (79)8.²⁰ From among other documents of the Council of Europe, concerning other aspects, one can mention the Resolution of the European Ministers Responsible for Sport on Employment in Sport 84/5 (15/16-5-1984) or the Resolution of the Assembly on Europe and Professional Sport 1204(1999).²¹

¹⁷ Cf. Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector. In: *International Sports Law Journal*, 2006, 3-4, p. 69 ff. It may be doubtful, whether this organisation is entitled to participate in the social dialogue based on the EU rules for the European social dialogue. Another problem could emerge with the national organisations of professional cycling teams which do not exist – therefore, on the European level, there would be a problem with the representativity of an organization (federation) representing European cycling organizations. Cf. SIEKMANN, Robert: *Some Thoughts about the European Club Association's Possible Participation in a Social Dialogue in the European Professional Football Sector*. Available online: http://www.asser.nl/default.aspx?site_id=11&level1=13914&level2=13931&level3=&textid=36133 (accessed on March 17, 2010).

¹⁸ http://www.easesport.org/ease/fichiers/File/Football/ip-08-1064_en1.pdf (accessed on March 17, 2010). UEFA and FIFPro have previously signed a memorandum of understanding: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/81/881781_DOWNLOAD.pdf (accessed on March 17, 2010). Even the European Commission's White Paper on Sport (p. 62), expected that UEFA (and FIFA) as the governing bodies of the game could be invited.

¹⁹ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 1.

²⁰ CHAKER, André-Noël: *Study on national sports legislation in Europe*. Strasbourg : Council of Europe Publishing, 1999, p. 78-79.

²¹ All the relevant documents of the Council of Europe relating to sport are to be found in SIEKMANN, Robert C.R. – SOEK, Janwillem (ed.): *The Council of Europe and Sport. Basic Documents*. Den Haag : T.M.C. Asser Press, 2007. On Council of Europe's documents on sports see also:

To leave the ground of Council of Europe and move to a broader international scene, it is worth mentioning that as far back as in 1978, UNESCO recognized sport and physical education as a “fundamental right for all”. In 1998, IOC and International Labour Organization (ILO) signed an agreement on job creation through sport in Guinea-Bissau and Mozambique. Sport is also referred to in the ILO as a tool to connect people and for campaigns (for example against a child labour in the production of sporting good industry).²² Moreover, in 2001 the UN Secretary General appointed a UN adviser on sport for peace and development, and a report on sport for development and peace was published in 2003.²³

By the *Sport for Development and Peace International Working Group*, sport is seen to have benefits in:

Individual development
Health promotion and disease prevention
Promotion of gender equality
Social integration and the development of social capital
Peace building and conflict prevention/resolution
Post-disaster/trauma relief and normalisation of life
Economic development
*Communication and social mobilisation.*²⁴

Finally, another different aspect of sports in the international law can be found. Namely, the IOC is claimed to be a subject of the international law according to Swiss law:

*In addition the Swiss Federal Council, which is where the International Olympic Committee is domiciled, has legislatively granted the International Olympic Committee a special legal status that recognises it as an international institution. However the application of similar arguments to other international sporting federations such as FIFA is less sure.*²⁵

Foster claims that the U.S. court in a case from 1980 (*Defrantz v. USOC*) confirmed this:

*Congress was necessarily aware that a National Olympic Committee is a creation and a creature of the International Olympic Committee, to whose rules it must conform. The NOC gets its power and its authority from the International Olympic Committee, the sole proprietor and owner of the Olympic Games.*²⁶

http://www.coe.int/t/dg4/sport/Resources/textsindex_en.asp (accessed on March 17, 2010) and conventions <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=41&CM=7&CL=ENG> (accessed on March 17, 2010).

²² COLA, Giovanni, di: Common Framework for Sport and Development : Poverty reduction strategies and job opportunities through sport partnerships. In: *Official International Handbook for the Sporting Goods Industry*. Verbier : World Federation of the Sporting Goods Industry, 2004, p. 58.

²³ Ibid., p. 59. Cf. <http://www.un.org/themes/sport/> (accessed on March 16, 2010). UN has its own definition of sport, defined by the UN Inter-Agency Task Force on Sport for Development and Peace as “all forms of physical activity that contribute to physical fitness, mental well-being and social interaction, such as play, recreation, organized or competitive sport, and indigenous sports and games.” Ibid.

²⁴ Ibid. For an overview on sports and development cf. <http://www.euractiv.com/en/sports/sports-development-policy/article-157838> (accessed on March 19, 2010).

²⁵ FOSTER, Ken: Is there a Global Sports Law? In: *Entertainment Law*, Vol.2, No.1, Spring 2003, p. 13.

²⁶ Ibid., p. 11-12.

§ 5 International law in sports

I. International sports law or global sports law?

After addressing the question of sports in the international law (cases when sport is explicitly mentioned in the international instruments) I will now turn to the problem of international law in sports (i.e. international law applicable to sports). Is there anything like an international sports law? Foster reminds us that the international law deals with relations between states, therefore, the international sports law is only international law applicable to sports.²⁷ On the other hand, Nafziger claims that “*the international character of major sports competition has shaped the formation of a transnational regime with its own authority and legitimacy.*”²⁸ However, what he means by this is not a traditional international law, but rather a so-called autonomous sports law, created by the sporting bodies themselves – both on the international as well as on the national level. Still, he is using the term international sports law, when claiming that even though CAS provides an international framework, the international sports law remains decentralized.²⁹ He admits, e.g., that while determining the law applicable for a contractual relationship, general rules on international private law apply. Moreover, enforcement of foreign arbitral decisions depends on the national law.³⁰

Foster discerns between international and global sports law (i.e. *lex sportiva*). The former is applied by courts, the latter, defined as “*a transnational autonomous legal order created by the private global institutions that govern international sport*”³¹, is basically immune from the national law, claims Foster (which should be doubted, by the way). According to him, while Nafziger sees international sports law as a branch of international law, he sees it rather as principles of international law applicable to sports.³² Still, he is using the term international sports law as well, just like Nafziger. He further distinguishes “internationalized sport” and “globalised sport”, an example of the latter being Formula 1, where no nationalities but rather companies compete.³³

To summarize, according to Foster, there are four types of rules used in sporting:³⁴

1. the rules of the game,
2. the ethical principles of sport,
3. international sports law, and
4. global sports law (i.e. the custom and practice that originate within international sporting federations³⁵).

²⁷ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 16.

²⁸ NAFZIGER, James A.R.: The Court of Arbitration for Sport and the General Process of International Sports Law. In: *International Law and The Hague's 750th anniversary*. Ed. Wybo P. Heere. Den Haag : T.M.C. Asser Press, 1999, p. 241. Transnational normative power of the sporting organizations is recognized also by ZYLBERSTEIN, Julien: The Specificity of Sport: A Concept under Threat. In: *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*. Ed. Roger Blanpain. Austin : Wolters Kluwer, 2008, p. 97.

²⁹ NAFZIGER, James A.R.: The Court of Arbitration for Sport and the General Process of International Sports Law, p. 241.

³⁰ Ibid., p. 248.

³¹ FOSTER, Ken: Is there a Global Sports Law?, pp.1-2.

³² Ibid.

³³ Ibid., p. 3. Foster is quoting here HOULIHAN, B.: Governance, Globalisation and Sport, paper presented at Anglia Polytechnic University, LLM Sports Law Seminar, November 1991.

³⁴ FOSTER, Ken: Is there a Global Sports Law?, p. 4.

³⁵ Ibid., p. 5.

His enumeration is probably limited only to the international level of sporting, since he is omitting the national rules. I will offer a complex system of rules below.

II. Types of rules in sports

Putting the ethical principles aside, the major problem is to be found in distinguishing between the rules of the game (*lex ludica*) and other rules in sporting, as admitted also by the CAS in an award at the Atlanta Olympic Games in 1996 (Mendy v. IABA). In this case, a boxer was disqualified for a low blow against the rules. The Panel admitted that according to the traditional theory,

*there is a distinction between what can be submitted to a court or arbitration panel – rule of law – and what cannot – the game rule. It however admitted that this was a vague distinction and that the more modern theory was to ignore the distinction in ‘high level sport’ because of the economic consequences.*³⁶

Concerning the international sports law as another group of rules in sports, in Foster’s words “international principles in sports”, Foster notes that the Court of Arbitration for Sport in a recent arbitration said they comprised a major element of *lex ludica*:

*all sporting institutions, and in particular all sporting federations, must abide by general principles of law ... Certainly, general principles of law drawn from a comparative or common denominator reading of various legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such lex ludica.*³⁷

That means that the CAS admits that the basic rules of international law apply for sports, and to be more precise, they form a part of the “rules of the game” (*lex ludica*)! Among these principles, the following could be listed: *pacta sunt servanda*, *equity*, *the doctrine of proportionality*, *doctrines of personal liability*, *the prohibition of unjust enrichment*, and *the doctrine of clausula rebus sic stantibus*.³⁸ This should probably mean that the rules of the game which would be in breach of the basic principles such as the right to life, would not be allowed and would be reviewable by the court even though previously mentioned Foster is opposed to the judicial review of rules of the game.

The last set of rules applied to sports is the global sports law (*lex sportiva*), understood by Foster as different from *lex mercatoria*, although their analogy is often used.³⁹ According to Foster, this analogy is false, as the grounds of *lex mercatoria* is contract, but this is not the case in the sports.⁴⁰

³⁶ Ibid.

³⁷ Ibid., p. 6-7. Quoting the case *AEK Athens & Slavia Prague v. UEFA* (Court of Arbitration for Sport 98/200; award 20/08/99) para.188.

³⁸ Ibid., p. 7.

³⁹ Cf. KOLEV, Boris: *Lex Sportiva and Lex Mercatoria*. In: *International Sports Law Journal*, 2008, 1-2, p. 57 ff. Available online: http://www.asser.nl/upload/documents/1182010_43802ISLJ%202008_1-2.pdf (accessed on March 15, 2010).

⁴⁰ FOSTER, Ken: *Is there a Global Sports Law?*, p. 15.

To reiterate the system of rules in sports as understood by Foster (disregarding the ethical norms), one can discern: *lex ludica* – rules of the game⁴¹ (comprising principles of international law according to the CAS), *lex sportiva* and the **global *lex sportiva*** (made by the CAS). Despite the CAS's proposal to see principles of international law as a part of *lex ludica*, I still perceive them as **the international law principles applicable to sports**, just like Foster does. One can namely not consider the list of the principles enumerated above as complete and exhaustive, and, moreover, the principles mentioned previously represent rather the basic principles of “natural justice”, which should apply in every normative system, not only in the international law. Furthermore, there are different principles of international law that could be applied in sports, although they can not generally be perceived as a part of *lex ludica* (just think of the international labour law standards of the International Labour Organization – these should certainly apply to all workers including the sportsmen and still can not be considered as a part of *lex ludica* – take an example of the right to collective bargaining).

The complicated system of rules can be simplified into two basic systems of rules – **rules of sporting** (*lex ludica*, *lex sportiva*⁴² – either local or global, these are generally self-made – i.e. autonomous, only rarely state-made – i.e. heteronomous, in case of interventionist states) and **law applicable to sports** (international, supranational or national – e.g. constitutional law may have an effect on sporting relationship by guaranteeing the right to have a case reviewed by the national court). For the sake of my thesis, the law applicable to sports and the *lex sportiva* are the most important rules the relationship of which I will study here. As already mentioned, I am concentrating on the right to privacy and fair trial. These rights can be found in rules which can take form of either international law (conventions on human rights or specialized conventions), European Union law or national law. The rules of the *lex sportiva* may potentially be in breach with these principles.

§ 6 Sports and the European Union

What is the position of sports within the European Union? Is there a special EU policy, or legal regulation, or a special “European model of sports”? Does the Court of Justice of the European Union recognize specificity of sport? And how does this specificity influence the applicability of European law in sports? These are the questions that I will offer an answer to in this subchapter.

I. European model of sports?

In the USA, sporting is a part of show business, of the entertainment industry, being practiced for profit. In Europe, the prevailing approach is rather that of a win maximizing strategy

⁴¹ Cf. FOSTER, Ken: *Lex Sportiva and Lex Ludica: the Court Of Arbitration for Sport's Jurisprudence*. In: *Entertainment and Sports Law Journal*, January 2006. Available online: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/foster/foster.pdf> (accessed on March 13, 2010).

⁴² Cf. NAFZIGER, James A.R.: *Lex Sportiva*. In: *International Sports Law Journal*, 2004, 1-2, p. 3 ff. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id59_1_ISLJ_2004-1-2Def.5.pdf (accessed on March 17, 2010).

instead of a profit maximizing strategy.⁴³ Therefore, it seems that the Europe should be more inclined to recognizing a special “social and cultural” status of sports, rather than considering it as a pure business. Sporting is namely both the business and culture.

Does it mean there is a special “European sports model”? As M. Moreuil noted,⁴⁴ according to the European Commission’s 1999 Helsinki Report on Sport, “*there are many common features in the ways in which sport is practiced and organised in Europe [...] and it is therefore possible to talk of a European approach to sport based on common concepts and principles*”. However, he immediately points to the European Commission’s approach in its recent White Paper on Sport, reading that “*any attempt at precisely defining a European Sport Model quickly reaches its limits*”.⁴⁵

What should be the common denominator of sporting in the EU, potentially creating an imaginary European model of sports? I would say it is the application of common standards (mainly respecting the basic rights), and understanding of the relationship between purely sporting rules and the specific principles (mainly freedom of movement) on which the European Union is created. It is mostly these areas, where a “specificity” of sport is invoked, to prevent application of the European law, its principles and standards.

II. The specificity of sports and the European Union

From the number of previously failed or imperfect attempts to connect sport and the EU, the one from 1997 can be mentioned, when the Amsterdam Declaration on Sport was proclaimed as a non-binding attachment to the Amsterdam Treaty, emphasizing the “*social significance of sport*” and asking European bodies “*to listen to sports associations when important questions affecting sport are at issue*.” In 1998, Commission published a paper “The Development and Prospects for Community Activity in the Field of Sport” and a consultations document “The European Model of Sport.” The Helsinki Report on Sport from 1999 tried to reconcile preservation of sporting rules with the changing legal framework within the EU law. In 2000, the European Council has responded in the Santa Maria de Feira Presidency Conclusions, where it requested that the Commission and the Council should “*take account of the specific characteristics of sport in Europe and its social function in managing common policies*.” The same year, after the Nice European Council meeting, a Nice Declaration on Sport was issued, where the European Council admitted that “*it is the task of sporting organizations to organize and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives*.”⁴⁶ However, none of these declarations was legally binding.⁴⁷

Only since December 1, 2009, when the Lisbon Treaty entered into force, Article 6 of the Treaty on the Functioning of the EU (former EC Treaty) states that “*the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member*

⁴³ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 20-21. On the European model of sport, cf. BLANPAIN, Roger: *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*. The Hague : Kluwer Law International, 2003, p. 2.

⁴⁴ MOREUIL, Mathieu: Sport and the Media in the European Framework. Available online: <http://amrc.cuc.edu.cn/data/upload/download/PDF/07/07-2.pdf> (accessed on March 17, 2010), p. 2-3.

⁴⁵ Ibid., p. 3.

⁴⁶ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 34-37.

⁴⁷ Cf. SIEKMANN, R.: The European Union and sport: is sport “special” in EU law and policy? In: *Sport en Recht: Buiten Rechte of Buiten Spel?*, p. 26.

States. The areas of such action shall, at European level, be ... sport". This means that while before December 1, 2009, the EU was competent to interfere with the sport only via general rules applicable to all EU citizens, or workers (as shown in the analysis of the Charter of fundamental rights of the EU), since December 1, 2009, sport can be directly addressed in the European law. What exactly can the EU do in the area of sport is expressed in Title XII on Education, Vocational Training, Youth and Sport, in art. 165 TFEU (ex art. 149 EC Treaty):

[...]

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

Community action shall be aimed at:

[...]

— developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.

This article could be understood by the sporting organizations as a sort of victory,⁴⁸ codifying the "specific nature of sport" in the basic treaty. Sport is recognized not only as business, but also the voluntary character of its structures, and its social and economic functions are stressed. Is this the true "European model of sport"?

Besides this "victory" of sports, the EU has at the same time obtained competence in promoting fairness and openness in sporting competitions and protection of the physical and moral integrity of sportsmen and sportswomen, especially the young ones. Therefore, I do not think that the claims of specificity, as expressed in art. 165 can somehow protect the sporting from ever increasing competence of the EU in sports.

But after all, it is the task of the Court of Justice to decide potential discords in the perception of "specificity", and the Court has already developed its own understanding of "specificity" which is in no way in contravention with the art. 165 TFEU and still represents an interference into certain matters previously considered to be of a purely sporting interest.

III. The Court of Justice of the EU and its perception of specificity

The Court of Justice has in its previous decisions used the articles on freedom of workers and freedom to provide services to address the issues related to sporting. It was possible due to the fact that on the basis of the decision in the Lawrie Blum case (further specified in the Agegate case⁴⁹), every person working in subordination for remuneration is to be considered as employee. This had a huge impact even within the sporting industry, as this meant that also sportsmen working in subordination (mainly in the case of collective sports) are considered employees for the sake of the European Union law. If not in a collective sport, sportsman can be a self-

⁴⁸ Cf. <http://www.fifa.com/aboutfifa/developing/releases/newsid=1141618.html#lisbon+treaty+gives+boost+sport> (accessed on March 17, 2010) or <http://www.euractiv.com/en/sports/lisbon-treaty-gives-eu-sports/article-187812> (accessed on March 17, 2010).

⁴⁹ BOGAERT, Stefaan van den: *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*. Den Haag : Kluwer Law International, 2005, p. 58-59.

employed person, providing services.⁵⁰ The court addressed this in *Deliège* case, where it said that the services need not to be paid for by those for whom they are primarily performed.⁵¹

Sport and its specificity was specifically addressed by the Court in the cases *Walrave and Koch* (prohibiting discrimination based on nationality in sport as long as the sport is an economic activity), *Donà and Mantero* (discrimination on non-economic, purely sporting grounds is allowed), *Bosman* (prohibiting quota system and transfer fees as being a discrimination and a hindrance for the freedom of movement, respectively), *Deliège* (considering a judoka as a provider of services and respecting sporting rules on choosing a sportsman to take part in the international competition), *Lehtonen* (delays for the transfer of players can be accepted as being of a purely sporting interest, and therefore are acceptable⁵²), *Piau* (FIFA rules on players' agents can be accepted even though they restrict competition, because they contribute to the trustworthiness of the agents⁵³), *Meca-Medina* (first claiming that anti-doping rules are of purely sporting interest, then admitting they can have an economic effect⁵⁴), and lately the *Bernard* case (where the Court accepted compensation fees for the education of young players on the occasion of their leaving the club to conclude their first contract with another club).

The Court's understanding of the relationship between sports and the EU law has evolved in the years. First, in the case *Walrave and Koch*, the court developed a so-called sporting exception, meaning that the rules of purely sporting interest don't fall within the EU competence. Only as far as the activity has an economic importance, it falls under the scope of the EU law.

This has changed in the *Deliège* case, where the Court has broadened the understanding of economic activity (even in the case of an amateur judoka, making her living with the help of her sponsors). This case also introduced the term "rules inherent" to sport.⁵⁵

The *Meca-Medina* case has even more broadened the scope of the EU law in sports, claiming that most of the sporting rules have also an economic effect, and therefore fall within the scope of the EU law. That is why the Commission understands the *Meca-Medina* case as Court rejecting existence of purely sporting rules. No rules can be claimed *a priori* exempt from the scope of EU law, a case by case approach is needed.⁵⁶ The decision in the *Bernard* case from March 2010 has not changed anything in this respect, while still speaking of the specific nature of the sport. A proper definition of specificity remains lacking.

IV. Specificity of sports in the labour law

In its White Paper on Sports,⁵⁷ the Commission has tried to explain the specificity of sports as existence of purely sporting rules (e.g. on separate disciplines and competitions for men

⁵⁰ Cf. *ibid.*, p. 52-59.

⁵¹ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 56-57, 91.

⁵² COLUCCI, Michele: Sport in the EU Treaty : In the Name of Specificity and Autonomy. In: *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*, p. 30.

⁵³ *Ibid.*, p. 31.

⁵⁴ BLANPAIN, Roger: The Future of Sports in Europe : Specificity of Sport : A Legal Perspective. In: *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*, p. 5-6. See also: INFANTINO, Gianni: *Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?* Available online: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf (accessed on March 10, 2010).

⁵⁵ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 89.

⁵⁶ *Ibid.*, p. 99, 106.

⁵⁷ Being not a basis for future legislation, but rather as an expression of current position of Commission in relation to sports. *Ibid.*, p. 43.

and women), and enumerated further specificities, such as autonomy and diversity of sporting organizations, the pyramid structure of the sports organizations (in fact a monopoly⁵⁸), being organized on a national basis, the principle of solidarity in sport and the principle of single federation per sport.⁵⁹ This definition is, however, not binding and not complete. Moreover, nobody can guess all its implications for different branches of law.

To address only the matter of specificity within the labour law here, the specificity results in a main difference between sporting employees and ordinary employees, who can terminate their contract whenever, provided they pay compensation to the employer. In the case of sportsmen, while still registered with one club, the player is not able to find a sporting employment elsewhere. This represents an obstacle to the free movement of a player, just like the imposition of a sporting sanction – ban – which also restrains the freedom of movement. All this represents a specificity of sports.⁶⁰

The specificities already mentioned, just like some other examples – the anti-doping rules, club licensing, rules on ownership, control and influence of clubs, rules on players' agents and transfer windows, are generally accepted by the Court and the EU. They are considered necessary for common good – to make the sports attractive for the public.⁶¹

Although the specificity of sports is recognized in these areas, there still may emerge a discord on what else is specific in the sports⁶² and when the specificity is so important that it justifies an exception from the law. There are some principles that should be especially strictly considered when granting a sporting exemption from.⁶³ Those are (mostly from the labour law point of view):

Labour is not a commodity
Freedom of labour
Freedom of association
Free movement of workers
The right to privacy
Equal treatment
Fair trial
*Freedom of speech.*⁶⁴

Most probably, even more principles could be identified, but that is not the aim of this thesis. I will mostly concentrate on two of these principles – the right to privacy and partially on

⁵⁸ This is allowed, because of specific character of competition – the clubs are not competitors in the relevant market. Ibid., p. 3. Quoting FLYNN, M. – GILBERT, R.: The Analysis of Professional Sports Leagues as Joint Ventures. In: *Economic Journal*, 111, 2001.

⁵⁹ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 2.

⁶⁰ Ibid., p. 184-186. Another obstacle is the Rule K5 of the English Football Association Premier League which prohibits an employee to seek for alternative employment opportunities. The Commission considered this as admissible to promote contractual stability (p. 188).

⁶¹ Ibid., p. 9. Cf. SIEKMANN, Robert: The European Union and sport: is sport “special” in EU law and policy? In: *Sport en Recht: Buiten Rechte of Buiten Spel?*, p. 29-30.

⁶² Cf. CYGAN, Adam: Are all sports special? Legal issues in the regulation of Formula one motor racing. In: *European Business Law Review*, 18, 2007, p. 1327-1352.

⁶³ COLUCCI, Michele: Sport in the EU Treaty : In the Name of Specificity and Autonomy. In: *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*, p. 25.

⁶⁴ BLANPAIN, Roger: The Future of Sports in Europe : Specificity of Sport : A Legal Perspective. In: *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*, p. 2.

the fair trial principle. Is there a possibility of any exemption from these rights? And if yes, under which conditions?

It is important to note that the specificity does not necessarily have to mean an exemption from a rule. Quite opposite, in the case of doping, abuse of cocaine, considered a criminal offence is considered as an offence in sporting as well, where it brings further sanctions imposed besides the criminal sanctions. On the other hand, another example could be of a freely distributed medicine, which can be considered doping in sports, creating a sporting offence out of a perfectly legal behaviour.⁶⁵

According to Papaloukas, **three categories of rules can be discerned in the view of the relationship between the (EU) law and sports:**⁶⁶

The first category relates to the sporting rules which are outside the scope of the European law and concern purely sporting matters (however, there is only a few matters which have no economic importance in sports as to make them exempted from the EU competence).

The second category of sports rules are rules that fall under the jurisdiction of the European institutions and can be tested for their compatibility with the EU Law.

The third category includes sports rules prohibited by the European law.

While the provisions of the above mentioned two categories are basically of a sporting nature, the provisions of the third category are primarily commercial in nature.

This is a categorization similar to discerning between *lex ludica*, *lex sportiva* and general law, what I have tried to explain in the previous chapter on the international sports law. A similar scheme of rules is offered by R. Parrish.⁶⁷

The categorization shows that the *lex sportiva* rules may be in contravention, or may find a way of co-existence with the EU law (sometimes with the use of an exemption). Generally, it is only the basic principles of law that can not be overruled and no exemption as to their application is possible. In all the other matters, a compromise is possible, as shown for example in 2001, when an agreement between FIFA and EU was concluded, under which the FIFA has undertaken to modify its regulations to comply with the EU law. It was specifically in the areas of protection of minors, their education, contract stability, solidarity mechanism, transfer windows and introduction of an arbitration system.⁶⁸

Currently, the EU interferes with the sports in the area of free movement, internal market, competition law, broadcasting rights and fight against racism, violence and doping.⁶⁹

As to the *status quo*, the latest decision of the Court in the Bernard case does not represent major threat to the current state of the affairs in the professional sports, requiring only that the compensation fees for the young players should be calculated on the basis of clear criteria. Therefore, it seems that a co-operation and a dialogue remain possible even in the future.

⁶⁵ PAPALOUKAS, Marios: *Policy, European sports law and lex sportiva*, p. 2. Available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1357783 (accessed on March 17, 2010).

⁶⁶ Ibid., p. 8.

⁶⁷ PARRISH, Richard: The Birth of European Union Sports Law. In: *Entertainment and Sports Law Journal*, Vol.2, No. 2, Summer 2003, p. 29. Available online: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf> (accessed on March 17, 2010).

⁶⁸ HENDRICKX, F.H.R.: De Webster-zaak in perspectief: een sportieve receptie van de Bosman-principes? In: *Sport en Recht: Buiten Rechte of Buiten Spel?*, p. 40.

⁶⁹ COLUCCI, Michele: Sport in the EU Treaty : In the Name of Specificity and Autonomy. In: *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*, p. 25.

To conclude, the concept of specificity of sports lies mainly in the specific normative system of sporting, where extralegal enforcement is possible due to the monopolistic and hierarchical pyramid structure of sports. The rules of the game (*lex ludica*) are generally claimed to be exempted from the review by any judicial body (this is true as far as they do not interfere with any rights and freedoms). The rules of the sport (*lex sportiva*) – stemming from regulations of the sporting organizations, or their decision-making activity, however, can be reviewed, to do away with possible breach of basic principles of law. These principles apply to sport externally, being expressed in the international legal instruments and in the supranational as well as national law. Still, a compromise is possible – taking into account the specificities of sports, comprising e.g. a special nature of competition system between the clubs, or a necessity to educate new players with the financial help of the compensation fees. However, such a compromise has to be proportionate. The only way how to establish the proportionality is only via a case-by-case approach by an independent court. This is, however, possible only at the EU and national level, what happens only rarely in fact. On the level of the international law, the specificity of sports emerges only before the arbitral body of the International Olympic Committee – the Court of Arbitration for Sports, which belongs to the “family of sports” and its independence can thus be doubted. Thus, it seems that the question of proportionality between the interests of sports and the rights guaranteed by the law, remains to a great extent in the hands of autonomous sporting bodies and only exceptionally is challenged by the national courts and the European Court of Justice.

§ 7 Sports and the national law – legal status of a sportsman

I. Influence of the EU Law on national sports law?

The European law certainly exerts influence on the national legislation. One can mention for example a necessity to change national laws on the sporting employment contracts after the decision of Court of Justice of the European Union in the Bosman case, in countries, which had a detailed regulation of such a contract.⁷⁰ Similar situation may happen now, after the Bernard case with the outcome that the compensation fees need to be based on real costs of the clubs that were spent in the process of education of young players.

On the other hand, the European law and the decisions of the Court in sporting matters do not force the countries to change other matters that were not seen as a hindrance in the free movement or other principles of the European law. An example could be that of considering players self-employed in some Eastern European countries,⁷¹ even though for the purposes of European law and protection granted by this law, they are considered employed workers by the Court. The mere fact that the sportsman is considered self-employed in a country probably does not influence his rights within the EU, even if an instrument (e.g. the regulation 1612/68) grants protection and rights only to employed persons. In this case, the already mentioned European notion of a worker applies, as established by the Court in cases Lawrie Blum, Agegate and others. The Court is not primarily interested in making sure that the player is considered employed in a

⁷⁰ Cf. GONZÁLEZ DEL RÍO, José María: El contrato de trabajo del deportista en Portugal. In: *Revista española de Derecho del Trabajo*, 116, 2003, p. 224.

⁷¹ E.g. Slovak Republic and Czech Republic. Cf. *Promoting the Social Dialogue in European Professional Football (Candidate EU Member States)*. The Hague : T.M.C. ASSER Instituut, 2004, p. 129-130. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_49_1_Social%20Dialogue%20ed.pdf (accessed on March 7, 2010).

certain country. In a case of a dispute at the European level, the Court applies its own criteria. Therefore, a Czech author, Hamerník, concludes that neither the Bosman decision, nor EU law in general expressly provides that athletes must be in an employment relationship with their clubs under national law when the relationship is between an athlete/national of Member State X and a club of Member State X in Member State X.⁷²

To sum up, the rights and freedoms recognized by the European Court of Justice in the area of sport should find their way into national law as well. If not, the Court may apply the European rules, supposed there is a European element in the dispute. By now, no case concerning the basic rights of sportsmen as to the privacy has been addressed by the Court. Another basic right that is of interest for this thesis – the right to a fair trial is guaranteed by the sole existence of the Court and its competence in deciding sporting matters as long as they relate to the basic rights and principles of the EU.

II. Status of a player in Slovak Republic – player as a self-employed

Why do I concentrate on the status of sportsmen in the national legislation? This is just to show that the protection of privacy of sportsmen is not always a matter of labour law. In some countries, it may be a more general matter – of civil or business law, where different standards may apply. This is the case in Slovakia, where for the majority of players no employee protection applies. While the Labour Code recognizes dependent work as solely falling under the scope of labour law, still, in practice, sportsmen are not considered employees, but rather falling under the Civil Code.⁷³ Not even courts ever consider this question. The freely available players' contracts from Slovakia⁷⁴ clearly show the massive use of atypical civil law contract, named as the player's contract, to establish a players' relationship with a club based on civil law instead of employment relationship. How come the courts accept this? It could be explained by a rooted tradition maybe, as the older judicial decisions (before 1989) created and confirmed an established practice of considering the injuries of players being not an accident at work, but an accident in a player's free time,⁷⁵ since the players in the communist period officially had different jobs with the state-owned companies, where they never worked in fact, only received wages.⁷⁶ Therefore, a

⁷² HAMERNÍK, Pavel: The Impact of EC Law on Sport in the Czech Republic. In: *International Sports Law Journal*, 2004, 3-4, p. 57. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id60_1_ISLJ_2004-3-4Def.5.pdf (accessed on March 13, 2010).

⁷³ Cf. JUREVICIUS, Raimundas – VAIGAUSKAITĖ, Dovilė: Legal Regulation of the Relationship between Football Clubs and Professional Players in Lithuania. In: *International Sports Law Journal*, 2004, 1-2, p. 34. In Czech Republic, company law is used, in Poland, a combination of company law and employment law. Ibid.

⁷⁴ Cf. www.vsstz.sk/Dokumenty/Zmluvy/Z_%20hračská.DOC (accessed on March 7, 2010), http://www.epi.sk/Main/Download.aspx?fn=EDL%5CVzoryzmluvapravnýchpodani%5C%5Cslovenske%5C%5CObcianskepravo_%5E%5CObcianskepravo_%5E%5B%5D_12.doc (accessed on March 7, 2010). Cf.: KRIŽAN, Ladislav: Mal by mať profesionálny futbalista na Slovensku postavenie zamestnanca? In: *Bulletin slovenskej advokácie*, XV, 2009, p. 28-34.

⁷⁵ Cf. An official statement by the Supreme court on the practice of compensating accidents at work - 19.6.1980, Cpj 11/80.

⁷⁶ KRIŽAN, Ladislav: Mal by mať profesionálny futbalista na Slovensku postavenie zamestnanca?. Cf. ČORBA, Jozef: The Slovak Act on the Organization and Support of Sport; a Missed Opportunity? In: *International Sports Law Journal*, 2009, no. 3-4, p. 65-70 or ČORBA, Jozef: Obchodovanie s bielym mäsom? Právne aspekty zmluvných vzťahov pri prestupoch športovcov. In: *Právo a obchodovanie : Zborník príspevkov účastníkov vedeckej konferencie doktorandov konanej 7. júna 2007 v Košiciach*. Ed. Ján Husár. Košice : UPJŠ, 2008, p. 46-56. Even today, such cases may be found: 5C/150/2003, District court in Žiar nad Hronom.

compensation for a sporting injury could have only been claimed under the Civil Code or under a special insurance scheme, if existed.

Only rarely, an injury while sporting was recognized as accident at work – e.g. in a case of a leader of a group of students doing a working practice abroad. Due to his broader tasks connected to the organizing of the stay abroad, this was seen as a part of his work in a case from 1979.⁷⁷

It is probably this common practice from the past that could not be uprooted even after so many years and numerous changes to the legal system. The courts, when deciding cases of sportsmen nowadays, concerning e.g. due financial rewards, do not consider the players of collective sports to be employees and their remuneration as wages.⁷⁸

From the side of the employees – the sportsmen, this is accepted as they are not required to pay social insurance, if they don't earn more than a certain amount of money in a year, and even if they do, being self employed may have some short-sighted advantages for them. Only rarely, a sign of will to change the situation emerged in the Czech Republic due to a strict system of arbitrary sanctions imposed by a club against the ice-hockey players.⁷⁹

The same reasoning applies for the employers – the clubs. They claim, similarly as in Bulgaria,⁸⁰ that introducing the labour law relationship between the players and the clubs, the economic situation of the clubs would cause their extinction. It may also be considered as a valid argument that the inflexible labour law allowing only for certain types of contracts with exactly specified conditions, and not allowing for autonomy, would not be able to take into account the specificities of an employment of a player – with specific renewable fixed-term contracts, specific regulation of the termination of contract (the problem of contractual stability), the obstacles in the free movement,⁸¹ and specific disciplinary measures not allowed in the labour law. At least in the latter case, a double legal relationship – employment relationship and membership in an association established on the basis of a freedom of association – could be a solution to allow for disciplinary measures not recognized by the labour law. Still, other questions, such as the termination of contract, would require specific exemptions from the general labour law.

A solution could be an introduction of a specific sporting legal regulation, recognizing the specificities of sports. Such an attempt failed in Slovakia in the years 2006-2008, when a new Act on sports was passed in the parliament. In the process of discussing the bill in the parliament, all

⁷⁷ District court in Žilina, 11 C 251/79.

⁷⁸ 14C/8/2004 . District court in Nitra, 9C/143/2005 – District court in Liptovský Mikuláš, 5Cb/136/2006 – District court in Dunajská Streda, 8C/87/2002 – District court in Žilina. Similarly, in a case decided by the Czech Supreme court – 33 Odo 848/2006 (30.4.2008) – available online: <http://www.epravo.cz/top/soudni-rozhodnuti/nepojmenovane-smlouvy-55185.html> (accessed on February 12, 2010).

⁷⁹ Available online: http://hokej.idnes.cz/hokejiste-se-bouri-proc-se-hadaji-s-kluby-a-chteji-obnovit-odbory-pxk-/hokej.asp?c=A090923_213412_hokej_par (accessed on February 12, 2010). Without being an employee, social dialog is not possible for the players. Cf. SIEKMANN, Robert: Labour Law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football In Europe. In: *Entertainment and Sports Law Journal*, April 2006, para. 7. Available online: <http://go.warwick.ac.uk/eslj/issues/volume4/number1/siekmann/> (accessed on March 7, 2010).

⁸⁰ SIMOV, Tzvetelin – KOLEV, Boris: Player's Contracts in Bulgarian Football. In: *International Sports Law Journal*, 2006, 1-2, p. 110. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id114_1_ISLJ_2006_1-2.pdf (accessed on March 7, 2010).

⁸¹ Speaking of the problem of transfers in Slovakia, cf. TOKOŠ, Jozef: Prestupy futbalistov v zrkadle práva. In: *Bulletin slovenskej advokácie*, 1997, no. 4, p. 45-58.

proposed norms on the status of players were left out at the end of the day.⁸² The last chance was a proposal by one of the members of the parliament, a mother of a professional tennis player, who tried to reintroduce paragraphs on a sporting employment contract.⁸³ This attempt has failed as well and the sportsmen's rights are in practice still governed by the Civil Code instead of the Labour Code. What effect this may have on the rights of the players, will be shown in the following chapters.

By now, the state has in general taken the road of non-intervention into the matter, although some minor signs of intervention could be found in the Act on sports. Generally, the European states respect the principles of subsidiarity and complementarity of state action in sport, as expressed in the Recommendation R (92) 13 of the Committee of Ministers to Member States of the European Sports Charter adopted by the Committee of Ministers on 24 September 1992.⁸⁴ Therefore, the regulations made autonomously are basically considered valid and binding, until not challenged by the court. This applies for the interference with the right to privacy and to fair trial as well.

III. Status of players in the Western Europe since the 1960s

Strange as it may sound, the status of players as falling under the Civil Code used to be the case in the Western Europe as well. It used to be claimed that sports is like art, there is a difference between *homo ludus* and *homo faber*, or at least that there is a problem to categorize the sportsmen as white-collars or blue-collar workers.⁸⁵ Moreover, similar questions on accidents at work and health and safety rules in sports appeared,⁸⁶ just like in the parallel situation in the then Czechoslovakia. It was Roger Blanpain, who was the first in Belgium to propose to consider sportsmen as workers, followed by a few legislative proposals.⁸⁷ Bourgion claims that an act of 1968 set legal basis of a social status of a professional sportsman in Belgium, but it was only in 1978, when there was an act passed on the professional sportsmen's employment contract.⁸⁸

In France, according to Mouly, existence of an employment relationship between a sportsman and an employer (club) was confirmed as long ago as in 1960 in the *Rostollan* case.

⁸² The original proposal is to be found at: [http://www.rokovania.sk/appl/material.nsf/0/FE52238C945CF595C12571060048FC41/\\$FILE/Zdroj.html](http://www.rokovania.sk/appl/material.nsf/0/FE52238C945CF595C12571060048FC41/$FILE/Zdroj.html) (accessed on February 12, 2010). Cf. ČORBA, Jozef: The Slovak Act on the Organization and Support of Sport; a Missed Opportunity? The original proposal introduced a sporting employment contract, both for the professional and employees in collective sports.

⁸³ July 1, 2008. Available online: <http://www.psp.cz/eknih/2006nr/stenprot/024schuz/s024023.htm> (accessed on February 12, 2010).

⁸⁴ CHAKER, André-Noël: *Study on national sports legislation in Europe*, p. 13. He discerns between countries with the interventionist sports legislation: France, Hungary, Italy, Luxembourg, Portugal, Romania, Slovenia and Spain, and countries with a non-interventionist sports legislation: Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, Germany, Iceland, Lithuania, Switzerland, United Kingdom. Ibid., p. 31. He does not mention Slovakia, but due to a similar system with the Czech Republic, he would most probably consider it a non-interventionist state. On the other hand, Králík considers Slovakia to be an interventionist country: KRÁLÍK, Michal: *Právo ve sportu*. Praha : C. H. Beck, 2001, p. 184-185. Parrish and Miettinen take the Chaker's view when claiming there are only a few interventionist states, and even in those, the intervention is decentralized. PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 11.

⁸⁵ GERMAINE, Jean-Claude: *Le sportifs et le droit*. Liège : Faculté de droit de Liège, 1975, p. 107-109, 116.

⁸⁶ Ibid., p. 144.

⁸⁷ Ibid., p. 152ff.

⁸⁸ BORGIONS, Patrick: Le statut juridique des sportifs rémunérés. In: *Revue du Travail. Sport : Le droit sur la touche?*, avril 1994, 14, p. 10-11.

The *Cour de cassation* has subsequently expanded the application of labour law to all sportsmen, either professionals or amateurs. Since 1980, labour contract became common in the French sporting. However, at that time, many other countries already introduced a specific legal regulation of the sporting matters instead of general employment relationship.⁸⁹ An example can be Portugal, where the sporting employment contract is defined as the one through which a sportsman obliges himself to perform sporting activities for an individual or a collective person for remuneration, taking part in the sporting activities under the authority of that person.⁹⁰ A sporting employment contract is also known in other non-European countries, e.g. in Brazil.⁹¹

A different problem was present at that time in the USA, where, before the 1970s, sportsmen were bound to their employer for the whole career, unless the employer has decided to “sell” them or dismiss them. Therefore, it is necessary to note that the matter of legal status of players is always evolving – and the same will probably apply to the Slovak Republic.⁹² Whether the evolution will take the road to general labour law or rather to a specific sporting employment, remains to be seen. In general, a special act on sportsmen’s status is not absolutely necessary, as seen in an example from the UK, where a judge has considered a player as worker simply based on the fact of being under the control and direction of the club (*Walker v Crystal Palace Football Club* case):

*It has been argued before us ... that there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill; e.g. the club in this case would have no right to dictate to him how he should play football. I am unable to follow that. He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions. In my judgment it cannot be that a man is taken out of the operation of the Act simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody.*⁹³

To conclude this chapter – what importance does it play in the national law, whether sportsman is an employee or self employed? Especially in Eastern Europe, this is a major difference. Should the strict labour law apply, no pecuniary disciplinary measures and no contractual regulation of private life would be allowed, as these matters fall out of the labour law framework in most of

⁸⁹ MOULY, Jean: Sur le recours au contrat de travail à durée déterminée dans les port professionnel : Le droit commun du travail a-t-il encore un avenir dans le domaine du sport? In: *Droit social*, 2000, no. 5, p. 508.

⁹⁰ GONZÁLEZ DEL RÍO, José María: El contrato de trabajo del deportista en Portugal, p. 226.

⁹¹ Ibid, p. 229. Quoting MELO FILHO, A.: Novo regime jurídico do desporto. In: *Brasilia Jurídica*, 2001. The obligations of the employee (sportsman) include: to participate in the games, tournaments, trainings and other preparatory activities for sporting competitions with the use and devotion of all his physical and technical abilities, to preserve one’s own physical condition as to be able to take part in sporting and to undergo medical controls and treatments necessary to practice sports. And finally – a specific clause in the law requires the sportsmen to perform the professional sporting activities in concert with the sporting rules, disciplinary rules and sporting ethics.

⁹² GILROY, Thomas P. – MADDEN, Patrick J.: Labor Relations in Professional Sports. In: *Labor Law Journal*, 28, 1977, no. 12, p. 768.

⁹³ BLACKSHAW, Ian: The Professional Athlete - Employee or Entrepreneur? In: *International Sports Law Journal*, 2006, 3-4, p. 91-92. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id115_1_ISLJ_2006_3-4_DEF.pdf (accessed on March 7, 2010).

these countries.⁹⁴ One has to keep this in mind, when approaching the problem of “behaviour clauses” – regulating the behaviour of sportsmen, which is the topic of the following chapters.

Chapter II Behaviour clauses in general

The behaviour of an employee is in the centre of attention of lawyers as well as human resource managers, sociologists, psychologists, and economists, both in the theory⁹⁵ and in practice. It is not only misconduct (also called detrimental behaviours, anti-social behaviours, counter-productive behaviours, deviant behaviours, dishonesty, and sub-role behaviours),⁹⁶ that is being studied.⁹⁷ The misconduct may be directed either against co-workers, or against the company – the employer. From another point of view, a pre-hiring (in the process of job application) and post-hiring misconduct may be discerned.⁹⁸ In this thesis, I will mostly concentrate on the **misconduct influencing the employer (company), especially in cases of post-hiring, off-duty behaviour, researched in connection with the right to privacy of the players**. However, there might be some differences in the perception of privacy in the USA, in continental Europe and in the rest of the world. These will have to be taken into account.

§ 1 Legal regulation of behaviour?

The problem of in-duty and off-duty behaviour may be regulated by statutory or customary (heteronomous) law or autonomous contracts (including collective agreements), work rules or by-laws of an organization, whereby it is **not reserved only to employment relationship** and may be used also in purely business relations (such as endorsement contracts). It is a matter common especially to the so-called talent agreements, or talent contracts, i.e. in cases of talented individuals (in the sense of using their talent in media and broader public). The image of the talent and of his partners or employers in public needs to be protected – at least that is what the employers require.

As an example, one can mention cases of TV show contestants (not always in the position of an employee), like in the case of Bachelor or Bachelorette TV show, where a man/woman (supposed to be a millionaire) is choosing the love of his/her life from a group of bachelorettes/bachelors. Here, the image of the show and the secrets need to be protected, what may lead to conflict with the right to privacy of participants – for example through a ban on

⁹⁴ JUREVICIUS, Raimundas – VAIGAUSKAITÉ, Dovilė: Legal Regulation of the Relationship between Football Clubs and Professional Players in Lithuania, p. 35, SIMOV, Tzvetelin – KOLEV, Boris: Player's Contracts in Bulgarian Football, p. 111-112.

⁹⁵ Different theories can be discerned: a trait theory (studying personal characteristics), agency theory, psychological contracts theory or management theory. Cf. KIDDER, Deborah L.: Is it „who I am“, „what I can get away with“ or „what you've done to me“?. In: *Journal of Business Ethics*, 57, 2005, p. 389-398. Available online: <http://www.springerlink.com/content/mk0q2257645m766k/> (accessed on March 10, 2010).

⁹⁶ Ibid., p. 389.

⁹⁷ For sociological research, c.f. HUIRAS, Jessica – UGGEN, Christopher – McMORRIS, Barbara: Career Jobs, Survival Jobs and Employee Deviance : A Social Investment Model of Workplace Misconduct. In: *The Sociological Quarterly*, vol. 41, 2000, 2, p. 245-263. Contains examples of researched in-duty misconduct: Got to work late without a good reason; Called in sick when not sick; Gave away goods or services; Claimed to have worked more hours than really did; Took things from employer or co-worker; Been drunk or high at work; Lied to get or keep job; Misused or took money; Purposely damaged property.

⁹⁸ BROWN, Gian: Employee misconduct and the Affirmative Defense of “After-Acquired Evidence.” In: *Fordham Law Review*, vol. 62, 1993, p. 393.

dating with another persons privately during the show. The validity and acceptability of such a clause in the contract could be seen as dubious (unproportionate), though. There are different ways used to motivate the participants to stick to the rules – e.g. through pecuniary awards, and on the other hand there are fines or reward withdrawals.⁹⁹ A similar situation is to be seen in case of models¹⁰⁰ or celebrity endorsement contracts.¹⁰¹ The same system of rules of conduct followed and backed up by financial incentives, or rather sanctions, may be even found in the branches of industry,¹⁰² where an employee is not usually in the centre of attention of media, but could get into media due to his forbidden conduct what could lead to a negative effect on the employer. Such a connection of an employee's illicit behaviour with the name and repute of a company could hurt the image and goodwill of the company concerned.¹⁰³ That is the reason why so-called behaviour clauses are being entered into contracts, even though a **question of legality of such restrictions on private life** can be raised.¹⁰⁴ In the USA, these are in general considered valid

⁹⁹ GOLDMAN, Eric: *Discussion about the Bachelor Contract*. Dec. 8, 2003. Available online: <http://www.ericgoldman.org/Courses/contracts/bachelorcontract.htm> (accessed on March 9, 2010).

¹⁰⁰ An example is a contract clause stating: "Model agrees to conduct himself/herself with propriety and dignity, and to do nothing on an engagement or otherwise that may tend to injure the reputation and goodwill of Model or Agency, nor to do any act or thing which impairs Model's capacity to at all times fully comply with the terms of this agreement, or which impairs Model's physical or mental qualities and abilities. Model further agrees to abide by all standard rules and policies of Agency with regard to behavior on castings and engagements. Agency may, upon five (5) days notice to Model terminate this agreement for breach of this paragraph." This is again a case where there is no employment relationship between the parties. Cf. <http://www.modelresource.ca/Model101/AgencyModelContract.shtml> (accessed on March 10, 2010).

¹⁰¹ WOOD, Douglas J. – BRUCE, Keri: *Celebrity Endorsements – The Devil Really is in the Detail*. Available online: <http://www.adlawbyrequest.com/2009/02/articles/industry/celebrity-endorsements-the-devil-really-is-in-the-detail/> (accessed on March 10, 2010). Offering an example of a different behaviour clause: "If [Celebrity] has committed any act that offends the community or any segment thereof and/or public morals and decency, such behavior shall be considered a material breach of this Agreement incapable of cure, and if in [Advertiser's] sole judgment such breach is likely to cause a diminution in the value of the [Advertiser's] commercial association with [Celebrity], then [Advertiser] shall have the right, in addition to any other rights [Advertiser] may have as a result of such breach, to immediately terminate this Agreement on written notice to [Celebrity]. In such event, there shall be no further compensation payable to [Celebrity] and such termination shall not limit or effect any other rights [Advertiser] may have against [Celebrity] under this Agreement on account of such termination." Or "If [Celebrity] has been convicted of a felony or a misdemeanor of moral turpitude that is likely to cause a diminution in the value of [Advertiser's] commercial association with [Celebrity], then [Advertiser] shall have the right to terminate this Agreement on sixty (60) days' written notice to [Celebrity]. In such event, there shall be no further compensation payable to [Celebrity] hereunder, except with respect to any sums that may be due [Celebrity] for services then already rendered or for authorized expenses incurred by [Celebrity], or payments due prior to the date of termination."

¹⁰² The clauses are used also with the talented executives of companies. In a study, 271 out of 375 chief executive employment contracts contained a morals clause. Cf. PINGUELO, Fernando M. – CEDRONE, Timothy D.: *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, p. 19. Available online: <http://ssrn.com/abstract=1471031> (accessed on March 10, 2010).

¹⁰³ On the other hand, rap artists gain "credibility" by getting involved in criminal behaviour. There, the behaviour clauses in their contracts would not work. Cf. *Should Rap Artists Have a Morality Clause in Their Contracts?* Available online: <http://hiphopandpolitics.wordpress.com/2009/08/25/should-rap-artists-have-a-morality-clause-in-their-contracts/> (accessed on March 10, 2010). Only monetary incentives could possibly have an effect. Cf. *The „Goodell Effect“ Comes to Hip Hop Music*. Available online: <http://www.playahata.com/?p=7068> (accessed on March 10, 2010).

¹⁰⁴ Being a problem of balance between the interests of an employer and an employee. Cf. GOLDBERG, Menachem: The balance between freedom of occupation and freedom of contract in a contract limiting an employee's freedom of occupation. In: *Labour Law and Industrial relations at the Turn of the Century*. Ed. Chris Engels, Manfred Weiss. Haag : Kluwer Law International, 1998, s. 179-192. Cf. GOLDBERG, Menachem: Privacy of the Employee as

and enforceable in the US employment law.¹⁰⁵ However, there is not enough scientific research on this topic.¹⁰⁶ The case law is also scarce, although there are quite a few examples of using the clause in practice.¹⁰⁷ From the latest court cases one can mention that of a TV soap opera actor, Michael Nader, who was arrested for selling cocaine and thereafter dismissed by the ABC Television.¹⁰⁸

§ 2 The so-called “behaviour clauses”

As far as the terminology is concerned, the term “behaviour clauses” is synonymous with the terms of good-conduct clauses, personal conduct clauses, moral turpitude clauses, morality clauses, morals clauses, or public image clauses. Their content, however, may vary. Sometimes, restrictive covenants prohibiting e.g. competition behaviour of an employee can represent a subcategory of behaviour clauses. Therefore, even though the term “morals clauses” is often used, the morality itself is not always the point, covering different conducts unrelated to morals. The concept of morality in law is a problem on its own that can not be solved satisfactorily due to the ever changing standards of morality. Morality can namely represent rules of conduct set by a specific society or even by every individual. Based on the above mentioned reasons, I prefer to use the term “behaviour clauses.” This concept is broad enough to cover both “immoral” as well as any other conduct (without considering its ambiguous morality) detrimental to the interests of the employer (the company). An example of a moral conduct with a negative effect on the employer which could not fall under the term “moral clause”, but falls under the “behaviour clause” could be pregnancy or new haircut of a model. These two cases show clearly that the behaviour is to be understood not only as the act itself, but more often as a conduct (or attitude) leading to a negative effect upon the employer. To make sure what I mean under the behaviour clauses, a few more examples may be offered (as given e.g. by Eric Goldman; bold styles added by me),¹⁰⁹ followed by a short analysis:

§ 3 The behaviour clauses used in the USA

University Coach

a Human Right. In: *Labour Law, Human Rights and Social Justice*. Ed. Roger Blanpain. Haag : Kluwer Law International, 2001.

¹⁰⁵ For example in the case *Lowe’s, Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950). Or newer case *Nader v. ABC Television, Inc.* Cf. FINERTY, John D.: *Employment Contract Morals Clauses*. Available online: <http://www.wislawjournal.com/archive/2006/0809/finerty-080906.html> (accessed on March 10, 2010).

¹⁰⁶ KRESSLER, Noah B.: Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide. In: *Col. J. of Law and the Arts*, 2005, p. 2. Available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869302 (accessed on March 10, 2010). Similar conclusion is made by PINGUELO, Fernando M. – CEDRONE, Timothy D.: *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, p. 2.

¹⁰⁷ In recent years, morals clauses have been employed against Michael Vick, Kobe Bryant, Kate Moss, Rebekah Chantay Revels (Miss North Carolina 2002), Latrell Sprewell, and many other talented individuals. Cf. PINGUELO, Fernando M. – CEDRONE, Timothy D.: *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, p. 11.

¹⁰⁸ *Ibid.*, p. 17.

¹⁰⁹ *Contracts // Fall 2005. Professor Eric Goldman. Sample morals clauses*. Available online: www.ericgoldman.org/Courses/contracts/draftingexercise2.pdf (last accessed on March 9, 2010).

The University may terminate the Coach in the following circumstances:

...

- *any conduct of the Coach in violation of any criminal statute of moral turpitude;*
- *a serious or intentional violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Kahuna Conference or the NCAA, which violation may, in the sole judgment of the University, include any serious violation which may result in the University being placed on probation by the Big Kahuna Conference or the NCAA and including any violation which may have occurred during prior employment of the employee at another NCAA member institution;*
- *a serious or intentional violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the Big Kahuna Conference or the NCAA by a member of the football coaching staff or any other person under the Coach's supervision and direction, including student-athletes in the football program, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including any serious violation which may result in the University being placed on probation by the Big Kahuna Conference or the NCAA;*
- *conduct of the Coach seriously prejudicial to the best interests of the University or its athletic program or which violates the University's mission.*

The wording of this clause, trying to cover negative (prohibited) behaviour, allows for a broad discretion by the University. Using vague categories such as best interests or a mission of the University, together with the "sole judgment" of the University as to the effect of the behaviour allows for misuse of the clause. No guarantees for the coach are stipulated.

Major League Baseball Player

The Club may terminate this contract if the Player shall at any time fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class condition or to obey the Club's training rules.

Terms of good citizenship and good sportsmanship are basically non-legal terms, where a precise definition is lacking. They could be seen as ethical ideals, however, a code of conduct of a citizen does not exist. The "good sportsmanship" also allows for deliberate interpretations. The second half of the clause is more precise, even though the first-class condition could only hardly be established by the parties or the court.

College Employee

Any serious act of misconduct by Employee, including (but not limited to) an act of dishonesty, theft or misappropriation of University property, moral turpitude, insubordination, or any act injuring, abusing, or endangering others.

While theft and misappropriation (and potentially also the abuse and endangering others) could be objectively assessed, this does not hold for the dishonesty, moral turpitude and insubordination (whatever the latter should mean). The brief clause does not establish whether the misconduct (e.g. theft) should be proven by the employer or whether a mere suspicion would be enough for invoking a sanction (possibly dismissal).

Television Actor

*The Actor shall not commit any act or do anything which might tend to **bring Actor into public disrepute, contempt, scandal, or ridicule**, or which might tend to **reflect unfavorably on the Network, any sponsor of a program, any such sponsor's advertising agency, any stations broadcasting or scheduled to broadcast a program, or any licensee of the Network, or to injure the success of any use of the Series or any program.***

This clause is concerned more with the effect of the behaviour, not with the conduct itself. It is therefore not necessary to consider the behaviour as moral or immoral, legal or illegal. What counts is a risk of disrepute. The drawback for the actor is that a pure “tending” is enough to invoke the clause by the employer. No proof or actual harm is necessary.

Professional Basketball Player

*The player shall always be **fully and neatly attired in public** and at all times (on and off the basketball court) conduct himself in accordance with **the highest standards of morality, honesty, fair play and sportsmanship** and will **not do anything which shall be detrimental to the Club, the League or professional sports generally or which shall subject any of these entities to ridicule or contempt.***

The player has positively undertaken to act morally and honestly, in accordance with the fair play and sportsmanship rules, all of which are terms considered as not clear in legal sense. The beginning and the second part of the clause are more solid – concerning the attire and the detriment to the Club or other mentioned entity. Here, the mere threat of detrimental effect would most probably not be enough, as the wording “shall be detrimental” could be understood as requiring an effective detriment.

Movie Actor

*The Actor shall conduct himself with due regard **to the public conventions and morals.** The Actor shall not, either while rendering such services to the producer or in his private life, commit an **offense involving moral turpitude under Federal, state or local laws or ordinances.** The Actor shall not do or commit any **act or thing that will tend to degrade him** in society or bring him into public hatred, public disrepute, contempt, scorn, or ridicule, **or that will tend to shock, insult or offend the community or public morals or decency or prejudice the producer of the motion picture, theatrical or radio industry in general.***

In this clause, primarily regulating positive duty to proper conduct, public conventions and morals would be an interesting thing to prove in the court – probably using the examples of the majority behaviour. Offences against turpitude are specified as those laid down in legal norms. The second half of the clause uses again the concept of “tending”, which might result in sanction without a real harm occurring.

Author

*The Author shall not commit any **act that indicates dishonesty or moral turpitude** or that otherwise **could materially injure the Publisher's reputation.***

Neither dishonesty, nor moral turpitude is specified by any law or legal norm in this clause. The reputation of the Publisher would have to be injured materially, a concept that should probably mean a financial loss or damage.

Another examples of behaviour clauses are offered by Noah B. Kressler (bold style again added by me, with a short commentary):¹¹⁰

Advertising

a. A-List Talent

Advertiser shall have the right to terminate this Agreement in the event Talent commits any felonious act involving moral turpitude under federal, state, or local laws.

b. B-List Talent and Risk-Averse Advertiser

Talent (i) has not been accused of or convicted of any crime (other than minor traffic violations), including, without limitation, any felony, crime of moral turpitude, morals offense or drug charge; (ii) is not now and has never been a user of illegal drugs or an abuser of alcoholic beverages and has never received treatment for drug or alcohol abuse; (iii) will not during the Term engage in any practice or acts which are likely to cause Advertiser embarrassment or which could be considered offensive or shocking to Advertiser's customers or the general public, and (iv) has disclosed to Advertiser any situation, event, legal or personal matter which if made public might cause a public relations issue. Advertiser shall have the right to terminate this Agreement if Talent breaches the foregoing warranties and representations. . . . It is understood and agreed that the foregoing shall not be Advertiser's exclusive remedy, but may be in addition to any other remedies available to it. Advertiser's decision with respect to all matters arising under this clause shall be conclusive.

c. Scale Talent Engaged as Spokesperson

Advertiser shall have the right to terminate this Agreement in the event that there is a public reporting of allegations or accusations that Talent has engaged in conduct that is generally viewed by the public as highly offensive and reprehensible from a legal or moral perspective.

The first example in this cluster specifies the behaviour by leaning on the law. The second example is more specific, not only regulating future behaviour, but also making a statement on previous and current behaviour (abusing certain substances, and more general statement in point iv), expressed in a status-like terminology (user, abuser). Only then the future conduct is regulated in non-legal and subjectively perceived terms of “shocking” and “embarrassment”. In contrast to the previous clauses, the remedies available to the business partner (not employer in this specific case), are specified. Similarly, the third clause allows for termination of agreement in case of a behaviour considered as offensive by the public. Here, a test of the “offended public” would certainly be an interesting piece of evidence.

Television

a. A-List Talent Closely Identified with Network

Network will have the right to terminate this Agreement for cause, which includes, without limitation . . . insubordination, dishonesty, intoxication, resignation . . . failure to conduct

¹¹⁰ KRESSLER, Noah B.: Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide.

Talent's self with due regard to social conventions or public morals or decency, participation in any "adult" media (as determined by Network in its sole discretion) or commission of any act (in the past or present) which degrades Talent, Program, or Network or Producer or brings Talent, Network, Producer or the Program into public disrepute, contempt, scandal or ridicule (provided that Network shall so terminate this Agreement within a reasonable period of time of such information becoming public or coming to Network's attention) . . . Network's use of Artist's services after termination of this Agreement shall not be deemed a reinstatement or renewal of this Agreement without the written agreement of the parties hereto.

b. Talent Closely Identified with Program (Nader)

If, in the opinion of ABC, Artist shall commit any act or do anything which might tend to bring Artist into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on ABC, any sponsor of a program, any such sponsor's advertising agency, any stations broadcasting or scheduled to broadcast a program, or any licensee of ABC, or to injure the success of any use of the Series or any program, ABC may, upon written notice to Artist, immediately terminate the Term and Artist's employment hereunder.

c. Scale Talent Engaged for New Program

Employee shall act at all times with due regard to public morals and conventions. If at any time Employee commits any act which shall be an offense involving moral turpitude or which brings Producer or Employee into public disrepute, contempt, scandal, or ridicule or which insults or offends the community or which reflects unfavorably upon Producer or any sponsor or licensee of the Series, then notwithstanding any other terms or conditions hereof, Producer shall have the right to terminate the Term without any further obligation to Employee.

In the first example, a very broad definition of misconduct is offered, allowing the employer (company) to protect his (its) image to the interests of the company. Future cooperation with the talent is not excluded, it should, however, not be considered as a renewal of the contract.

In the second example, a question of proof is being addressed in a manner that it is enough to consider an act to be violation by the contracting party. Both clauses allow for termination of the contract. The second clause is more in favour of the employer, as “tending” to cause harm is enough to terminate the contract.

The third clause is equally ambiguous, however, “tending” is not enough for the termination. Moreover, the behaviour clause is formulated in a positive manner, not a negative one (i.e. how the talent should behave, not how he should not behave).

Motion Pictures

a. “A”-List Talent

If Talent should, prior to or during the term hereof or thereafter, fail, refuse, or neglect to govern Talent's conduct with due regard to social conventions and public morals and decency, or commit any act which brings Talent into public disrepute, scandal, contempt, or ridicule or which shocks, insults or offends a substantial portion or group of the community or reflects unfavorably on any of the parties involved, then Studio may, in addition to and without prejudice to any other remedy of any kind or nature set forth herein, terminate the Agreement at any time after the occurrence of any such event . . . Studio shall not invoke its rights [hereunder] if the only act subjecting Talent to contempt or ridicule, etc. relate solely to Talent's sexual preference or political or religious beliefs or philosophy as expressed in public.

b. Above-the-Line Talent

*The artist agrees to **conduct himself with due regard to public conventions and morals** and agrees that he will not do or commit any act or thing that **will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule**, or that will tend to **shock, insult or offend** the community or ridicule public morals or decency or prejudice the producer or the motion picture industry in general.*

c. Cole

*The employee agrees to **conduct himself with due regard to public conventions and morals**, and agrees that he will **not do or commit any act or thing that will tend to degrade him** in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to **shock, insult or offend** the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.*

d. Lardner

*That the artist shall perform the services herein contracted for **in the manner that shall be conducive to the best interests of the producer**, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an **offense involving moral turpitude under Federal, state or local laws or ordinances**, or shall conduct himself in a manner that shall **offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt**, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, **terminate this contract and the employment thereby created**.*

e. Scott

*At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, **the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency** or prejudice the corporation or the motion picture industry in general; and he will not willfully do any act which will not willfully [sic] his capacity fully to comply with this agreement, or which will injure him physically or mentally.*

In comparison with one of the previous clauses, the first clause in this cluster specifies that a “certain part” of community should consider the behaviour as shocking, or insulting, not the whole community. Otherwise, the description of misbehaviour is as usual very broad. A strong negotiating position of the talent is reflected in the last part of the clause, exempting the beliefs and sexuality from a possible misbehaviour. The remaining four clauses are similar in the manner they regulate positive obligation of the employee.

Summarizing and analyzing the abovementioned examples from the USA, in most of the cases, the prescribed or prohibited conduct is phrased in such broad terms that it can cover both the behaviour in- and off-duty. One can conclude that the clauses introduce either a **positive obligation** of due care or a number of **negative obligations** – namely to restrain from behaviour representing a) criminal and illegal conduct (which is not always necessarily criminal), b) immoral conduct (including questions of honesty and publicly accepted conventions), and c) other behaviour, specifically behaviour not acceptable in the profession (e.g. fair play rules in sporting). That means there are three levels of negative normative prescriptions – legal rules,

moral rules and professional ethics,¹¹¹ whereby the first and the second level may find its expression both in in-duty and off-duty behaviour, and the third level basically only in the in-duty (on-field) behaviour of an employee.

To mention an example from practice, a case of misconduct in the workplace happened in the USA in 2002, when an employee – a teaching assistant used a Fentanyl (controlled substance) patch on her back and fainted in the workplace. She was dismissed and criminal charges were filed against her for possessing a controlled substance. The question was whether there was a just cause (required by the collective agreement) for discharge in her case. Her act was considered “immorality” under Section 1122 of the Pennsylvania School Code, but due to no prior need to discipline the employee during her long career and also due to the fact that the patch was given to the employee by her friend, an arbitrator considered her dismissal as lacking a just cause. However, the court considered this act an immorality and a just cause for dismissal. Finally, the Supreme Court of Pennsylvania upheld the arbitrator’s decision in 2007.¹¹²

It is important to note that the limits on conduct of the contracting party follow the one and only directly protected value: **interests of employer** (or contracting partners). All other targets such as health of the employee, or the image of the employee are only substitutes or subsidiary goals to reach the main target. Even when a court decides a case on “immoral” conduct – in breach of the behaviour clause, it has to examine the real or potential effect upon the employer, otherwise the sanctions are not applicable. Failing to reach the goal of protecting the interests of employer may namely result in **sanctions imposed by the employer** – in these examples of behaviour clauses it was specifically the termination of employment (or business) relationship, but also any other sanctions (e.g. fines) agreed upon in the contract may be imposed, depending on the national legal system. Damages sued for in the court need to be discerned from sanctions, as these are only recuperation of loss.

A major drawback seems to be the fact that the behaviour clauses rarely deal with the burden of proof and with the procedural safeguards both being essential matters. In case of using the clause by the employer in disciplining or sanctioning the employee, it is questionable whether general rules and principles of natural justice could be invoked, or the rules made by the employer (company, sporting club, association, international federation) should be used. Still, recourse to an ordinary court procedure should always be guaranteed.

In general, in the US practice, misconduct (whether on-duty or off-duty) is being assessed and reviewed in the first row by arbitrators. The services of arbitrators are used both in the cases when the behaviour clause is explicitly stated in the contract, as well as in cases where this regulation is lacking in the contract (implied clauses). Generally, the conduct of employees while off-duty is considered a part of their private life and arbitrators may only search for the *nexus* (*nexus* test) or influence of the employee’s behaviour on the employer’s interests.¹¹³ Even a potential threat (it is a so-called “likely damage” approach, used by many arbitrators.) to the employer is enough – an example can be a case of an employee dismissed because of brutal beating to death of an old lady, what could potentially cause fear among the co-workers and

¹¹¹ By making these rules a part of a contract clause, the rules obtain legal effect.

¹¹² Available online: <http://www.aopc.org/OpPosting/Supreme/out/J-106-2006mo.pdf> (accessed on March 10, 2010). For summary of the case see e.g. Pennsylvania Supreme Court Reverses Teacher’s Firing Under Immorality Clause. Available online: <http://jonathanturley.org/2007/12/30/pennsylvania-supreme-court-reverses-teachers-firing-under-immorality-clause/> (accessed on March 10, 2010).

¹¹³ KEARNEY, Robert A.: Note : Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases. In: *Notre Dame Law Review*, 69, 1993, p. 137-139.

customers of the store where the employee worked. Therefore, a dismissal was allowed by an arbitrator.¹¹⁴

§ 4 The behaviour regulation in the EU

In this subchapter, I will try to compare the previous general remarks on the US system of regulating employee behaviour with the situation in continental Europe – in Western Europe (Germany) and Eastern Europe (Slovak Republic), to find a common legal basis (framework) allowing for this type of legal regulation of conduct in both common law and continental law (including the specific labour law of former communist countries in the EU). The main problem seems namely to be the question how to find a balance between the interests of the employer, protected by the behaviour clauses, and the interests or even basic rights and freedoms of the employee. The clauses namely do not only regulate the behaviour, but also - by the same token - limit the private life of an employee as far as e.g. his freedom of speech is concerned, or his freedom to work (in case of non-competition clauses), or right to privacy (sexual life, health and addictions). That is why sometimes a term “restrictive covenants” is used to denote these clauses.¹¹⁵

The behaviour clauses can be expressed **in contracts** in order to bolster potential remedies,¹¹⁶ or to further specify types of conduct that are to be considered as not allowed and hurting the interests of employer. On the other hand, they can be contained **in the law** and therefore not necessarily explicitly invoked in a contract. Still, they are considered as a part of the contractual duties. For example, general clause in German BGB (Civil Code) contains in its § 242 a duty of a debtor to fulfil his obligations with good faith, what is considered to be applicable also on the employment relationship.¹¹⁷ In Slovak Republic, it is a duty of employee to take into account the interests of his employer (§ 81 letter e) of the Labour Code).

I. Germany

Besides the **statutory obligation** of good behaviour by an employee in-duty, the off-duty conduct can be considered in Germany as a part of *vertragliche Nebenpflichten* (additional duties based on contract) according to § 242 BGB (since labour law in Germany is to a great extent leaning on the BGB).¹¹⁸ However, it is not necessary to set the standard behaviour rules in the contract,¹¹⁹ since these are already stated in general in § 242 BGB. The **contract clauses would** have then only a declaratory character. Moreover, there is a risk that if the clauses are expressed in a too broad wording, they can be considered null and void by a court – should they interfere

¹¹⁴ Ibid., p. 142-143.

¹¹⁵ LAGESSE, Pascale – NORRBORN, Mariann – BERKOWITZ, Philip M.: *Restrictive Covenants in Employment Contracts and other Mechanisms for Protection of Corporate Confidential Information*. London : Kluwer Law International, 2006.

¹¹⁶ KRESSLER, Noah B.: *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, p. 14.

¹¹⁷ WISSKIRCHEN, Amrei: *Ausserdienstliches Verhalten von Arbeitnehmern*. Berlin : Duncker & Humblot, 1999, p. 19.

¹¹⁸ Ibid., p. 36-37.

¹¹⁹ Originally, in Germany, collective agreements were not allowed to regulate private life of the employees, in contrast to the employment contracts. Now it is accepted. On the other hand, company agreements (*Betriebsvereinbarungen*) can not impose behaviour rules off-duty. Cf. *ibid.*, p. 122-123, 134.

with the fundamental rights of an employee without a justified reason. Amrei Wisskirchen calls here attention to two opinions on the behaviour clauses in German labour law. According to the first, clauses can only reinterpret the duties expressed in the § 242 BGB. The second opinion leans on the contracting freedom and autonomy, and allows for further clauses, if these are not in breach of good morals (*Sitten*). This is supported by the fact that employment contract in Germany is a part of Civil Code. In other countries (Slovakia, e.g.), the Civil code is applicable only as a subsidiary code next to the Labour Code, what has an impact on the contracting freedom of the employers and employees in the Slovak Republic (see below). Finally, there is a third possibility that a part of a behaviour clause reiterates the statutory obligations and the other part sets further standards exceeding the statutory duties. Should then the whole clause be considered null and void? If not, it would tempt the employers to use broad and general clauses, which would always have to be interpreted by the courts in case of a suit.¹²⁰

II. Slovak Republic

In the Slovak Republic, the behaviour clauses may take form of a **separate contract on working conditions**, as shown in a case 10C/43/2006 by District Court in Považská Bystrica, where the employee has undertaken to fulfil his duties with all his powers and to behave ethically. Another possibility is to include such requirements of conduct in the **workplace discipline rules (work rules)**.¹²¹ However, due to the fact that there is a very limited contract law in the branch of labour law in Slovakia, no contracts other than those presupposed by the Labour Code are valid. Therefore, should such a case occur, the contract would be deemed null and void and statutory regulation on duties of employee would apply. The same is true for all kinds of behaviour clauses (contracts) including non-competition clauses and clauses on non-revealing the trade secrets.¹²² These are again unnecessary as there is a prohibition of competing behaviour in the Labour Code itself, and trade secrets are protected by the Commercial Code.

§ 5 The regulated behaviour

What are the main **obligations (positive or negative)** imposed by the implied and express behaviour clauses? The clauses mainly deal with activities of the employees (e.g. hobby or competing activities), but only those that can influence the performance in job or the economic situation of the employer. There is a negative obligation to restrain from these activities. An example can be competition clauses, or clauses prohibiting ownership of shares in competing company (generally only if the share is above 5%, otherwise the interests of the employer can not be threatened), abstaining from relationship with competitors, and from economically risky behaviour (such as betting or hazard, forbidden for example in case of bank-employees). A positive obligation is that of duty to maintain the health and abilities, or duty to reside in a specific area (in case of a regional journalist that has to be the first at the spot if something happens). Both in case of negative and positive obligations, the rules should not be unproportionately limiting the rights and freedoms of the employee. For example, in case of duty to protect one's own health, reasonable care is that of not eating food that the person developed an allergy against on purpose. Similar cases are negative rules forbidding pilots, truck drivers etc.

¹²⁰ Ibid., p. 105-109.

¹²¹ E.g. 12Co/33/2006 – Circuit Court in Prešov.

¹²² District court Bratislava II - 42CbHs/1/2006.

to drink alcohol at all. This could potentially be considered an unproportionate breach of the right to privacy, should also drinking alcohol on holidays be prohibited, since this can generally in no way influence the abilities of an employee in job. Such a limitation of behaviour (private life) should therefore be expressed and interpreted restrictively – it should be specified for example that it is not allowed to drink alcohol 24 hours before working. Similarly, according to Wisskirchen, absolute prohibition to eat chips three days before a photo-session in case of photo-models, or prohibition to go out in the evening before a match in case of sportsmen, would limit the fundamental rights of the employee. He claims it would make more sense to set as a rule that the model or sportsman have to appear fit for the job.¹²³ However, this could be difficult to judge and would not allow for any prevention.

§ 6 The protected interests

As far as the **protected interests** are concerned, the specific positive and negative duties of the employee relate basically to the employer. They may relate to the:¹²⁴

- a) honour of the employer – what can test the frontiers of the freedom of speech – if the speech hurts the reputation of an employer, it is a valid reason to dismiss. The sensibility is even bigger in the case of companies with a specific objective (*Tendenzbetrieben*) – e.g. religious and political, or charity companies.
- b) attack on the existence of the company – e.g. in 1972 a bank employee was dismissed in Germany on the grounds of propagating communism and refusing the privately-owned banks (BAGE 24, p. 438 ff), while in his employment contract he had previously undertaken a duty to work on the sustainability of the bank. This was also a matter of freedom of speech. Again, important is the (at least potential) effect on employer – should it not have an influence on the employer, it would probably not have been a valid reason to dismiss. Another example could be chasing away the customers (by bad behaviour, or on personal grounds). These examples would be in breach of the duty of care, as expressed in the §§ 536 or 618 BGB¹²⁵
- c) breach with the competition interests, interests on productivity and trade secrets – again mainly by limiting the freedom of speech – for example in a case of a demonstration against nuclear powerplants, if the participant is an employee of such a plant. However, I guess this could also fall under the category b). Another examples could be criticism or filing a complaint against the employer.

§ 7 Consequences of misconduct

What are the possible **consequences of misconduct (failed conduct)**? There are two main options: employer may ask for damages, may discipline (e.g. fine) or dismiss the employee. Dismissal can be based on the grounds of behaviour (e.g. criminal behaviour) or on the grounds of the person of employee – in case of loss of a required ability or characteristic, or because of friendship or relationship with the employer's competitor.¹²⁶ In 1990, *Landesarbeitsgericht* (LAG) in Hamm (Germany) has decided on dismissal of an employee of a financial institution –

¹²³ WISSKIRCHEN, Amrei: *Ausserdienstliches Verhalten von Arbeitnehmern*, p. 111-121.

¹²⁴ Cf. *ibid.*, p. 51-76.

¹²⁵ *Ibid.*, p. 76.

¹²⁶ *Ibid.*, p. 98-100.

Sparkasse, having affairs with married clients. A husband of one of the clients warned the institution he would take out all his money, should the employee not be dismissed. On the other hand, a dismissal for purely moral reasons, not affecting the employer, was not allowed in case of an employee performing striptease in TV adult show.¹²⁷

A similar case happened in Germany in 1996, when a care taker in psychiatric institution run by a protestant religious organization, revealed in a TV show his sexual preference for sadism-masochism and his neutral views of unfaithful women. He was supposed to be dismissed first, but then the employer decided to change his work position. However, at the end of the day, the employee was dismissed, arguing the patients could feel worried about the possible sexual violence from the side of the employee. Taking into account that no incident happened in the previous years of the service and that the employer was not able to prove that patients got to know about the TV show or that their attitude towards the employee had changed, the court (*Arbeitsgericht* Berlin, July 7, 1999, 36 Ca 30545/98) has decided on invalidity of the dismissal. An important point was, however, that the employer used the dismissal after the two-week term from the moment of getting to know the reason for dismissal (i.e. there was a formal fault on the side of the employer). Otherwise, using the possibility to dismiss in two weeks and using the argument of specific interests of a religious company, the court would most probably decide otherwise – in favour of the employer.¹²⁸

From among further German cases¹²⁹ one can mention a case from 2002, 2 Sa 150/02 decided by LAG (*Landesarbeitsgericht*) Schleswig-Holstein, where the court allowed for dismissal after an employee has outed his opinion on the terrorist attacks of September 11, 2001, considering them as liberation act, leading to the employer's loss of trust in the employee. In another case Sa 157/08 a court LAG in Hamm has considered a discharge as legal when an employee acted off-duty as a DJ and a concert organizer where some of the interpreters had an extremist right-wing background.

Otherwise, a few cases of competition¹³⁰ and revealing trade secrets or internal information,¹³¹ or spreading rumours about the employer¹³² appeared before the Slovakian courts. In most of these cases, however, courts didn't take a standpoint on the possibility of using these arguments for dismissal, since in most cases courts used a formalistic argumentation to turn down the dismissal, based on the formal faults by employer.

Of course, the misconduct of employees is not limited only to off-duty behaviour. It is mostly in-duty that misconduct is performed and is used as a dismissal reason. In Slovakia, these are mostly cases of misconduct in the form of theft in the workplace¹³³ or bad behaviour.¹³⁴

An interesting case in this aspect is a Slovak case of a waitress behaving so badly towards the clients of the restaurant that these refused to enter the restaurant in the future. As this

¹²⁷ Ibid., p. 80-96.

¹²⁸ BRUNS, W. – DEBONG, B. – ANDREAS, M.: Kündigung wegen ausserdienstlichem Fehlverhalten? In: *Juristischer Rat*, 05/00. Available online: http://www.bibliomed.de/cps/rde/xbcr/SID-3E01936C-CA7EF7DE/bibliomed/sp_old-2000_05_Juristischer_Rat_Kuendigung_wegen_ausserdienstlichem_Fehlverhalten.pdf (accessed on March 9, 2010).

¹²⁹ Available online: <http://www.juraforum.de/urteile/begriffe/ausserdienstliches-verhalten.html> (accessed on March 10, 2010).

¹³⁰ District court in Žilina - 8C/1464/1998.

¹³¹ E.g. District court Bratislava II - 12C/493/2001, District Court in Banská Bystrica - 13C/5/2005, District court Bratislava II - 17C/241/2006, District court in Trenčín - 18C/75/2006.

¹³² District court in Prievidza - 12C/55/2008.

¹³³ 12Co/33/2006 – Circuit Court in Prešov.

¹³⁴ District court in Prievidza - 12C/55/2008.

threatened the existence of the business of the restaurant's owner, court allowed for immediate termination of employment relationship.¹³⁵

In Slovak Republic, an interesting combination of in-duty and off-duty behaviour is acting of an employee in the workplace after her working time was over, persuading other employees to quit the employment relationship with the employer (used as a reason to discharge in a case 51C/286/2006, decided by District court in Bratislava II). In this case, court decided on unjust dismissal due to formal errors of the employer.

To sum up, in general, the in- or off-duty **behaviour has to have an impact on the employment relationship to be considered a misconduct allowing for a sanction**. It is therefore important to discern, whether the **employer's business was (at least potentially) affected by the (mis)conduct**. Some authors therefore claim that should an employee be caught stealing in his free time, it is not a valid reason to dismiss in Germany, as long as this does not directly affect the employer.¹³⁶ In most of the cases, the employer would certainly be affected, should the clients (customers) know of the misdeed and therefore avoid the company. The other problem is a preventive dismissal should the employer know that one of his employees was caught stealing. If this act was proven, a criminal sanction is a reason to dismiss in most countries. Should this not be proven, the presumption of innocence would apply.

Moreover, the behaviour clauses (if allowed by the national law) must be formulated with caution – the **limitations of employee conduct must be specific and reasonable** (e.g. not performing risky hobbies in case of sportsmen). Intervention into the private sphere (right to privacy) of an employee is allowed only if it is necessary in consideration to the interests of the employer. Within the judicial interpretations of this *nexus*, German BAG court (*Bundesarbeitsgericht*) in 1969 concluded that a political activity of an employee touches upon the employment relationship (BAG AP, nr. 58, § 626 BGB). BAG further said the relationship must be influenced in a concrete and specific way, should the behaviour of an employee be considered as a reason to dismiss on grounds of failed fulfilment of duties (*Vertragspflichtverletzung* – BGHZ 3, p. 270; 29, p. 65).¹³⁷

According to Wisskirchen, clauses in (e.g. sporting) contracts, requiring to devote all the energy and abilities to the employer (club), and to restrain from any behaviour in the private life which could affect the good repute of the employer (club), are too general and in breach with the basic rights and freedoms as they limit the employee only to his quality as employee, not a human being with one's own private life. Therefore these clauses should be considered null and void according to Wisskirchen.¹³⁸ However, I do not agree here. The Court would most probably not hold them for null and void, and would only limit their applicability so that they are

¹³⁵ District court in Žiar nad Hronom - 4C/186/2005.

¹³⁶ Anwalt Arbeitsrecht informiert. Available online: <http://www.rabw.de/blog/ausserdienstliches-verhalten-als-kuendigungsgrund-2.html> (accessed on March 10, 2010). Similarly cf. SOTTORF, Svenja: Über welche Rechtsfrage hat das Landesarbeitsgericht Hamm entschieden? Available online: http://www.hensche.de/Arbeitsrecht_aktuell_Kuendigung_wegen_ausserdienstlicher_Zuhaelterei_LAG-Hamm_17Sa1567-08.html (accessed on March 10, 2010) – concerning a case by LAG Hamm 17 Sa 1567/08. In this case, an employee acted as pimp in his free time, even illegally forcing young girls from Czech Republic to work as prostitutes in Germany. As a reason for this criminal behaviour, he presented a low wage from his employer, a fact that was broadly discussed in media. The court has decided that this was a negative influence upon the employer, justifying a dismissal. Cf. http://www.hensche.de/Rechtsanwalt_Arbeitsrecht_Urteile_fristlose_Kuendigung_LAG-Hamm_17Sa1567-08.html (accessed on March 10, 2010).

¹³⁷ WISSKIRCHEN, Amrei: *Ausserdienstliches Verhalten von Arbeitnehmern*, p. 36-40.

¹³⁸ Ibid., p. 118-119.

proportionate. After all, the employer has to have a possibility to protect his interests should the employee's behaviour have a detrimental effect on the employment relationship or on the business.

Of course, the employee has always the **right to have the dismissal (as well as the decision of an arbitrator in the USA) reviewed by the competent court.** Since 1980s, even the US states have namely introduced the necessity of a good cause to terminate an employment contract. In 1991, it was estimated that 2.000.000 employees are being discharged each year in the USA and out of them 150.000-200.000 could claim wrongful dismissal – i.e. a dismissal without a good (just) cause.¹³⁹ A court (in Baldwin case) has decided that the cause is just if it is leaning on facts and evidence, not only assumptions of the employer. On the other hand, it is claimed, that if the employer was obliged to prove the allegations, it would make impossible for him to get rid of employees that represent a risk.¹⁴⁰ Finally, it is important to remark that sometimes, the misconduct by an employee is only invoked as a counterclaim, when employee files a suit against the employer. This is often a successful strategy of the employer in the USA.¹⁴¹

Chapter III Behaviour clauses in sports

In general, the behaviour rules, often expressed in the so-called behaviour clauses, should prevent the sportsmen from pub brawls, sexual misconduct and drug and alcohol abuse. This is usually explained by the position of the sportsmen as role models for the youth, which leads to the effect that the standards for the athletes' behaviour are higher both on-field as well as off-field in comparison with a regular employment relationship.¹⁴² This is the so-called "athlete as a hero" ideal.¹⁴³

However, the responsibility of the sportsmen for their behaviour and a possibility of the employers (clubs) to discipline them is not unlimited. Some authors namely claim that even in the case of sportsmen, the behaviour has to produce an impact upon the employer to be eligible as a reason for disciplining.¹⁴⁴ This should probably mean that a behaviour that nobody knows of and that does not have an effect on the employer is not a reason to discipline or punish. The discipline can be purely economic, or take forms of suspending (or banning for good) a player, or of a dismissal.¹⁴⁵

¹³⁹ In the USA, there is a doctrine of at-will employment which can be terminated without any reason. Just cause is required only in cases when the employment relationship is modified by a contract between the parties – e.g. in case of a fixed-term employment.

¹⁴⁰ FABIANO, Michael D.: The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It. In: *Hastings Law Journal* 44, 1992-1993, p. 400-401, 405-408.

¹⁴¹ BROWN, Gian: Employee misconduct and the Affirmative Defense of "After-Acquired Evidence." In: *Fordham Law Review*, vol. 62, 1993, p. 382. Cf. SHEA, Robert M.: Posttermination Discovery of Employee Misconduct: A New Defense in Employment Discrimination Litigation. In: *Employee Relations Law Journal*, 1991, 17, 1, p. 103-110.

¹⁴² FELIU, Alfred G.: Foreword: Discipline in Professional Sports. In: *Hofstra Labour & Employment Law Journal*, 17, 1991, 1, p. 130-132.

¹⁴³ Cf. § 8 k) Kollektivvertrag für Fußballspieler/innen der Österreichischen Fußball-Bundesliga. Stand 16. März 2008 http://www.vdf.at/KV-Entwurf_Stand_18.03.08_final.pdf (accessed on March 10, 2010).

¹⁴⁴ NICOLAU, George: Discipline in Sports. In: *Hofstra Labour & Employment Law Journal*, 17, 1991, 1, p. 146-147.

¹⁴⁵ FELIU, Alfred G.: Foreword: Discipline in Professional Sports, p. 130-131.

Similarly, Martin Kosla claims that in order to invoke the breach of a behaviour rule as an unjust reason to terminate, “*the key considerations are public exposure and whether the conduct caused injury to the sport, rather than the accused’s personal interests.*”¹⁴⁶ That is to say, the personal interests of the employer are not as important as an injury to sport in general. I can not generally agree with this viewpoint; I will come back to this below. He also offers a number of examples of behaviour clauses: “*These provide, for example, that an individual must not: ‘indulge in conduct detrimental to the game’; ‘behave in any way so as to bring [the sport] into disrepute’; engage in ‘any act prejudicial to the interests of any competition or to the interests of [the] sport generally’; or ‘engage in conduct unbecoming to their status which could bring ... the game ... into disrepute.’*”¹⁴⁷ As it is obvious from the clauses’ wording, Kosla specifically concentrates on very general and broad clauses protecting the reputation of the sport. His research should thus be considered with *caveat*, since he is not taking into account other possible situations of misconduct and behaviour rules in a sporting employment.

Coming back to his two key elements to be established in case of terminating a sportsman’s contract for a conduct detrimental to sport, he considers the condition of a public exposure to be met when a conduct becomes common or public knowledge. Should this not be the case and the sportsman would be disciplined in secret by his club or association, there would not be a reason to dismiss, claims Kosla.¹⁴⁸ At least not on the basis of a contractual clause protecting the reputation of sport. Another clause or ground for dismissal would have to be used, which would certainly not represent any major problem.

Concerning the injury to the sport as a second condition for invoking disciplining or the termination of contract based on the hurt reputation of sports, Kosla claims the behaviour has to affect the sport and not only the employer’s interests.

It may be difficult to accept this reasoning in the light of the previous chapter on behaviour clauses where I have shown examples of non-sporting employment relationships where an employee was not required to harm “the good repute of the waitresses” to justify his (her, in this case) dismissal. Hurting the interests of the employer was enough. This is certainly true, Kosla only analyzes the clauses protecting the reputation of sports in his article. i.e. he concentrates only on behaviour damaging the sport in general, and continues saying that

*...an individual’s behaviour may be classified as injurious to the sport if: (1) it has some negative bearing upon the individual’s capacity to perform their public duties or functions in the sport; or (2) the individual has been put forward to the public as subscribing to a particular standard, and that standard has been lowered in the eyes of the public.*¹⁴⁹

Thus it is clear he only concentrates on the interpretation of the term “bringing a sport into disrepute”. Is it wise to do so, disregarding the interests of the employer? It is probably of use in cases when an employer does not have to be hurt or damaged by the conduct, but still, the good repute of the sports is endangered. This clause is allowing for sanctioning even in such cases. For example in a case mentioned by Kosla, when “*goalkeeper Mark Bosnich was charged by the English Football Association with bringing the sport of soccer into disrepute following his*

¹⁴⁶ KOSLA, Martin: Disciplined For ‘Bringing A Sport Into Disrepute’ - A Framework For Judicial Review. Available online: <http://www.worldlii.org/au/journals/MULR/2001/22.html> (accessed on March 15, 2010).

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

Hitler-style salute to the opposing team's fans during a Premier League match."¹⁵⁰ It would certainly be difficult to state and prove that this gesture had any impact on the employer (the Club), since disciplining based on the general labour law would require a justification of the sanction.

Still, Kosla makes a good point when reminding us that e.g. off-duty criminal behaviour may not only collide with the interests of the sport, but also of the employer, in cases when "*professional football players are obliged to attend public promotional events and functions such as player family days, autograph sessions and football clinics*" and the knowledge of a player's criminal behaviour would certainly affect "*his capacity to perform his sporting responsibilities and functions*" in this sense.¹⁵¹ The same reasoning could potentially be invoked in the already mentioned Bosnich case. But again, even in this case, a balance must be struck between protecting a sport's reputation and an individual's freedom of speech (expression). Therefore, both the discipline and a possible judicial review should always take into account the proportionality between the interests of the sports (and employer) on the one hand and the rights of the employee (sportsman) on the other.

§ 1 Sources and the types of clauses

I. Law

To use an example the most familiar to the author, the Slovakian Act on sport does not specify any rules on the behaviour of sportsmen, with the exception of a duty to use and wear the state symbols of the Republic while taking part in an international competition (para. 17) and the prohibition to use doping (para. 19). The Act reads that even a sportsman who refuses to take part in the doping control should be considered liable just like the one using doping. An integral part of this behaviour rule, or duty, is to render one's whereabouts information to the national association that the sportsman is a member of. Here, the same *caveats* should apply to the balance of interests and protection of privacy, as those shown in the previous text. The interesting point is that the rules created by the state copy original WADA rules, which are this way made heteronomous (opposite of autonomous) and enforceable by the state in the interest of the state itself.

Otherwise, only general rules on employee behaviour apply, mentioned already in the chapter on employee behaviour in general (a duty to take account of the employer's interests in § 81 of the Labour Code of Slovak Republic). Similar duty to take notice of the employer's interests and not to harm the employer is a part (either express or implied) of labour codes in the majority of countries.

II. Individual (employment) contracts

A Employment contracts in the USA

In the USA, as already mentioned, it is mostly the individual employment contracts that contain a behaviour clause:

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

Under the NFL Player Contract, § 11, a football club may terminate the player contract “[i]f at any time, in the sole judgment of the Club...[the] Player has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on [the] Club....” ...Under the NBA’s Uniform Player Contract, §16, a basketball team may terminate a player contract “if the Player shall at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, where or not such acts would constitute a crime), and good sportsmanship....” ... Under the NHL Standard Player’s Contract, § 2(e), each NHL player agrees “to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally.” ... Under the Major League Baseball Uniform Player’s Contract, § 7(b), a baseball club “may terminate [a player contract]...if the Player shall at any time fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship....”¹⁵²

The morals clauses mentioned in the quotation above are in fact much larger (the full text of the NFL rules of conduct is in the Annex no. 1).¹⁵³

B Sporting employment contracts in Britain

The European standard player’s contracts do not differ much, maybe only by containing a special explicit prohibition on betting, not allowing the players to bet on their own matches in order to prevent a manipulation of the results.¹⁵⁴

A British Premier League Standard Contract (full text is in the Annex no. 2) does not contain such a clause. It is interesting in that it discerns between a misconduct and further prohibited (or prescribed) behaviour. The importance of this discerning lies in the fact that the gross misconduct may serve as a reason to terminate the contract (Art. 10.1.1).

It is worth noting that the clause on other activities (3.2.1.) that could potentially lead to an incapacitation of the player is leaning on the insurance policy, therefore, a need to define a potentially dangerous activity is left over to the insurance company. Another interesting point is that the non-competition clause is relatively broad, covering not only similar sporting activities, but any other activities with the exception of those enumerated (e.g. business investments).

C Players’ contracts in the Slovak Republic

¹⁵² PINGUELO, Fernando M. – CEDRONE, Timothy D.: *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, p. 11.

¹⁵³ Standard Player’s Contract. In: *NFL Collective Agreement*, p. 244-253 <http://www.nhl.com/cba/2005-CBA.pdf> (accessed on March 20, 2010).

¹⁵⁴ Cf. <http://www.starscorer.de/star/index.php/mustervertraege/3> (accessed on March 10, 2010):

5. Der Spieler verpflichtet sich, es zu unterlassen, auf Gewinnerzielung gerichtete Sportwetten – selbst oder durch Dritte, insbesondere nahe Angehörige, für eigene oder fremde Rechnung – auf den Ausgang oder den Verlauf von Fußballspielen oder Fußballwettbewerben, an denen Mannschaften des Vereins oder ggf. des Muttervereins oder der Tochtergesellschaft mittelbar oder unmittelbar beteiligt sind, abzuschließen oder dieses zu versuchen. Der Spieler darf auch Dritte dazu nicht anleiten oder dabei unterstützen, solche Wetten abzuschließen. Er ist verpflichtet, sich auf solche Sportwetten beziehende, nicht allgemein zugängliche Informationen oder sein Sonderwissen Dritten nicht zur Verfügung zu stellen. Dem Spieler ist bewusst, dass Verstöße gegen die vorstehende Verpflichtung nicht nur eine Vertragsverletzung darstellen, sondern zugleich auch den Tatbestand des unsportlichen Verhaltens gemäß § 1 Nr. 2. der Rechts- und Verfahrensordnung des DFB verwirklichen und zu einer sportstrafrechtlichen Ahndung führen können.

In comparison with the previously mentioned detailed regulations of a sportsman's behaviour, Slovakian Players' Contracts, based on Civil Code rather than the Labour Code, are relatively brief on the matter. The players are bound to play according to their best abilities, to follow the rules set by the club, not to abuse drugs and lead a healthy lifestyle.¹⁵⁵ In some contracts, a duty not to play any other sports or not to do an activity potentially harming the health of the player is stipulated. A general obligation not to cause a detriment to the interests of the club or association may be added.¹⁵⁶

III. Collective agreements

Another form of autonomous behaviour regulation in sports is to be found in collective agreements, provided there is a social dialogue developed in the country (in the majority of the European countries – Slovakia excluded – as well as in the USA, the sportsmen in collective sports are considered employees and therefore partners in the social dialogue including the collective bargaining.). The prohibited or prescribed behaviour is much more specifically explained and put down in writing in these agreements – at least as far as the EU is concerned.

A *Collective agreements in the USA*

In 2008, in the USA, “*the collective bargaining agreements in the National Football League, National Basketball Association, National Hockey League, and Major League Baseball each contained a standard or uniform player agreement that included a morals clause.*”¹⁵⁷ That means the collective agreements themselves do not contain a regulation on the conduct of the employees. The regulation is in the standard individual contracts which form a part of the text of the collective agreements.

B *Collective agreements in the European Union*

The situation is different if one looks at the European collective agreements in sports. To offer the most detailed regulation, I will omit the German example on this occasion and offer rather an example from Italy, where in the basketball, a collective agreement from 2003¹⁵⁸ demanded that the athletes behave consistent with good citizenship, follow lifestyle guidelines, internal norms, abstain from certain behaviour and submit to the decisions of the club on the clothes and shoes to wear. The media appearance was regulated as well (full text is in the Annex no. 3).

¹⁵⁵

http://www.epi.sk/Main/Download.aspx?fn=EDL%5CVzoryzmluvapravnypodani%5Cslovenske%5CObcianskepravo_%5E%5CObcianskepravo_%5E%5B%5D_12.doc (accessed on March 10, 2010).

¹⁵⁶ http://www.vsstz.sk/Dokumenty/Zmluvy/Z_%20hra%C4%8Dsk%C3%A1.DOC (accessed on March 10, 2010).

¹⁵⁷ PINGUELO, Fernando M. – CEDRONE, Timothy D.: *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, p. 11.

¹⁵⁸ Collective Labor Agreement "Professional Players 2003" (*Traduzione in inglese a cura della Lega Serie A*) Between: Italian Basketball Federation, a League Basketball Association, Giba Association of Italian Basketball Players. Available online: <http://www.giba.it/index.php/foreigner/collective-labour-agreement-serie-a> (accessed on March 10, 2010). Compare with the collective agreement in football: Collective Agreement Between Federazione Italiana Giuoco Calcio (F.I.G.C.), Lega Nazionale Professionisti (L.N.P.) (Italian League of Professionals) and Associazione Italiana Calciatori (A.I.C.) pursuant to art. 4 of Act no. 91 of 23 March 1981, and subsequent amendments. Available online: <http://www.assocalciatori.it/LinkClick.aspx?fileticket=L2qDGaX0FXw%3D&tabid=58&language=en-US> (accessed on March 10, 2010).

The rules in this collective agreement can be divided as follows: first, there are general rules on good sportsmanship, which might be considered very abstract, but in practice their interpretation may not cause major problems. The same article (13.4) guarantees that all the limitations of right and freedoms must be based on objective needs of the sporting organization, therefore in line with the principle of proportionality. In the following articles (13.5-13.7, 14.5-14.7), the behaviour rules are more specified, and their further details are supposed to be set down in internal norms. Abuse of substances is especially prohibited without any exception. The remaining articles deal with the outer relations of the club (uniforms, shoes, limited freedom of speech while being interviewed) and finally a non-competition clause and a clause on the prohibition of undertaking a risky sporting activity are included.

This resembles to a great extent the detailed regulation of the previously mentioned NFL Standard Player's Contract (Annex no. 1). What is different is the explicit rule in para. 14 of the Standards Player's Contract as to the possibility to terminate the contract should the player fail to comply with the behaviour rules. Moreover, art. 4 of the Contract allows explicitly for fines. Otherwise, similar rules comparable with the Italian rules can be found – including a duty to keep oneself in a good condition, limited freedom of expression in public, prohibition of competition and prohibition to make different sports. Further rules on conduct may be introduced by the club.

Analyzing these rules, one can immediately see the differences between a U.S. approach and the European approach towards the regulation of behaviour of the sportsmen. In Europe, great attention is being paid to the privacy rights that are safeguarded even in the collective agreements (of course, the practice differs even in the EU), which is not the case in the USA. It seems that the drafter of this collective agreement tried to take account of the basic principles of drafting the behaviour rules – proportionality, objectivity, and the respect to basic rights. What is missing here is the sanctions and their proportionality.

IV. By-laws of sporting federations

A National by-laws

1. The British FA rules

In the British Football Association, rules of conduct are specified in detail in many rules, like an FA Rule E4 which states that: “A Participant shall not carry out any act which is discriminatory by reason of ethnic origin, colour, race, nationality, religion, sex, sexual orientation or disability.”¹⁵⁹

2. German practice of autonomous behaviour regulation

In Germany, a research on the behaviour rules in football¹⁶⁰ showed that in almost all football clubs, there were behaviour clauses in the internal materials, prohibiting racist, xenophobic and right-wing radical acts and speeches in general – concerning both the players as

¹⁵⁹ Cf. FA Disciplinary Processes: Season 2006-07. Available online: http://www.thefa.com/TheFA/~media/Files/PDF/TheFA/DisciplinaryProcess_2006.ashx/DisciplinaryProcess_2006.pdf (accessed on March 20, 2010).

¹⁶⁰ DEGELE, Nina – SCHNEICKERT, Christian: *Fussball Intersektional : Materialien zu Methoden, Strukturen und Repräsentationen*, 2008, p. 33-34. Available online: <http://www.soziologie.uni-freiburg.de/Personen/degele/Forschung/pfiff.pdf> (accessed on March 26, 2010).

well as visitors. Some clubs protect the “liberal democratic order”, some other clubs prohibit discriminatory gestures or expressions, sometimes specifically anti-Semitic ones. Sometimes, obscene, provocative, or insulting behaviour is expressly forbidden, especially if related to the origin, race, colour, language, religion, sexual identity and sexual orientation.

3. *The Slovak regulation of behaviour*

Comparing this with the situation in Slovakia, the disciplinary code of Slovak Football Association only generally notes that the disciplinary bodies deal with the behaviour in breach of the rules of sporting bodies, behaviour in connection with the matches and competitions, behaviour bringing the sport into disrepute, and finally bringing into disrepute the officials of the sporting organizations, as well as not respecting the rules of fair play (art. 2, a-d). The regulation is therefore only abstract and general. On the other hand, the disciplinary code of the Slovak Ice-Hockey Association (from 2009) is more casuistic, enumerating: breach with the morals at representative meetings, breach with the rules of sporting behaviour, libel directed against other persons involved in sporting (including the visitors), violent conduct, influencing the result of a match, and finally – behaviour of fans being in breach with the sporting ethics.

B *International by-laws (FIFA)*

The FIFA Disciplinary Code discerns between minor infringements and serious infringements as far as discipline is concerned. The former are enumerated in the art. 46 and the latter in the art. 47 (listed in the Annex no. 4).

These are behaviour rules concerning purely sporting matters on-field. The wording allows for sanction even in the case such as that of Bosnich, performing a Nazi greeting, but otherwise it is concentrated on the rules of the game. From among the enumerated, only the “unsporting behaviour” could be understood as an abstract notion. Still, the application of this term to a practical situation would probably not be of a major problem.

There is another group of misconduct, enumerated below, taking place at matches or competitions, which (at least most of them) could potentially represent a breach of criminal law or law protecting the public order. Therefore, a double punishment could potentially occur – by the sporting body and by the police or the regular court.

The prohibited behaviour is the following (art. 48 ff.): Misconduct against opponents or persons other than match officials, Misconduct against match officials, Brawl, Unidentified aggressors, Team misconduct, Inciting hatred and violence, Provoking the general public, Ineligibility, Abandonment, Offensive behaviour and (the breach of) fair play, Discrimination, Infringements of personal freedom, Threats, Coercion, Forgery and falsification, Corruption, Doping, and finally Failure to respect decisions.

Again, the application of the terms in practice should not represent any problem. These types of misconduct clearly show what kind of conduct is prohibited and sanctioned by the FIFA. Thus, they can be understood as a specific regulation of the athlete’s behaviour. In fact, none of the prohibited behaviour shows a sign of conflict with a basic right – just the opposite, these rules serve to protect the right to integrity of the others (sportsmen, visitors, etc.). Still, also when punished by the autonomous sporting body, proportionality needs to be respected. In this case, proportionality of sanction is required.

Trying to summarize the practice of regulating the behaviour of sportsmen, one can conclude that there are two main types of behaviour regulations. These are **autonomous and**

heteronomous regulation. The heteronomous is the rules set by law (Acts of Parliament, customary law, etc.). The autonomous regulation is the one going beyond the legal regulation and being set by the sporting bodies themselves or in cooperation (dialogue) with the sportsmen's organizations (trade unions). An interesting middle category is the collective agreements that were made generally binding by the state (government) – here the instrument has both the characteristics of autonomous and heteronomous regulation.

There are also different possible categorizations of the behaviour that is being regulated. This can be either **regulation of the behaviour on-field**, that means while in-duty, or regulation of the **behaviour off-field** – out of duty, sometimes representing an intervention into the basic rights such as that of privacy or of freedom of expression.

A similar categorization could be based on the proposed difference between **the functional duties**, representing the performance of the on-field duties (such as the best effort and sporting performance), and the **behavioural duties**¹⁶¹ **which are not directly inherent to employment and may be specific to sports employment** (anti-doping or the rules connected to the “athlete as a hero” ideal) – often including a limitation of the basic rights.

From another point of view, concerning the form and wording of different behaviour clauses, one can discern between a **general clause** (good sportsmanship) and **specific ones** (not to wear jewellery). While the general ones are coined in broad and often unclear wording trying to protect the interest of the sporting organization (a club), the specific ones are more nuanced.

The specific clauses concern mostly a) **behaviour** (including speech), b) **health** (including doping and diet), c) **non-competition**, and finally, based on the decision of relevant bodies in case of selected athletes - d) a specific rule on submitting the **whereabouts information** in order to be available for doping testing.

§ 2 Case studies – the types of behaviour regulated

In the daily press, one can very often come across cases of sportsmen with an unacceptable behaviour, either on-field, or off-field. As an example, one can mention cases of Wigan Athletic's Marlon King, or Newcastle United's Joey Barton, both concerning an off-duty violent behaviour in public. From the latest news, John Terry's love affair with another player's wife can be mentioned.

In the USA, it is mainly the older case of Latrell Sprewell that is being mentioned as an example.¹⁶² Here, the player of basketball had a fight with the coach after a training (considered in-duty?), being later punished by termination of his contract and a suspension. The case ended before an arbitrator, who reinstated and at the same time suspended the player only so that the other clubs could not sign him. (Otherwise, following the termination of the contract, the player would namely become a free agent.) It seems there was no common policy in the national association as not to offer contracts to such problematic players.¹⁶³

¹⁶¹ The discerning between functional duties and behavioural rules comes from GODOY FAJARDO, Carlos Hernán – VOIDONIKOLAS MUÑOZ, Jorge: Códigos de conducta: aplicabilidad y exigibilidad en las relaciones laborales. In: *Revista de Actualidad Laboral y Seguridad Social*, January 2008, p. 19-24. Available online: http://www.godoycordoba.com/pdfs/9-codigos_de_conducta.pdf (accessed on April 19, 2010).

¹⁶² MANFRED, Robert D.: Labor Law and the Sports Industry. In: *Hofstra Labour & Employment Law Journal*, 17, 1991, 1, p. 136-137

¹⁶³ The cartel does work only if the top sporting body wishes it – by making pressure on the clubs. This was not the case. Cf. ORZA, Gene: The Perception and Reality of Discipline in Sports. In: *Hofstra Labour & Employment Law Journal*, 17, 1991, 1, p. 142.

Another exemplary U.S. case is an older case of Lamarr Hoyt in baseball. The player was smuggling medical pills from Mexico in his trousers and was punished for this off-duty criminal behaviour by having his contract terminated and the player was banned from 1987 season.¹⁶⁴ Many more recent cases from other parts of the world are enumerated in an article by Martin Kosla.¹⁶⁵

Many of these cases are settled at the lower – club level, or national level, where the proceedings are not public, and only results are being announced to the public.¹⁶⁶ However, this does not mean that the basic rights of athletes can not be breached hereby. An example can be offered of Italian football association FIGC which has recently introduced a measure to sanction swearing on-field.¹⁶⁷ The players are to receive immediate suspension. However, FIFPro (while considering swearing unacceptable) sees this as in breach with the freedom of expression, a legal argument that had already been successfully tested in the Netherlands.¹⁶⁸

Much more information on cases of misbehaviour with the legal details can be found on the international level – e.g. in the decisions of the FIFA DRC¹⁶⁹ or CAS.¹⁷⁰

Researching the case law of the FIFA DRC or CAS, one can come across some cases of misconduct invoked in the proceedings. It is not very often the case, but still, there can be a few examples found. Hereby it is necessary to distinguish between the **behaviour which is required as an inherent part of the employee's duties** (such as good performance in the game – on-field) – the functional duties, and other behaviour regulation which sets **standards that are generally not inherent to the job** (specific behaviour rules) and sometimes can be **in contravention with the basic rights** such as privacy or freedom of expression (e.g. the swearing ban in Italy, or prohibition of use of any drugs and doping together with an obligation to submit the “whereabouts information” in order to be tested for doping anytime and anywhere). In general, the term misconduct is being used to covers both the functional duties and behavioural duties generally not inherent to job, but specifically required by the employer.

To show some examples, first, cases of unsatisfactory performance will be given, as a breach of required functional duty inherent to the job. One could speak of the *functional rules*. This category of misconduct comprises also a case of not allowed leaving the workplace (club), and, interestingly, the CAS considered also a case of termination of contract without just cause as being misconduct.

¹⁶⁴ NICOLAU, George: Discipline in Sports. In: *Hofstra Labour & Employment Law Journal*, 17, 1991, 1, p. 148.

¹⁶⁵ KOSLA, Martin: Disciplined For ‘Bringing A Sport Into Disrepute’ - A Framework For Judicial Review, p. 1.

¹⁶⁶ An example of discipline decisions and sanctions in the UK (The Football Association) is to be found at: <http://www.thefa.com/TheFA/Disciplinary/NewsAndFeatures/2009/DisciplinaryLatest.aspx> (accessed on March 15, 2010).

¹⁶⁷ Cf. http://www.fifpro.org/news/news_details/227 (accessed on March 24, 2010).

¹⁶⁸ Ibid.: „I once represented a player in the Netherlands who received a red card for swearing. I appealed to the freedom of expression in his defence. Since then, referees in the Netherlands hardly ever give immediate red cards for swearing. A referee can issue a yellow card for cursing and swearing, but that is a disciplinary measure.” “It is clear to everyone that sports organisation may not take away other basic rights from someone, such as the right to life, the freedom of the press and freedom of religion. This also applies without curtailment to the freedom of expression. Only the government is authorised to limit this freedom and then only in retrospect. We should note that the government has never attempted to do so in the past 100 years.”

¹⁶⁹ <http://www.fifa.com/aboutfifa/federation/administration/decision.html> (accessed on March 20, 2010).

¹⁷⁰ <http://jurisprudence.tas-cas.org/sites/CaseLaw/Help/All%20%28Detailed%29%20-%20Tout%20%28D%C3%A9tail%C3%A9%29.aspx> (accessed on March 20, 2010).

After that, I will pay a closer attention to some examples of a behaviour generally not inherent to the job, which represents the *proper behavioural rules*: a case of an off-field cocaine abuse (being considered as doping¹⁷¹ which is probably to be understood as a requirement inherent to the “sporting employment”) – the famous case of the Rumanian player Mutu, followed by a case of illicit behaviour during the training period (therefore probably to be considered as in-duty). There are also some more cases where misconduct is being invoked but I suppose these two cases will be enough for the sake of my research. Anyway, in the majority of such misconducts, only disciplinary measures are being taken which are usually not challenged before the higher arbitration bodies such as FIFA DRC or CAS. Only if the behaviour is used as a reason to terminate the contract, players are willing to have the decision reviewed by an arbitrator.

Finally, I will have a look at a case of doping control, which did not end up before the CAS either. It is an example of interfering with the right to privacy off-field – the Kashechkin case. Here we have a case of breach of privacy where the behaviour rule required sportsmen to report on their whereabouts and to allow for testing on doping.

To sum up, two possible aspects of research are possible here:

- 1.) **misconduct in case of functional duties of the worker** (good performance, being at the disposal and not terminating the contract without a just cause). In these cases, the **right to privacy is not being invoked**.
- 2.) **misconduct in cases of behavioural duties** – this could be the case of recreational drug use and “immoral” behaviour like sexual conduct. Sometimes, behaviour may be considered as inherent to the employment (i.e. functional rule), even though usually it is not the case. This may happen especially in the sporting employment – I will offer some examples and thoughts on this later. These cases may potentially **interfere with the right to privacy** of sportsmen. A specific case of limited privacy is the already mentioned rule on announcing the whereabouts information, requiring the athletes to submit to tests for doping anywhere and anytime, even during their holidays. Should they fail to report their whereabouts or not submit to the testing, it would be considered as misconduct, and sanctioned as a doping offence. Still, the limiting of the privacy is dominant here, and is present even if the sportsmen obey the rules forbidding the doping and requiring them to allow for the testing.

I. Lack of performance

The cases of a player’s lack of effort as a reason to terminate the contract appear mostly before the FIFA Dispute Resolution Chamber (DRC).

In the case 74653 of 22.7.2004,¹⁷² a club refused to fulfil its contractual obligations towards a player, namely to pay his wages, arguing that “*the player had not been displaying his highest performance*” and asked for damages of 500.000 USD, plus other amounts totalling USD 668.038. However, the Chamber ruled that the club had committed a breach of contract by failing to pay the salaries of the player. Thus, this decision means that the potential sanction upon the player should never take a form of illegal withholding of salary – that is to say without a fine

¹⁷¹ A list of cases before CAS, where WADA was a part, is to be found at: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Legal-articles-case-law-and-national-laws/Case-Law/> (accessed on March 20, 2010).

¹⁷² http://www.fifa.com/mm/document/affederation/administration/74653_756.pdf (accessed on March 25, 2010).

being imposed by the employer (if fine is allowed as a disciplinary measure in a country). Another important matter is where the money goes – whether it represents an enrichment of the employer or is rather used for the social facilities in the workplace.

A similar example is the case 3542 of 11.3.2005,¹⁷³ where

the members of the Chamber remarked that the player's bad performance level could have been dealt with in several alternative ways, none of which include withholding the basic contractual duties towards the player. The non-fulfilment of such basic contractual obligations as is the payment of salaries, the Chamber argued, may not be implemented as a tool to sanction a player for disappointing performance levels.

Another case, 46290 of 27.4.2006,¹⁷⁴ again brought up a question, whether low performance can be considered as a reason for the club to reduce the payments to the player. This example shows that the low performance can not only be a reason to dismiss, but rather is used in practice as a ground to impose a fine, lower the wage or to sanction the player financially. The Chamber has refused this, because the assessment of the performance can only be unilaterally determined and based on subjective criteria by the club. These fines were therefore not accepted by the Chamber. In this respect, one can raise doubts whether there is really no way to determine actual performance and level of effort of the player – taking into consideration technical tools allowing for comparison of previous and current performance of the player.

In 2005, an interesting case 65657 of 23.6.2005¹⁷⁵ was decided by the Chamber, concerning the termination of contract because of low performance. This time, such an option was stipulated in the contract:

Art. 6.3.1 of the relevant contract ... stipulates the following: "the contract can be broken under the initiative of the football club in case of: discovery of the inadequacy of the professional and sports skills of the footballer; in case of the footballer's non-fulfilment or inappropriate fulfilment of his obligations conditioned by this contract,..."

The club held that the player *"did not fulfill his contractual obligations, particularly with regard to his level of preparation and skills."* The player surprisingly did not challenge the termination, but rather claimed for the outstanding payments by the club, which were, however, rejected by the Chamber. The right to terminate the contract was thus not questioned in this case.

It was questioned in another case, 16695 of 12.1.2006,¹⁷⁶ where a contract clause, *"clause 14 of the employment contract, according to which the club has the right to unilaterally terminate the contract within the first ten days of the contractual duration excluding all claiming rights of the player"*, got under scrutiny. The clause was invoked due to the low performance of the player. In the para. 8-10, the Chamber has concluded as follows:

8. After extended deliberations, the Chamber considered that such clause creates a disequilibrium between the rights and the obligations of the player and the club. Even more, since the right to terminate the contract is left exclusively at the discretion and the subjective criteria of the club, i.e. the stronger party in the employment relationship. Furthermore, the DRC stated that according to

¹⁷³ http://www.fifa.com/mm/document/affederation/administration/3542_1050.pdf (accessed on March 25, 2010).

¹⁷⁴ http://www.fifa.com/mm/document/affederation/administration/46290_795.pdf (accessed on March 25, 2010).

¹⁷⁵ http://www.fifa.com/mm/document/affederation/administration/65657_1017.pdf (accessed on March 25, 2010).

¹⁷⁶ http://www.fifa.com/mm/document/affederation/administration/16695_621.pdf (accessed on March 25, 2010).

the jurisprudence of the Players' Status Committee, a probation period of a player is not admissible in employment contracts of football players. As a consequence, the DRC decided that such clause has to be qualified as not admissible, respectively, null and void.

9. In continuation, the Chamber analysed the Respondent's allegations and noted that they do not contain any reference to a precise or concrete behaviour of the player, which would establish and prove a just cause for the club to terminate the employment contract unilaterally and prematurely. In addition, the Chamber deemed that the allegedly bad performance of a player during a match can be no valid reason for the termination of an employment contract.

10. Taking into consideration the above, the DRC decided that the Respondent terminated the employment contract without just cause.

The Chamber has therefore proclaimed such a clause as invalid due to two reasons – it would be considered a probationary period which is not allowed in the football (the reason why not can be doubted, especially should the player be considered a worker as any other and all deviations from the general labour law should be interpreted restrictively),¹⁷⁷ and moreover, the assessment of the poor performance of the player could be subjective.¹⁷⁸ However, at the end of the day, the Chamber has ruled that the player signed a waiver and agreed to terminate the contract by agreement, therefore his claim of unjust unilateral termination became irrelevant.

To make the overview of possible misconducts (as breach of rules inherent to an employment relationship in general) which can be found in the case law of FIFA DRC and CAS complete, one has to mention a case when the alleged misconduct lied in leaving the workplace the club (i.e. not being in service) and a misconduct based in the non-justified termination of a contract:

II. Misconduct in the form of absenteeism

A counterclaim by a club against a player can be found in the decision of the Dispute Resolution Chamber of FIFA from February 19, 2009, case 29835,¹⁷⁹ involving a player I. against the club M., regarding a contractual dispute between the parties. Here, the club alleged the player's misconduct and that he "*willfully left the disposal of M.*", i.e. he left the club (the

¹⁷⁷ Cf. case 86833 of 17.8.2006 - http://www.fifa.com/mm/document/affederation/administration/86833_826.pdf (accessed on March 25, 2010). The player allegedly "*did not fit in well to the team's playing system*" and in the contract, there was a 30 day probation period, when the club could terminate the contract if not satisfied with the player's performance.

¹⁷⁸ The latter argument was repeated e.g. in the case 46552 of 27.4.2006, where a termination was considered unjust on these grounds - http://www.fifa.com/mm/document/affederation/administration/46552_789.pdf (accessed on March 25, 2010). Or in the case 114534 of 26.11.2004, where, "*in the light of the fact that this clause does not include any compensation to the benefit of the other party in the event of the club exercising this option, the Chamber concluded that such cause cannot be considered valid.*" Cf. http://www.fifa.com/mm/document/affederation/administration/114534_842.pdf (accessed on March 25, 2010). Similar argumentation is to be found in the case 65580 of 1.6.2005 - http://www.fifa.com/mm/document/affederation/administration/65580_1020.pdf (accessed on March 25, 2010) and case 75975 of 28.7.2005 - http://www.fifa.com/mm/document/affederation/administration/75975_954.pdf (accessed on March 25, 2010), where "*the Chamber deemed that in view of its potestative nature, the aforementioned contractual clause shall not have any effect.*"

¹⁷⁹ <http://www.fifa.com/mm/document/affederation/administration/drclabour/29835.pdf> (accessed on March 26, 2010).

workplace) and did not return on time, but without any proof presented to the DRC. Therefore, the counterclaim was not accepted.

III. Termination of a contract considered as misconduct

As already shown, misconduct can be considered as a reason to dismiss – depending on how serious the misconduct is. However, there are also reversed cases, when the **termination of a contract is considered as misconduct** – a termination without just cause.

Something of that sort happened in a case of CAS (CAS 2008/A/1519 – FC *Shakhtar Donetsk (Ukraine)* v/ Mr. *Matuzalem Francelino da Silva* (Brazil) & Real Zaragoza SAD (Spain) & FIFA and CAS 2008/A/1520 – Mr. *Matuzalem Francelino da Silva* (Brazil) & Real Zaragoza SAD (Spain) v/ FC *Shakhtar Donetsk (Ukraine)* & FIFA).¹⁸⁰ In this case, the player notified his Club “of the fact that he unilaterally terminated their contractual relationship with immediate effect and in accordance with article 17 of the FIFA Regulations for the Status and Transfer of Players.” The Club considered this a termination without a just cause, and asked for compensation. It even called attention to the behaviour of the player – namely to the circumstances of how he announced this termination (para. 168):

An additional and important element of sport specificity that must be taken into due consideration when establishing the compensation due in the event of breach or undue termination is the behaviour and the status of the parties involved, with a particular attention to the behaviour of the party that did not respect the contractual obligations in place.

The DRC previously deciding the case has accepted this as notes the CAS in para. 169, taking into account that

the Player by accepting an increase of his salary on 1 April 2007 and deciding shortly afterwards to leave Shakhtar Donetsk has offended the good faith of the club. Also, DRC observed that the Player left the club without indicating in advance his wish to look for other employment opportunities.

The CAS has accepted this reasoning, noting in para. 172 and 173 that

the Player left the club just a few weeks before the start of the qualifying rounds of a competition which is obviously very important to Shakhtar Donetsk, i.e. the UEFA Champions League. ... The Panel will take the above into due consideration as an element to establish the value of the loss caused by the Player to Shakhtar Donetsk through the premature termination of his agreement.

At the end, the player was required to pay almost 12 million EUR compensation for his right to terminate a contract, whereby a special attention was paid to the aggravating circumstances of his act.

IV. Mutu case: drug use

¹⁸⁰ http://www.tas-cas.org/d2wfiles/document/3229/5048/0/Award%201519-1520%20internet_.pdf (accessed on March 26, 2010).

After the detailed look at the behaviour inherent to the employment relationship in general, now we come to a behaviour which could be both considered as functional (inherent) and not functional (inherent) – namely a recreational use of drugs. This matter was considered in the *Mutu case* (CAS 2008/A/1644 Adrian Mutu v/ Chelsea Football Club Limited¹⁸¹). Here, the use of a drug (cocaine) by a player in his (most probably) free time was considered a doping. On October 1, 2004, a drug test was held on the Player by the UK Football Association. The outcomes were positive for cocaine. On October 28, 2004, the Club terminated the employment contract with the player, with the immediate effect. Moreover, on November 4, 2004, the Disciplinary Commission of the Football Association imposed a seven-month ban on the Player with a worldwide effect (the effect was introduced by a decision dated November 12, 2004). Furthermore, the player was considered as having terminated the contract based on his misconduct – his unacceptable behaviour: “On 20 April 2005, the FAPLAC¹⁸² decided that the Player had committed a breach of the Employment Contract without just cause within the protected period against the Club.” The CAS panel similarly concluded that

contrary to the Appellant’s submissions, the damages were caused by the Player’s breach leading to the termination of the Employment Contract, and that the Club’s claim for compensation of its “reliance expenditures” is not precluded by the Club’s choice to terminate the Employment Contract for the Player’s breach” (para. 116).

The Club was awarded damages, even though, as the player claimed, “it is extremely rare in English law for an employer to be awarded damages against an employee for breach of contract” and “an employment relationship is treated differently from other contractual relationships”. He claimed a contractual clause to this sense could be treated as an unenforceable penalty clause when it does not represent a “genuine pre-estimate of loss” and is “oppressive”. However, the Court of Arbitration for Sport decided the Club has a right to damages of cca. 17 million EUR.

Here, the CAS did not even consider whether the Club acted proportionally when terminating the contract. Clearly, this was considered as proportionate due to the fact of cocaine use being considered as doping and a gross misconduct. Furthermore, a possible bringing of the sport into disrepute could be invoked by the employer. The exorbitant sum of damages was calculated on the basis of transfer fees mainly, which could have been amortized, should the club not terminate the contract with the player. The Player has claimed a shared responsibility in this sense – namely that the Club could have transferred him to minimize the damage. The CAS has dismissed this reasoning. Now, the player, claiming not to possess enough property, is supposed to pay the club a portion of the transfer fees and other costs. The Club, having used its uncontested right to terminate the contract runs therefore a risk of not being able to collect the damages.

V. Preventing disciplinary misconduct

A case of violating disciplinary rules forbidding a female visit during the training period was considered a breach of professional ethics in a case decided by the Dispute Resolution Chamber of FIFA on February 19, 2009, case 29708, between a player G against the club Y

¹⁸¹ <http://www.tas-cas.org/d2wfiles/document/3459/5048/0/Award%201644%20FINAL.pdf> (accessed on March 26, 2010).

¹⁸² Football Association Premier League Appeals Committee.

regarding a contractual dispute between the parties.¹⁸³ The characteristic of the act (violation of professional ethics) could be considered questionable, being a matter by its nature rather of a conduct not inherent to the employment. Still, the behaviour was prohibited by the disciplinary rules of the employer – the Club invoked a contractual clause, which certainly is to be considered a behaviour clause, stating in Art. 10 para. 2 no. 3 and 4 of the contract the following: “*The contract may be cancelled by (the club) with immediate effect if (the player) seriously violates professional ethics or sports and cause serious damage to (the club’s) interest and reputation.*” That is probably the reason why the Club tried to have the behaviour classified as a violation of professional ethics – to be able to invoke this clause.

The violation or damage to the Club’s interests should have been committed by the player in May 2008, when during the Club training period the player

led a woman to his room privately, which disobeyed severely of items 21st (1) and 22nd (2) of Article IV from Contractual Player Administration Rules of Y.” “The Respondent claimed that this behaviour damaged his reputation and “led bad infection of club daily management especial to the young players who ... were severely influenced by G.”

The DRC was supposed to assess in this case whether such misconduct could be a reason to dismiss the employee (the player). The Chamber has decided that this clause in the contract should be used to terminate the contract only as an *ultima ratio*. It may in fact be considered a breach of the player’s duties, but the Chamber requires that in such cases, the player should have been warned first. Moreover, he has already been sanctioned – namely by suspension from the trainings. The termination of contract would therefore be in breach of the principle *ne bis in idem*, claimed the Chamber.

In this case, the termination of contract was clearly not to be considered proportional, even though, as the employer claimed, the behaviour of the player had an effect on the other players and on the whole club. Still, probably this was not considered serious enough by the Chamber so as to allow for the termination. It is a pity from the point of view of this thesis that the Chamber did not address the question whether such a rule limiting the private life of the player should be considered as a functional rule inherent to the employment (at least based on the internal rules of the Club), and whether it is a limitation of the right to privacy due to the specific needs to maintain the discipline during the training period.

VI. Comparison: drug abuse and the breach of discipline

When comparing the Mutu case with this case, a main principle can clearly be identified: The behaviour, even if not considered inherent to the employment in general (the cocaine use in the free time is a questionable matter in this aspect) can be a reason to sanction the player. For him, such behaviour can namely be in breach with the rules inherent to a specific sporting employment. However, while using drugs may be considered as a valid reason to terminate the contract immediately (being a gross misconduct), the “moral” or “disciplinary” misconduct (which can be a problem to differentiate from a more serious act) can not lead immediately to the dismissal. First, a more proportionate measure has to be taken, such as a fine or a warning.

¹⁸³ <http://www.fifa.com/mm/document/affederation/administration/drclabour/29708.pdf> (accessed on March 26, 2010).

While using fine, we already know from the previous case studies that these fines are acceptable only if they are based on objective grounds, therefore, the disciplinary measure should probably also be used only in the cases of a behaviour that is prohibited by the law or contract in a manner which does not allow for subjective evaluation.

From this point of view, one could also question the proportionality of the termination of Mutu's contract. Was that the only possibility? The player claimed it was not. There are two main questions to address – whether the use of cocaine should be considered doping, and whether the use of cocaine is a reason to dismiss. Apparently, the other clubs did not deliberate long to sign the player after his contract was terminated, therefore did not consider his behaviour as misconduct disqualifying the player from future use by the clubs.

VII. Obligation to accept testing for doping

Another interesting case concerning the expected behaviour and a breach of the right to privacy should be noted, even though it did not end up before any major arbitral body. Still, it is an exemplary case of breach with the right to privacy, based on the anti-doping rules (they have been changed in the meanwhile, though) of the World Anti-Doping Agency (WADA). This was a case when the cyclist Kashechkin was controlled for doping during his holidays in Turkey in 2007. He considered this as a breach of privacy. However, the Belgian court declared itself not competent, as the sportsman did not live in Belgium anymore. It was expected that Kashechkin would submit his case before the CAS. Should then the Court decide that the anti-doping controls in the free time are in breach of the privacy of sportsmen, this could have threatened the whole system of anti-doping controls, established after the first World Conference on Doping in Sport, which took place in Lausanne in 1999 on the initiative of IOC and which had the establishment of the World Anti-Doping Agency as a direct outcome.¹⁸⁴

What is interesting in this case from our point of view is the fact that the sportsman's privacy was breached in order to test him for doping in his free time. At that point of time, the selected sportsmen were obliged to be in disposal of the doping controllers 24/7. This was due to the fact, that the doping in whatever form, even an unintentional one, or in the form of a recreational drug use, is considered to be a breach of the basic duty of the sportsmen to restrain from doping. Therefore, it seems that the restraint is a part of the athlete's job, covering even all his private life. This has changed in the meanwhile so as to allow for the controls only in one hour during a day, whereby the athlete may decide about the time and place. Still, a question whether this measure is proportionate remains open. I will address this later. By now, it seems there is a general approach, considering the rule not to take doping as a functional rule of sporting employment, which is shown by the fact that even a missed test is considered doping and punished as such. Maybe a case-by-case approach would be more fair.

Out of these cases, the Mutu case, sexual conduct case and the Kashechkin case clearly have a right to privacy connotation. The strongest ties with the privacy has the question of the

¹⁸⁴ SOEK, Janwillem: Recht van de atleet op eerbiediging van zijn privéleven. In: *Sport en Recht: Buiten Rechten of Buiten Spel?*, p. 51-52. In the meanwhile, a second conference in Copenhagen took place in 2003 and UNESCO has also issued an International Convention against Doping in Sport. Ibid., p. 53-54. However, doping controls took place much already much earlier. Testing in the free time was introduced to fight steroids used in the period of training that were not present in the body of a sportsman during the competition itself. That is also the reason why the World Anti-Doping Code of 2003 allows for unannounced out-of-competition testing, that can be conducted anytime and anywhere. Ibid., p. 57-59.

anti-doping fight and the behaviour rule of “not to take doping”. The other cases of low performance, a counterclaim of misconduct and the termination of contract as a misconduct rather show what a misconduct reasoning can be used for – not only to control the behaviour as far as the private life of the player is concerned (whether of direct influence upon the performance of the job or not), but it also has direct labour law implications concerning the conduct considered as functional part of the basic duties and obligations of the employee, where there is usually no right to privacy to be invoked. The behaviour (conduct/misconduct) of an employee can therefore be considered a relatively broad notion in the sporting dispute settlement.

§ 3 Discipline and sanctions

As noted by some researchers, “*hardly a day goes by without news of misbehavior by a professional athlete. In the month of February 2009, for example, the media reported such misbehavior on at least twenty-two out of twenty-eight days.*”¹⁸⁵ As far as these are not criminal misdeeds, their punishment rests solely with the clubs or sporting associations.

The legal basis for disciplining may have its source either in individual employment contracts, in the collective agreements, or in the regulations of national sporting associations and international federations. Only rarely the disciplining power stems from the law, i.e. an act of the parliament or customary law.

In 2007, the U.S. NFL, an autonomous body, has implemented a Personal Conduct Policy (NFL PCP). The NFL PCP requires that all persons associated with the NFL avoid conduct detrimental to the integrity of and public confidence in the National Football League. That means an athlete can be punished for his conduct, even if his actions do not result in a criminal conviction.¹⁸⁶ This is the basic idea of sporting discipline.

Basically this sporting discipline should be considered private by nature. Still, some authors call attention to a somehow public character of punishment. These public elements include:

- (1) the public nature of punishment,
- (2) the sense of direct accountability to fans, and
- (3) the assertion of independent moral authority to punish by sports leagues or commissioners.¹⁸⁷

Still, this is only a philosophical approach to the disciplinary punishments by the sporting bodies, being generally irrelevant for a lawyer. Disciplinary sanctions remain a separate system of sanctions, based on a contractual relationship, with no relationship between criminal sanctions, civil liability and disciplinary sporting sanctions, potentially leading to situations of being punished more times for the same offence.¹⁸⁸

Ian Blackshaw reminds us of a judgment of March 15, 1993, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case *G. versus Fédération Equestre Internationale* and Court of Arbitration for Sport (CAS), where it claimed that “*it is generally accepted that the*

¹⁸⁵ YOUNG KIM, Janine – PARLOW, Matthew J.: Off-court misbehaviour: Sports leagues and private punishment. In: *The Journal of Criminal Law & Criminology*, vol. 99, 2009, no. 3, p. 573. Available online: http://www.law.northwestern.edu/jclc/backissues/v99/n3/9903_573.Parlow.pdf (accessed on March 12, 2010).

¹⁸⁶ Ibid., p. 577-578.

¹⁸⁷ Ibid., p. 592.

¹⁸⁸ GARDINER, Simon et al.: *Sports Law*. 3rd ed. London : Cavendish Publishing Ltd., 2006, p. 660.

*penalty prescribed by regulations represent one of the forms of penalty fixed by contract...*¹⁸⁹ Therefore, the sanctions are generally considered as private. What type of penalties are we exactly talking about? It is mostly the following sorts:

- a) written admonition;
- b) fine;
- c) reduction of pay;
- d) temporary exclusion from training sessions with the team;
- e) termination of the contract.¹⁹⁰

The use of penalties is considered acceptable in the sports world. In the Italy, fines are even imposed for positive drug tests – sportsmen have to sign contracts on this.¹⁹¹ It seems it is only Germany who is against any fines as penalties in sports.¹⁹² This is due to the fact, that when accepting the nature of these sanctions as being contractual (i.e. private) by nature, a problem emerges in Germany, where the sportsmen are considered employees, but the German labour law does not know the possibility of one-sided retention or withdrawal of wages in the context of disciplinary measures (with the exception of cases where a works council agrees to this).¹⁹³ The same is the situation in Slovak Republic or Czech Republic. However, in these Eastern European countries, the sportsmen are not considered employees, therefore the Civil Code instead of Labour Code is used in practice, which allows for contractual penalties, recognized by the courts.¹⁹⁴

In this respect one should also pay attention to where the money collected in the form of fines goes. It should not serve as a means of enrichment of the employer, but rather should be used for a social fund of the company.

Another problem can be the use of arbitration in labour matters in these countries, when deciding on disciplinary sanctions – neither Germany, nor Slovak and Czech Republic do recognize arbitration in employment disputes.

The proportionality of sanctions potentially represents another problem – the court in Gelsenkirchen has concluded that a long suspension may be in breach with the right to work.¹⁹⁵

Further problem lies in the identification of the employer, i.e. the subject with the right to sanction. Is it the club or the national association? If it is the club, associations don't have the right to discipline the club's employees, as long as their competence and sanctions do not form a

¹⁸⁹ BLACKSHAW, Ian S.: *Mediating Sports Disputes: National and International Perspectives*. The Hague : T.M.C. Asser Press, 2002, p. 158.

¹⁹⁰ Cf. Art. 11: <http://www.assocalciatori.it/LinkClick.aspx?fileticket=L2qDGaX0FXw%3D&tabid=58&language=en-US> (accessed on March 10, 2010).

¹⁹¹ http://www.e-comlaw.com/sportslawblog/template_archives.asp?chosenYear=2010&chosenMonth=3 (accessed on March 10, 2010).

¹⁹² <http://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2003/0505/sport/0030/index.html> (accessed on March 10, 2010).

¹⁹³ WEISEMANN, Ulrich: *Sport, Spiel und Recht*. München : C.H. Beck'sche Verlagsbuchhandlung, 1983, p. 10-21. Later in the text he concludes that fines are allowed in the workplace if agreed by the employee representatives. Ibid., p. 21. On the other hand, Portuguese law allows for fines in sporting explicitly: GONZÁLEZ DEL RÍO, José María: El contrato de trabajo del deportista en Portugal. In: *Revista Española de Derecho del Trabajo*, 116, 2003, p. 230.

¹⁹⁴ Cf. case 14C/8/2004 Okresný súd Nitra, 8C/87/2002 Okresný súd v Žiline.

¹⁹⁵ WEISEMANN, Ulrich: *Sport, Spiel und Recht*, p. 19.

part of the disciplinary rules in the workplace.¹⁹⁶ Otherwise, association is in a relationship with the sportsmen only so far as it issues licenses for the sportsmen. It is not an employer. And since the associations do not exert rights of an employer, that leads to a conclusion that when a license is withdrawn, it does not mean an automatic termination of the contract with the club. Not even a clause in the contract to this sense is allowed.¹⁹⁷

If the Association is not an employer, its disciplinary power over the players could be understood as solely based on the freedom of association, if the sportsmen are members of the association (which is, however, not always the case, depending on the national practice). Furthermore, some authors claim that the competence of parties other than the club to punish the sportsman is voluntarily accepted by the players.¹⁹⁸

Be it as it may, it seems true that sporting employment is characterized by a special triangular shape – consisting of sportsmen, clubs and national associations (and potentially international federations).¹⁹⁹ Sometimes, another (fourth, fifth) party to the relationship – organizer (or even sponsor) of a sporting competition – emerges.²⁰⁰

This chaotic system makes the disciplining difficult and complex. In an attempt to clarify, let us – just like in the previous subchapter – divide the system of sanctions into heteronomous (imposed by the state) and autonomous sanctions (imposed by the individual contracts, collective agreements or associations).

I. Sanctions in the law

Sanctions established in the law (either statutory or customary) are rare. In Slovakia, this is the case of sanctions for doping only. The Act on sports no. 300/2008 Z.z. namely recognizes sanctions established by the international sporting and doping bodies as well as by national associations. Only if these should not be applied, sanction (expulsion) laid down in the Act (para. 21) will apply.

II. Employment contracts

As an example of an employment contract, I will use the Premier League Uniform Player's Contract. It discerns – in a traditional way – the warning, fine, temporary expulsion from the premises of the club, the termination of the contract, and suspension. The full text is to be found in the Annex no. 5.

In a case the sanction (fine) would be too high, it can be lowered on appeal by the DRC FIFA, as it happened in a case from September 28, 2006, on the claim presented by the Player X, XX, as *Claimant* against the club, Y, YY, as *Respondent* regarding a contractual dispute arisen between the parties involved.²⁰¹ In this case, “*the Respondent emphasized that for the Claimant's*

¹⁹⁶ Some authors claim, that the association has a right to discipline the employee instead of the employer. Cf. SCAVELLO, Joachim: Le contrat de travail du footballeur. In: *Droit social*, 2007, no. 1, p. 83.

¹⁹⁷ WEISEMANN, Ulrich: *Sport, Spiel und Recht*, p. 17-18. Quoting from a court decision BAG, BB, 82, 368.

¹⁹⁸ *Ibid.*, p. 101.

¹⁹⁹ Only the latter three elements (clubs, national associations and international federations) are mentioned in the triangle by: GERMAINE, Jean-Claude: *Le sportifs et le droit*, p. 13.

²⁰⁰ OLFERS, M.: Topsporters in de problemen? De rechtspositie van de topsporter bij uitsluiting van deelname. In: *Sport en Recht: Buiten Rechte of Buiten Spel?*, p. 100.

²⁰¹ Case 96391. Available online: http://www.fifa.com/mm/document/affederation/administration/96391_8466.pdf (accessed on March 26, 2010).

failure to return in time, according to the employment contract, he has to pay a fine of USD 10'000 per day..." However, "the members of the Chamber at first stressed that with regard to the monthly income of the Claimant, i.e. USD 15'000 for the season 2005 and USD 20'000 for the season 2006 respectively, the penalty imposed on him is completely disproportionate and thus cannot be accepted." This clearly shows that the Chamber requires proportionality in imposing a sanction.

III. Collective agreements

It is again the Italian Collective Agreement²⁰² that will serve here as an example of a system of sanctions based on the collective bargaining. The system does not differ much from the general system of sanctions. The full text is to be found in the Annex no. 6.

This example is specific in that it makes an attempt to provide for information on behaviour rules and possible sanctions in a visible place – for the sake of the workers (sportsmen).

IV. By-laws of sporting organizations

The FIFA Disciplinary Code of 2009 discerns two basic categories of sanctions – applicable to natural and to legal persons. The third category is mixed – sanctions applicable to both kinds of persons. The full text is included in the Annex no. 7.

Comparing this system of sanctions with the ones imposed by football association in Slovakia, no major differences can be identified. The same is probably true for all sporting associations since the system of sanctions is basically limited to a few generally accepted types of penalties.

V. The termination of contract – different standards of proportionality?

After making a clear picture of the system of disciplinary penalties, let us now turn to the most extraordinary of them – the **termination of contract**. As already shown in the subchapter on case studies, termination of contract can sometimes be understood as misconduct (irrespective whether this was agreed upon as misconduct in the employment contract's clause on misconduct). An analysis of the reasons used to terminate a contract by the employer can be of use at this point, as undertaken by Janwillem Soek.²⁰³ He rightly points out that a just cause is necessary both on the side of the employer as well as on the side of the employee when wishing to terminate the contract. This is due to a "specific" need for contractual stability in sporting, being a concept that could theoretically be challenged on its compatibility with the freedom of movement, the right to work and the prohibition of forced labour.

Soek claims there is also another specificity while terminating the contract in sporting:

²⁰² Collective Labor Agreement "Professional Players 2003" (*Traduzione in inglese a cura della Lega Serie A*) Between: Italian Basketball Federation, a League Basketball Association, Giba Association of Italian Basketball Players.

²⁰³ SOEK, Janwillem: Termination of International Employment Agreements and the "Just Cause" Concept in the Case Law of the FIFA Dispute Resolution Chamber. In: *International Sports Law Journal*, 2007, 3-4. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id121_1_ISLJ%202007_3-4.pdf (accessed on March 16, 2010).

*In labour law in general, personality conflicts, general dissatisfaction with performance, petty issues or one incident of inappropriate behaviour or misconduct, are usually not serious enough to warrant dismissal for just cause. In football however such aspects can indeed be a reason for terminating the contract with just cause. ... However just cause for dismissal is not defined in the Regulations.*²⁰⁴

This is to say that the reasons for terminating the contract may differ from a standard labour law relationship²⁰⁵ - e.g. in the case offered by Soek: “A club terminated the employment contract with a player because he had misbehaved during an official match. “After scoring a goal the player celebrated in a way which was considered indecent.””²⁰⁶ However, as was already shown in the previous subchapters, the FIFA DRC and the CAS in such cases usually do not allow for disproportionality. Therefore, it seems that the rights of the players may still be safeguarded on the international arbitral level in a similar case. Still, it would be more effective and fair, should the proportionality introduced and interpreted by the arbitral bodies be used also at the national – club level. Ample examples from different jurisdictions namely prove that the termination of contract is widely used as a sanction in sporting:

A Termination causes in the USA

The NBA uniform player contract²⁰⁷ states that:

(a) The Team may terminate this Contract upon written notice to the Player if the Player shall:

(i) at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime), and good sportsmanship, to keep himself in first class physical condition, or to obey the Team’s training rules;

(ii) at any time commit a significant and inexcusable physical attack against any official or employee of the Team or the NBA (other than another player), or any person in attendance at any NBA game or event, considering the totality of the circumstances, including (but not limited to) the degree of provocation (if any) that may have led to the attack, the nature and scope of the attack, the Player’s state of mind at the time of the attack, and the extent of any injury resulting from the attack;

(iii) at any time, fail, in the sole opinion of the Team’s management, to exhibit sufficient skill or competitive ability to qualify to continue as a member of the Team; ... or

²⁰⁴ Ibid., p. 28-29.

²⁰⁵ Soek discerns: Terminating the agreement because of a player’s absence (p. 33), Terminating the contract because the player is not permitted access to the training, Terminating the contract for disciplinary reasons, Termination of the agreement because of drug use (p. 37), Terminating the contract because of the player’s physical condition (p. 38), Termination of the contract because of a dubious provision in the contract (p. 38-39), Terminating a contract because of a player’s lack of effort, Termination of the contract because of the player’s political asylum (p. 39), Termination of a contract because of insufficient playing time by the player, Termination of the contract because of not being enabled to play (p. 40), Terminating the contract by not taking up the option to extend the contract, Terminating the contract because of a competing employment contract (p. 41), Terminating a disputed employment contract (p. 42) and Terminating the contract on the basis of a provision in the contract (p. 43).

²⁰⁶ Ibid., p. 37, Case 14558 of January 15, 2004. Available online: http://www.fifa.com/mm/document/affederation/administration/14558_642.pdf (accessed on March 26, 2010).

²⁰⁷ <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf> (accessed on March 10, 2010).

(iv) at any time, fail, refuse, or neglect to render his services hereunder or in any other manner materially breach this Contract.

Especially the first and the third indent allow for disproportionate termination of contract using vague terms and subjective reasoning, which would probably not be accepted in football by the FIFA DRC or by CAS in general.

B Termination causes in Italy

The Italian collective agreement²⁰⁸ is using only objective reasons that should not be considered disproportionate by the arbitral bodies (taking into account for example the use of substances recognized as a termination reason in Mutu case):

Dismissal for Just Cause

26.11. Independent of other reasons for cancellation, the club can move for early cancellation of the contract in the following cases:

- *use of doping substances or procedures;*
- *use of psychotropic substances;*
- *sports fraud;*
- *conviction and sentencing to serve time in jail for intentional crimes, sentence finalized and not suspended or pardoned;*
- *sickness or injury resulting from reckless or grievous behaviour of the athlete that results in a period of inability to perform lasting longer than one month;*
- *disqualification or disqualifications during a season that, combined, amount to over ten days of official competition;*
- *more than one unexcused absence from games during the season;*
- *grievous and repeated failure to fulfil the responsibilities outlined in this contract*

C Termination causes in the UK

Finally, the uniform player contract of the Premier League allows, as already mentioned, for termination based on the “gross misconduct”, to be understood in the way as outlined in the contract itself, and showed in the previous text.

10. Termination by the Club

10.1 The Club shall be entitled to terminate the employment of the Player by fourteen days' notice in writing to the Player if the Player:

10.1.1 shall be guilty of Gross Misconduct;

10.1.2 shall fail to heed any final written warning given under the provisions of Part 1 of Schedule 1 hereto; or

10.1.3 is convicted of any criminal offence where the punishment consists of a sentence of imprisonment of three months or more (which is not suspended).

To conclude, one may repeat that the termination of contract may be both considered a sanction for a player, as well as a misconduct (termination without just cause), which can be sanctioned. That comes out of the strive for the so-called contract stability (Art. 14 of the FIFA regulation) between a club and a player. Should a club breach the contract unilaterally without

²⁰⁸ Collective Labor Agreement "Professional Players 2003" (*Traduzione in inglese a cura della Lega Serie A*) Between: Italian Basketball Federation, a League Basketball Association, Giba Association of Italian Basketball Players.

just cause, sanctions for the club would be various: ban on registering new players, deduction of points, exclusion from competitions. On the other hand, in case of sportsmen unilaterally terminating their contract without a just cause within the protected period, sporting sanctions such as suspension could be imposed – this was a Mexès case. (Moreover, they are punished by high financial compensations/damages²⁰⁹). After the protected period is over, sporting sanctions are not imposed even if there is no just cause. Instead, disciplinary sanctions may be imposed, if the notice on termination is given after the term of 15 days from the last match (Andy Webster case).²¹⁰ Still, the termination needs to be proportionate in relation to the termination cause – that is the substance of the “just” cause. The same applies for all the other sanctions as well, even though the term “just” is not used there. The international arbitration in sporting clearly adheres to this principle.

²⁰⁹ Cf. WEGER, Frans de: *The Jurisprudence of the FIFA Dispute Resolution Chamber*. The Hague : T.M.C. ASSER Press, 2008, p. 100-109.

²¹⁰ PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 184-185.

Part II Basic rights of sportsmen

Chapter I Basic rights

§ 1 Basic rights of sportsmen in international law

Let us first concentrate on the international law guaranteeing the basic rights of sportsmen – mainly the right to privacy and the right to a fair trial. In the next chapters, the regulation of the Council of Europe and of the European Union will be examined.

Which are the main problems occurring in the world of sports, related to the basic principles of law, basic rights and freedoms guaranteed by the international law? One can immediately think of attempts to limit access of non-nationals to national teams, problems with the termination of contract (high compensations have to be paid, due to the need of a contractual stability), and the “specific and autonomous” character of dispute resolution, trying to evade the competence of national courts. Are these to be considered as discrimination, slavery (or forced labour)²¹¹ and denial of fair trial, respectively?

The largest impact in the field of international law of human rights certainly has the **U.N. Universal Declaration of Human Rights** from 1948, guaranteeing absolute equal treatment (art. 2),²¹² right to liberty (art. 3), prohibition of slavery (art. 4) and “*the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*” (art. 8). The art. 10 grants everyone (including sportsmen) the right “*to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*” Although the last part of the sentence speaks of criminal charges, the article is otherwise very general, comprising every possible determination of rights. Are the disciplinary hearings which are held behind closed doors compatible with these principles?

Further in the Declaration, art. 12 protects everyone against “*arbitrary interference with his privacy*”, complemented by the statement “*everyone has the right to the protection of the law against such interference or attacks.*” Are the rules on conduct of the players in their free time in breach of this rule? How are the players protected against such interference?

Players are often not allowed by their contract to express their opinion on certain matters publicly. Is this compatible with the art. 19 stating “*Everyone has the right to freedom of opinion*

²¹¹ Arnold Muehren turned to the European Commission to decide on the nature of transfer rules as a forced labour, what was refused by the Commission in 1984. See JELLINGHAUS, S.F.H.: Een kennismaking met het sport(en)recht. In: *Sport en Recht: Buiten Rechten of Buiten Spel?*, p. 14. The sportsmen have voluntarily entered this kind of employment, they are not forced to do anything against their will, they are just limited to a certain extent. See PARRISH, Richard – MIETTINEN, Samuli: *The Sporting Exception in European Union Law*, p. 172. Those who do in fact suffer the most are players who are being brought to Europe from abroad (mostly from Africa) and after they disappoint their agent, they are left on their own with no work and no way back home. Cf. OLUKAYODE, Thomas: Les nouveaux esclaves du sport business. In: *Courrier International*, 30. march 2001, 543, p. 46-48. Cf. <http://www.euractiv.com/en/sports/sports-development-policy/article-157838> (accessed on March 16, 2010). Similarly European Parliament (European Parliament resolution of 8 May 2008 on the White Paper on Sport (2007/2261(INI)) in alinea 104.

²¹² On inequality of women in sports, cf. http://www.ilo.org/wow/PlanetWork/lang--en/WCMS_081377/index.htm (accessed on 15.3.2010), further on sex discrimination: http://www.sportlaw.ca/articles/pdf/CAAWS_Discrimination_full.pdf (accessed on 15.3.2010) and finally on religious discrimination – boxers that are not shaved due to their Sikh belief – cf. http://www.e-comlaw.com/sportslawblog/template_archives.asp?chosenYear=2010&chosenMonth=3 (accessed on 15.3.2010).

and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”?

From further problematic aspects, one can mention the art. 13 on the freedom of movement, which can be seen in the line with the European principle of the freedom of movement, hindered by transfer fees or compensation fees. Are these obstacles proportionate?

Art. 20 guarantees freedom of association – even to associate in trade unions (repeated explicitly in art. 23). Is this possible also for the players in countries, where they are not considered as employees, but rather as self-employed? How is then their right to social security guaranteed, mentioned in art. 22, if they may not be a part of a social insurance scheme being self-employed rather than employees? Further, is their right to rest and leisure, and holidays with pay (art. 24) respected, if they are self-employed?

So many questions, and that is only the rights expressed in the Universal declaration from 1948. The Declaration was followed in the 1966 by the **International Covenant on Economic Social and Cultural Rights** (in force since 1976), repeating the social rights relating to work, union formation, adding the right to strike. Finally, specific instruments like the **Convention on the Elimination of All Forms of Discrimination Against Women** and the **International Convention on the Elimination of All Forms of Racial Discrimination** could be mentioned, as well as the United Nations **Convention on the rights of the child**.²¹³

§ 2 The rights guaranteed by the Council of Europe

From among the regional documents, one can mention e.g. the **European Convention on Human Rights** from 1950, protecting against slavery, servitude and forced (compulsory) work (art. 4). Fair trial is guaranteed to everybody “*in the determination of his civil rights and obligations or of any criminal charge against him*” (art. 6). Should therefore any decision of a sporting body interfere with the civic rights and obligations of the player, he has a right to have these determined by a fair and public hearing by an independent and impartial tribunal established by law. Do the sporting arbitrations trying to evade a judicial review fulfil these criteria? Or only national courts do?

The right to privacy is repeated in the art. 8, allowing for interference only “*for the protection of the rights and freedoms of others*.” Is the regulation of private conduct of a player always following the goal of protection of the rights and freedoms of others, e.g. of the club as an employer? The right to freedom of expression can also be limited only under similar circumstances (art. 10).

Finally, art. 13 calls for an effective remedy before a national authority should these rights be denied or diminished in any way in breach of the Convention and a Protocol from 1963 recognizes a freedom of movement.

There is no simple answer to all these questions. Yes, basically the rights should apply to everybody, provided there is not another interest present, which would proportionately allow for a reduction of rights – there is a space for the specificity of sport to be invoked. This is, however, a complicated matter, usually decided by the courts on a case-by-case basis.

²¹³ The latter especially evaluated with the context of sporting by BLANPAIN, Roger: *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, p. 138.

§ 3 Basic rights of sportsmen in the EU

The **Charter of fundamental rights of the EU** from 2000, although originally not legally binding (this has changed since entry into force of the Lisbon Treaty on December 1, 2009, referring to a modified version of this Charter²¹⁴), sets the basic standards to be respected in all areas of human life and activity in within the Union. In its art. 5, it prohibits slavery, servitude and forced labour, together with the trafficking in human beings. This is sometimes used to point to the players' agents, who often bring young talents to Europe, "selling" them further, without taking any care for them and without offering them any services.

Art. 7 guarantees the right to privacy, art. 11 the freedom of expression, and art. 12 the freedom of association including establishing and joining trade unions, whereby art. 28 respects the right to collective bargaining and collective action (with respect to the national law). Art. 15 allows for the freedom to seek employment in any other Member State (applicable to the players of collective sports) or to provide services in any Member States (applicable to individual sports). General freedom of movement is to be found in art. 45. Finally, articles 20 and 21 provide for equality and non-discrimination (again, the question of domestic and foreign players in national teams, or of home-grown players can be raised). The Charter did not omit the rights of children and young people – these are protected in art. 24.²¹⁵ Articles dealing specifically with workers do protect the sportsmen (as long as they are workers) against unjustified dismissal in art. 30 and against child labour in the art. 32. Social security is guaranteed in art. 34 and the procedural safeguards – right to an effective remedy and to a fair trial – are established in art. 47 and 48, guaranteeing a fair trial with public hearing and before an independent tribunal.

This Charter is relevant for the area of sports as well, since the sportsmen just like any other citizens of the EU are directly affected by the EU law and its interpretations and application, even though before 2009 (Lisbon Treaty), there was no mention of sports in the basic treaties of the EU. There was only an attempt (by UEFA) for a protocol on sports, attached to the Treaty.²¹⁶ However, it was only with the Lisbon treaty that the sport found its way into the Treaty.

Chapter II The proportionality of the basic rights limitation

In this chapter, I will analyze the basic-rights-implications of behaviour regulation in sports. The conduct rules, as already mentioned, often have a connection to the right to privacy,²¹⁷ or to a freedom of expression,²¹⁸ but this is not necessarily always the case.

In case of a conflict with the basic rights, it is advisable that a behaviour clause should explicitly address the question of proportionality between the prohibited behaviour and the right to privacy, freedom of expression and other possibly infringed rights. Such a statement on proportionality is of course not necessary, a court would always apply this principle, still, it is

²¹⁴ Cf. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF> (accessed on April 21, 2010).

²¹⁵ Further elaborated in a binding directive no. 94/33/EC on the protection of young people at work.

²¹⁶ PARRISH, Richard: The Birth of European Union Sports Law. In: *Entertainment and Sports Law Journal*, , p. 33.

²¹⁷ E.g. by prohibiting sexual intercourse the evening before a match. Cf. GERMAINE, Jean-Claude: *Le sportifs et le droit*, p. 50.

²¹⁸ Cf. BLANPAIN, Roger: *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, p. 84.

useful to remind the one who is preparing the contract, as well as a possible arbitrator or whomever who applies the clauses of the contract, that there is a necessity of the proportionality and balance between the interests of the parties. Very broad behaviour clauses run the risk of being challenged before the court which would then apply its own rules of proportionality. If the sporting bodies wish to evade such a judicial review with a possibly negative outcome, they should always stick to proportionality – mainly when applying a sanction. The sanctioning phase of the behaviour regulation is namely more in the risk of disproportionality than the wording of the rules of conduct. Examples of how the sporting arbitral bodies perceive proportionality have been already shown. Therefore, a cautious use of the clauses and sanctions is necessary.

Not to go far away from the examples given in the previous text, let us in this context offer an example of a necessity of balance of interests, while addressing potential implications of doping controls on the privacy of the sportsmen.²¹⁹

It is a duty of every sportsman to behave so as not to have his doping tests positive – involving a regular visit of the WADA website and control of the substances forming a part of every food or medicines the sportsman is taking into his body. The sportsmen can namely be tested any time (not only during the competitions) on whether they do use doping.

Is this to be considered proportionate? What if a player uses a drug (e.g. the already mentioned cocaine) in his holidays that can not influence his abilities in a competition which is supposed to take place in a few months? This could definitely be considered disproportionate by some athletes. Would it not be more proportionate to allow for the testing only in a period directly preceding the competition? The argument to the negative is that the medical science is so much developed, there is a doping which can show results even after a few months. However, probably not all substances considered doping do have such effect. Why should then positive testing to cocaine during a holiday break be considered doping for a future competition? The two aspects – the private life and the interest of a fair sporting should be taken into account and balanced proportionately to answer this question. Should the right to privacy not be taken into account, every slight doping even without an effect on the future physical shape of the athlete would then be considered in breach of the anti-doping rule. The privacy would thus be disproportionately limited. Otherwise, if sportsmen were sanctioned only for doping that can have a future effect on the physical abilities of the sportsman, some activities in the free time could be considered as falling outside the scope of rules inherent to sports, respecting the sportsmen's privacy without endangering the integrity of sports.

Currently, because of the testing for doping, some chosen sportsmen have to permanently announce their whereabouts (whereabouts information²²⁰) to the International Sport Federation or

²¹⁹ Cf. SOEK, Janwillem: Is the Professional Athlete's Right to Privacy Being Tacitly Ignored? In: *International Sports Law Journal*, 2008, 1-2, p. 100. Available online: http://www.asser.nl/upload/documents/1182010_43802ISLJ%202008_1-2.pdf (accessed on March 17, 2010). See as well RIGOZZI, Antonio – KAUFFMAN-KOHLER, Gabrielle – MALINVERNI, Giorgio: Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code. In: *International Sports Law Review*, 3, August 2003, p. 39-67. The authors examine whether the World Anti-Doping Code, which became effective as of January 1, 2004, is compatible with athletes' fundamental rights, including the right to personal liberty and privacy, equal treatment, a fair trial, and the right to work.

²²⁰ <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/IST/QA-on-Whereabouts/> (accessed on March 17, 2010). Rules are to be found in the International Standards for Testing, binding those who have adopted the World Anti-Doping Code.

National Anti-Doping Organisation, what might be considered a breach of their right to privacy. The rules on this are to be found in the International Standards for Testing,²²¹ binding those who have adopted the World Anti-Doping Code. These rules were revised as of January 1, 2009. According to the new rules, sportsmen have to be available for testing only for one hour between 6 a.m. and 11 p.m., whereby they can choose whether they will be available at home or at some other place.²²² Three missed tests or three times lacking whereabouts information in 18 months period lead to a sanction of 1-2 years of suspension.

Another aspect of doping controls, already mentioned, is the fact that these rules are applicable only to the athletes in a registered pool, i.e. only some athletes were chosen to undergo this procedure. The rules on choosing the candidates could also possibly be challenged on the grounds of equal treatment.

Finally, the data gained in the process of testing needs to be protected as well – therefore an International Standard for the Protection of Privacy and Personal Information was prepared by WADA, effective in a changed version as of January 1, 2009.²²³ The rules on testing for doping thus clearly show strive for a balance. Due to the introduced changes, the balance between privacy and anti-doping interests has shifted more in favour of the privacy. Still, maybe not enough.

The main questions remain the following: Does this a regulation, made by WADA as a non-governmental organization, breach the right to privacy? If the answer is affirmative, is this breach proportional and balanced? What kind of interests should be balanced here? What sanctions are allowed? Is there a possibility to challenge a decision before any judicial body?

Answers to these questions comprise certain aspects of autonomy of sports (in the form of creating own rules), aspects of protection of basic human rights and freedoms (including the right to a fair trial) and an aspect of employment relationship (the athlete may be dismissed, or disciplined).

Rules on doping certainly are sporting rules,²²⁴ independent from any possible criminal consequences of the use of a drug (or any other doping substance). This makes the doping offence and its sporting consequences generally not reviewable by a national court, should not any basic right or economic interest of a sportsman be interfered with. However, anyway, the cartel-like organization of sport may prevent the sportsmen from taking part in competitions even if a court should find a breach of the player's rights.

This could be a case of a failure to announce the whereabouts information, which may result in a sanction. This sanction would be considered contrary to any principle of fair process by some authors, as there is no proof on actual doping, only a breach of the rule of the WADA code.²²⁵ Still, the sporting bodies could enforce a suspension or any other sanction.

²²¹ International Standards for Testing. Available online: http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Int.%20Standard_Testing_2003version_EN.pdf (accessed on March 13, 2010).

²²² <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/IST/QA-on-Whereabouts/> (accessed on March 13, 2010).

²²³ Available online: http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/WADA_IS_PPPI_TC_EN.pdf (accessed on March 13, 2010).

²²⁴ This was admitted by the Court of Justice of the European Union in the Meca-Medina case.

²²⁵ SOEK, J.W.: Recht van de atleet op eerbiediging van zijn privéleven. In: *Sport en Recht: Buiten Rechten of Buiten Spel?*, p. 62.

The main problem is and remains that of proportionality. Is the interference of anti-doping rules with the right to private life, right to a fair trial and potentially also the right to work proportionate? Sporting organizations can claim that if there were sportsmen committing frauds (doping), the interest and trust of public in the sporting would certainly diminish (the other aspect is the protection of athlete's health).²²⁶ The sporting bodies have an interest in sports without doping, what should be considered as an interest of the sportsmen as well. From this point of view, the interference with the rights could be justified. Besides, however, the sportsmen have another interest – in their privacy and the right to work. The measures to fight the doping should therefore be accepted, but only in the form least interfering with the rights of the sportsmen. How to find a proportionate solution? The testing was already made more proportionate by abolishing the 24/7 obligation to submit to tests, but there may still be some space for more proportionality between the protected interests of sports and sportsmen.

Some may propose there is also a possibility that the sportsmen will accept these tests limiting their privacy voluntarily and therefore there is no need for proportionality. However, could this acceptance of tests be really considered voluntary? The sportsmen are not in a strong negotiating position in this matter. In fact, they have no choice. If they don't accept the testing and the interference with their basic rights, due to the enforcement system of sporting organizations, their right to work would be affected. They would simply not be allowed to compete and to make their living that way. Is there a balance of interests then?

Finally, what also seems to be not satisfactorily guaranteed here is the right to a fair trial. In fact, should the doping control bodies make a decision not compatible with the right to a fair trial, the sportsman would get only a limited, or even no assistance from any side. Some authors point to a U.S. case *United States Anti-Doping Agency v. Mark Hainline*, where “a suspension rendered the athlete ineligible to have access to the training facilities of the USOC Training Centers or other programs and activities of the USOC, including grants and awards of employment.”²²⁷ Therefore, the right to work of the employee could be seriously infringed. A judicial recourse would not be very much useful. Only a sporting arbitration would most probably be used, with the CAS at its top. Still, “those who have to finance their arbitration and lose, leave the process morally condemned and financially depleted, facing the prospect of temporary or permanent unemployment, usually with very modest transferable skills.”²²⁸

Chapter III Fair trial

To decide on the proportionality in a just and fair trial, procedural safeguards need to be guaranteed. The procedure, either before a court or an arbitral body should meet the principles of fair trial. These are mainly:

- trial by independent judges
- in due time
- right to receive information (access to the files)
- right to be legally represented (right to legal counsel)
- right to be heard (right to defence)
- trial in public

²²⁶ Ibid., p. 72.

²²⁷ CARSKA-SHEPPARD, A. – WEILER, P. – MEDFORD, J.: *Back on track: The principles of corrective justice for performance enhancing malpractice in sports*. Available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020302 (accessed on March 16, 2010).

²²⁸ Ibid.

- uninfluenced witnesses
- legality, equality before the law, presumption of innocence, etc.

In the following chapter, the last chapter of this thesis, I will pay attention to the principles applicable during the procedure of determining a breach with the rules of conduct and with imposing a proper sanction within sporting. In this respect, I will also concentrate on the questions of competence of sporting bodies and regular courts to decide the matters related to the behaviour rules in sporting.

§ 1 The autonomous dispute resolution competence in sports

Due to a possible problem with establishing the breach of a behaviour clause, either on disciplinary level or on a level leading to the termination of contract, an effective system of dispute resolution is necessary. This system represents the basic safeguards of the sportsmen's rights in the disciplinary process and within the process of termination of contract.

The need to protect the rights of sportsmen is a result of the specificity of sports, manifested in the form of a normative system of its own (created by contracts – either real or “fictitious” ones – by accepting the regulations of a sporting organization), pyramid structure and hierarchical character of sports organizations. Due to these facts, organizations have extralegal possibilities of enforcement and reasons for the reluctance to allow ordinary judicial system to decide or review their disputes. The courts themselves recognize the difficulty of discerning purely sporting matters and matters reviewable by the court.

I. Autonomy recognized by national law

Certain autonomy in deciding specific sporting disputes is allowed, whereby the rules on the dispute resolution have various sources. Countries which took an interventionist approach towards sports, introduced **acts of parliament** dealing with the basic principles of the dispute resolution procedure within sports. For example, in Slovakia, Act no. 300/2008 Z.z. on the organization and support of sport allows (in para. 24) for setting down the dispute resolution rules in case of a breach of a rule of the game. These are used during the match (or other sporting competition) itself. The decisions are basically not reviewable. In the case of a major breach of the rules by a match-arbitrator, disciplinary proceedings could be filed against that person.

Another type of disputes according to the Slovakian Act represents those concerning sporting rules outside of the game itself (the Act reads “the rules of a sporting competition outside of the game”) such as:

- disputes between the organizer of the competition and a club or sportsman,
- disputes between the clubs other than those concerning their business relations or their property, and
- disputes between a sportsman and a club where there is a contractual relationship other than labour law or civil law relationship (those are to be decided by the court).²²⁹

²²⁹ Here it is necessary to stress that the labour-law-character of the sporting activity is a matter of debate and is not recognized in practice in Slovak Republic. It is an interesting matter to discern between the rules that should be governed by the organization itself as purely sporting rules and the rules that should be considered labour law rules. The Slovak Labour Code does not allow for combining labour law and other legal disciplines in a labour contract. The standards set in the contract have to be those as recognized by the Labour Code only. However, this does not preclude the sporting organizations from introducing their own rules, specifying the rights and duties of an employee – a sportsman, as long as these are matters pertaining to the dependent labour performed by the employee. These

In these cases the Slovakian Act allows for competence of sporting association to decide the case using its own procedural rules and system of sanctions. On both the national, as well as on the lower, club level, special bodies were created to deal with the disciplinary measures as laid down in the disciplinary codes of the sporting bodies. These are mostly imposed by the so-called disciplinary committees. As the Act reads, their competence is legally recognized only in the matters of breach of the “rules of sporting competition” and of the member duties of a club (para. 26 on disciplinary procedure adds to this competence in cases of breach of “rules set by the organizations and their bodies”). These are probably to be understood as autonomous “sporting issues”. In all the other cases, the court would be competent.

However, at this point one may think of cases of purely sporting matters, decided by the sporting bodies, which may disproportionately affect the rights of the sportsman as a human being and a citizen. For example, if a standard sanction to be applied in the disciplinary procedure – warning, fine, suspension and expulsion (as set by the Act), could potentially be in breach with the basic rights and freedoms of a person either as laid down by national legislation, or supra-national (international) rules. An example would be a disproportionate length of suspension, colliding with a right to work, should the sportsman be considered a worker (which is not the case in Slovakia). Therefore, these cases should be reviewable by the court as well, even though the Slovakian Act reserves these decisions to sporting bodies.

There seems to be a parallel to the question of competence of the European Union to intervene in sports. Just like the decisions of the Court of Justice of the European Union respect the specificity and autonomy of sport, but protect the basic rights of every person including sportsmen, the same should apply for the national courts. To put it simply, being a sportsman should not mean deterioration of the rights guaranteed by the national and international legal instruments to each and every human being (citizen). A court should be the safeguard of this.

II. International autonomy

Even without an interventionist state, allowing for disciplinary rules and autonomous dispute resolution, **international and national sporting organizations** create their own rules on these matters. They may take a form of disciplinary codes, as it is e.g. the case of FIFA. According to art. 73 of the FIFA Disciplinary Code (2009), specific judicial bodies were created: the Disciplinary Committee, the Appeal Committee and the Ethics Committee. The Disciplinary Committee sanctions a breach of FIFA regulations and the Appeal Committee hears appeals from the Disciplinary Committee. Finally, according to art. 74 “*decisions passed by the Appeal Committee may be appealed against before the Court of Arbitration for Sport.*” An autonomous system of disciplinary dispute resolution was thus created.

The Disciplinary code also tries to offer safeguards for the independence of the bodies, e.g. by prohibiting that the members of the judicial bodies could belong to any other committee of FIFA. Still, on the club level as well as on the national and international level doubts can be raised as to the independence of the dispute resolution bodies. As far as the procedure itself is

could be for example specifications of what represents a misconduct. However, no sanctions are allowed under the Slovakian labour law, therefore no contractual agreement on fines is allowed in labour relationship. How to reconcile this with the sanctions imposed by the club (employer) on the players (employees)? This is also a reason why the sporting bodies are reluctant to recognize the sporting relationship to be an employment relationship. There is a need to make the labour law more flexible if it should allow for contractual sanctions. Another possibility would be to discern between the labour law relationship and another relationship between a player and the club, based for example on the freedom of association, or civil law, allowing for double relationship between the parties.

concerned, art. 96 deals with the admissible proofs (*Proof that violates human dignity or obviously does not serve to establish relevant facts shall be rejected.*). The parties may have a legal representative present during the proceedings (art. 100). Matters of language and of the form of communication are addressed as well (art. 103 (2): *The communication of decisions by electronic mail is not permitted*). These are the general rules, which are further specified in the section on Disciplinary Committee. Basically, the procedure takes a written form, oral statement, if necessary, takes place behind closed doors (art. 111). What is surprising is the fact that the reasons for decision need not to be communicated automatically, but only if the party requires so (art. 116). Appeal is not allowed in enumerated cases including fine, warning et al. If allowed, it has to be filed within three days of notification of the decision. As to the material law, art. 144 (3) reads that “*during all their operations, the judicial bodies of FIFA draw on settlements already established by sports doctrine and jurisprudence.*” It seems that a body of “sports law” (*lex sportiva*) is supposed to be established.

National bodies take similar approach. The Slovak Ice-Hockey Association in its Disciplinary Code discerns breach of rules set by the association or international federation on the one hand, and breach of sporting and moral rules in the course of the competition on the other hand. Collective responsibility of a club is distinguished separately (art. 3).

The competence to decide disciplinary matters belongs to the club, the disciplinary committee of the Association and to the Executive committee of the Association. A possibility to decide on a disciplinary matter precludes in one year, except when a criminal proceeding takes place in the same matter (art. 22). The proceeding itself is not open to public, but the sportsman himself is present. An appeal is possible to the higher level of organization – to the Executive Committee of the Association or to the executive committees of the regional associations.

III. Collective bargaining and the autonomy in dispute resolution

Besides the regulation of dispute resolution as presupposed by the intervention of a state, or by the sporting bodies themselves in their statutes and disciplinary codes, other rules can be put down in writing within the **collective bargaining** in countries where the sporting is considered to be an employment relationship (or where a social dialogue exists between the partners). In case of conflict between a disciplinary code and a collective agreement, the agreement should prevail.

In Austria, a proposal of a collective agreement in the football *Bundesliga*, as of March 16, 2008,²³⁰ presupposed the creation of disciplinary committees in every club. The proceedings were supposed to be not public, but the player would be allowed to bring a person of trust with him. The main principles of the procedure would prohibit double sanctioning, unequal treatment and disproportionality. The interference with the rights of the player should be minimal.

IV. Contractual autonomy in the dispute resolution

Individual employment contracts (based on the national legal system, not on a specific *lex sportiva*) may also set down basic rules for the dispute resolution. However, this is usually reserved for disputes in relation to the validity of the contract itself and not to the disciplinary offences. An example was quoted by the Court of Arbitration for Sport (CAS 2008/A/1644

²³⁰ Kollektivvertrag für Fußballspieler/innen der Österreichischen Fußball-Bundesliga. Stand 16. März 2008. Available online: http://www.vdf.at/KV-Entwurf_Stand_18.03.08_final.pdf (accessed on March 17, 2010).

Adrian Mutu v/ Chelsea Football Club Limited) from the employment contract of the player, where the jurisdiction of FIFA Dispute Resolution Chamber and of CAS was contractually agreed upon:

The parties hereto confirm and acknowledge that this contract[,] the rights and obligations undertaken by the parties hereto and the fixed term period thereof reflect the special relationship and characteristics involved in the employment of football players and the participation by the parties in the game of football pursuant to the Rules and the parties accordingly agree that all matters of dispute in relation to the rights and obligations of the parties hereto and otherwise pursuant to the Rules including as to termination of this contract and any compensation payable in respect of termination or breach thereof shall be submitted to and the parties hereto accept the jurisdiction and all appropriate determinations of such tribunal panel or other body (including pursuant to any appeal therefrom) pursuant to the provisions of and in accordance with the procedures and practices under this contract and the Rules.

A similar rule is to be found in an Italian collective agreement, according to which an arbitration clause concerning the establishment, interpretation and termination of the contract should be entered into every individual sports services contract:²³¹

21.1. In conformity with the provisions of article 4, par. 5, of Act no. 91 of 23 March 1981 and subsequent amendments, as well as art. 3, par. 1 (last sentence), of Act no. 280 of 17 October 2003, the individual sports services contract shall contain an arbitration clause as a result of which the settlement of all disputes regarding the interpretation, execution or cancellation of the said contract or, in any case, those arising in any way from matters relating to the work relationship springing from it, shall be referred to the AB for its decision which shall be delivered in an informal manner.
21.2. By signing this Contract, the parties undertake – on the basis of their common belonging to the sports system and of their acceptance of the constraints consequently assumed by signing with a club or by affiliation, as well as of the legal regulations applicable to the case – to accept the cognizance and resolutions of the AB without reservation.

These tools should protect the interests of the employees just like those of the employers, both in the disciplinary cases as well as in cases of termination of contract. However, some doubts may emerge as to the impartiality of the “judicial” or arbitral bodies and their competence to interfere with the basic rights and freedoms of sportsmen, guaranteed by the national and international law. How a career can be ruined if the fair process is lacking, was shown clearly in the German case of Katrin Krabbe,²³² where the complicated story evokes a novel – with exchanged urine samples, doping which was not considered doping at the time of the testing, decision on suspension from an executive body which had no power to do so, misdemeanour charges for obtaining a cure on the black market, punishment by an Association that the athlete was not even a member of (since only clubs can be members), and finally being punished twice by the German Association and the IAAF, moreover without a hearing.

²³¹ Collective Agreement Between Federazione Italiana Giuoco Calcio (F.I.G.C.), Lega Nazionale Professionisti (L.N.P.) (Italian League of Professionals) and Associazione Italiana Calciatori (A.I.C.) pursuant to art. 4 of Act no. 91 of 23 March 1981, and subsequent amendments. Available online: <http://www.assocalciatori.it/LinkClick.aspx?fileticket=L2qDGaX0FXw%3D&tabid=58&language=en-US> (accessed on March 17, 2010).

²³² FAYLOR, John A.: The Dismantling of a German Champion: Katrin Krabbe and her Ordeal with the German Track and Field Association and the International Amateur Athletic Federation (IAAF). In: *Arbitration International*, 17, 2001, 2, p. 164-169.

Therefore, a **review by the court** (outside the system of “sports family”) should be guaranteed. However, this is often evaded by the sports organizations, including a clause in their basic statutes (regulations), binding the parties not to use the services of a court, but rather those of an arbitral body. In general, the regulations of sporting bodies to this sense, as well as an arbitration clause in a contract could both be considered as a contractual agreement,²³³ preferring the services of arbitrators (alternative dispute resolution) rather than the ordinary courts. The use of an arbitration clause is allowed (with the exception of labour law matters in countries like Germany or Slovak Republic), but the possibility of recourse to a court should always be preserved.

In the case of sporting arbitration, it is moreover often not sure, whether the agreement on using the services of an arbitrating body was really the will of the player, who is usually a weaker party to the contract. Ian Blackshaw in this context offers an example of a case of a butcher, who was brought to a kind of “settlement” of the dispute rather than turning to the ordinary court, later, however, considered this as a forced act.²³⁴

§ 2 Dispute resolution in between the courts and arbitration – the procedural aspects

As was already noted, there are two main types of disputes occurring in the sports. The first group is the disciplinary cases, decided by the judicial bodies of the sports organizations. On the other hand, there are disputes concerning the contract of the player with the club. These disputes, just like the appeals from the disciplinary bodies may be brought before the ordinary courts, based on the competence of the courts to decide labour-law and civil-law disputes, as well as to review the decisions taken by the bodies created on the basis of the freedom of association. However, sporting bodies are reluctant to have their decisions or disputes reviewed by an independent court, in breach of the basic rights to a fair trial. As Ken Foster remarks, “*athletes are now being asked to sign agreements not to take legal action against international sporting federations as a precondition of taking part in international competitions. Such waivers have been used at the last three Olympic Games.*”²³⁵ This should be considered completely illegal! In

²³³ Cf. PAULSSON, Jan: Arbitration of International Sports Disputes. In: *Arbitration International*, 9, 1993, 4, p. 369.

²³⁴ BLACKSHAW, Ian: Mediating Business and Sports Disputes in Europe. In: *Entertainment and Sports Law Journal*, 2008, para. 19. Available online: http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume6/number2/blackshaw_int (accessed on March 15, 2010). It is the case *Deweere v Belgium* (1980). “*In Deweere, a Belgian butcher was facing a criminal prosecution for over-charging for pork. The Belgian authorities threatened a provisional closure of his business until the conclusion of the criminal proceedings, which might be for a period of months. Alternatively, they offered the butcher what they described as ‘a friendly settlement’, which involved payment of the relatively modest sum of 10,000 Belgian francs. Not surprisingly he chose the ‘friendly settlement’, but he subsequently complained to the European Court of Human Rights that he had been forced to go the ‘friendly settlement’ route and, as a result, was denied the fair trial to which he was entitled. The Court agreed and held that, whilst there was nothing wrong, in principle, with a party waiving their right to either a civil or a criminal trial by entering into an agreed settlement, on the facts of the case the settlement had been forced upon him and, therefore, it was not voluntary. The consequences of having his business closed down for months were so severe that the butcher had no practical alternative but to agree to pay the penalty, which, in effect, had been inflicted upon him by the State without a trial. Indeed, the European Court of Human Rights has said that the right of access to a Court may, in fact, be legally waived, for example by means of an arbitration agreement, but that such a waiver should be subjected to a ‘particularly careful review’ to ensure that the claimant is not subject to any kind of ‘constraint’ (Deweere, at para 49).*”

²³⁵ FOSTER, Ken: Is there a Global Sports Law? In: *Entertainment Law*, vol. 2, 2003, no. 1, p. 15.

case of disciplinary matters this is easy to understand as these matters are perceived by the sporting organizations (incorrectly) to be purely internal matters of the sporting organization. On the other hand there is no clear reasoning by the sporting organizations why disputes concerning employment contracts of the sportsmen, should not be decided by the regular courts just like in every other employment relationship.

Is it caused by the strive for “specificity”, or a fear of losing high compensations, should a continental European Court with no tradition of allowing for tremendous damages decide on the matter? Be it as it may, the sporting organizations can not legally restrain the possibility of recourse to a court. What they can do is only to use their extralegal power of a monopolistic organization to deter the sportsmen from using the services of a court.

A classical example of what happens if a party to the dispute uses legal (extra-sporting) tools to have a dispute settled, is a case from the Netherlands from 1991, when a second half of a match of FC Den Bosch was supposed to be played again on the basis of decision of the Court in Utrecht, due to the premature end of the original match when fans have entered the field. However, the second half of the match never took place, as the Court in Amsterdam abolished this decision and the UEFA has suspended the FC Den Bosch for three seasons as a punishment for involving a regular court in the matter.²³⁶

A more famous example could be that of the famous cyclists *Walrave and Koch*, who have given up their case, when the International Cyclist Federation threatened to abolish their discipline.²³⁷ In a similar Dutch case *Colyn and Zijlaard*, their team was not allowed to compete despite of the court’s decision. The Federation preferred to pay a fine instead.²³⁸

Sports organizations this way evade the competence of ordinary courts out of fear that the regular court could challenge sporting rules, which would make the whole idea of sporting impossible. Evidence of such a threat can be found again in the Netherlands as far back as in 1927, when a police officer witnessed a physical contact between a defender and an attacker in a public football match. The officer considered it as his duty to bring the player to police station and report on the offence. Only after that the player was allowed to return to the playground. However, the match was not finished, and all football matches were suspended while a process of negotiations with the government took place.²³⁹ The Football Association sent a letter to the Minister of Justice, stating:

*We are of the opinion that the police’s only duty on sports fields is to keep the peace. Maintaining the rules of the game, which do not allow rough play, is the referee’s duty. In participating in the match, the players show their acceptance of this form of supervision. Interference from the other parties, especially the police, would make regular practice of the sport impossible.*²⁴⁰

The same applies to the relationship between sports organizations and courts nowadays. In the past, the FIFA and UEFA issued regulation seven prohibiting the players to turn to the courts while solving their dispute, claiming that such provision aims at protecting mainly the purely sporting rules rather than any other potential legal aspects of sporting (renting a field

²³⁶ KOLLEN, F.C.: Sport en Regelgeving. In: *Sport en Recht*. Ed. H.H. van der Brug, H. de Doelder, C.J.M. Klaassen, F.C. Kollen. Zwolle : WEJ Tjeenk Willink, 1992, p. 52-53.

²³⁷ STAVEREN, Heiko T. van: Why does sport need its own jurisdiction? In: *International Law and The Hague’s 750th anniversary*, p. 230.

²³⁸ Ibid., p. 231.

²³⁹ Ibid., p. 229-230.

²⁴⁰ Ibid., p. 230.

etc.).²⁴¹ Nevertheless, such a rule is in breach of the Art. 6 of the European Convention on Human Rights. Therefore, a court may overrule the FIFA or UEFA or any similar regulations.²⁴² However, as already shown, the effect of the court decision may be hampered by the monopolistic power of the sports organization.

On the other hand, the courts themselves are not very keen on deciding the sporting matters, although the judicial review is generally possible, except in Portugal, where art. 25 (2) of the basic law claims that “*any decisions or deliberations concerning strictly sporting matters which are based on a breach of technical or disciplinary norms may not be challenged nor can they be appealed against outside the relevant sporting authorities.*”²⁴³ This could be a hindrance to judicial review of a disproportionate penalty imposed by a competent body, not respecting the basic principle that “*sportspersons, who are ... citizens, should always be given recourse to a judicial system that corresponds to their needs and expectations.*”²⁴⁴

In the UK, courts don't generally intervene in the sport disputes, unless a principle of “natural justice” is challenged. A similar approach is to be seen in the USA. In case *Harding v. United States Figure Skating Association* from 1994, the court even stated:

*The courts should rightly hesitate before intervening in disciplinary hearings held by private associations... Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute.*²⁴⁵

The judicial review should thus concern the protection of legal interests, fundamental rights and principles of justice. Otherwise, sporting bodies are competent to decide. I suppose, this still leaves an ample space for autonomous dispute settlement. It would not make much sense to subjugate every decision-making to the regular courts, since in comparison with the court procedure, decision-making of the sporting bodies or arbitral bodies can be much more speedy, what is of major importance for sports (e.g. in disputes occurring during the Olympic games).²⁴⁶ The use of arbitral or autonomous dispute-settlement does not automatically call for judicial revision and does not mean the court will change or abolish the original decision. This happens only if the arbitration proceedings and disciplinary proceedings don't respect the basic rules of a fair trial. In these cases, the court acts as a last instance of protection of a sportsman's rights.

In Australia, there was an interesting debate on whether disciplinary tribunals, especially in sports, are required to apply natural justice. The court in case *AFL v. Carlton* distinguished between procedural fairness and natural justice, but at the end of the day refused to determine the matter definitively.²⁴⁷ Still, the necessity of independence of the arbitrating body is recognized by

²⁴¹ Ibid., p. 231.

²⁴² Ibid., 231.

²⁴³ CHAKER, André-Noël: *Study on national sports legislation in Europe*, p. 96.

²⁴⁴ Ibid., p. 136. Cf. BITTING, Melissa R.: Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for ‘Job Security’? In: *Florida State University Law Review* 25, 1998, p. 509.

²⁴⁵ BLACKSHAW, Ian S.: *Mediating Sports Disputes: National and International Perspectives*. The Hague : T.M.C. Asser Press, 2002, p. 2-3.

²⁴⁶ PAULSSON, Jan: Arbitration of International Sports Disputes. In: *Arbitration International*, 9, 1993, 4.

²⁴⁷ NOLAN, Anthony: Australian Rules Football: Disciplinary Processes. In: *Arbitration International*, 16, 2000, no. 4, p. 483.

the sporting organizations, as a way to prevent the challenging of the decision before the court.²⁴⁸ Moreover, further questions are to be considered in relation to make the procedure fair and therefore waterproof from any possible interference attempts by courts. The main question dealt with should be the publicity of the proceedings.²⁴⁹

Some results in the attempt to make the proceedings fair are to be found among the basic principles of the FIFA Dispute Resolution Chamber (DRC). These comprise the competence of the DRC to decide only on the contracts that were lodged with the football association, the principle of *no ultra petita* (the award shall not exceed the claimant's claim), principle of *culpa in contrahendo* (obligation to compensate for damages incurred in the process of failed negotiation), principle of *res iudicata* and the principle of *pacta sunt servanda*.²⁵⁰

§ 3 Arbitration bodies in sports

To set things straight, according to Reeb,²⁵¹ there are three possible ways of solving sports related dispute between the parties:

- a) by the national sports organization,
- b) by competent national court,
- c) by arbitration.

Of course, one has to immediately add international sports organizations offering arbitral services (e.g. FIFA DRC), supranational courts (Court of Justice of the European Union) and international arbitration bodies (e.g. Court of Arbitration for Sport) into this scheme. Moreover, before arbitration, mediation can be required (see the International Ice Hockey Federation regulations²⁵²).

Reeb's scheme can be more simplified, as already mentioned in the previous chapter, since there are basically two tracks of dispute resolution – by regular courts, or by extra-judicial means (be it autonomous sporting bodies or general arbitral bodies). The role of the courts is only a minor one – it is said that only 0,1 % of sporting disputes in football in Germany went to the national court.²⁵³ As far as the autonomous sporting bodies are concerned, one can distinguish between international and national ones. The national bodies of dispute resolution represent e.g.

²⁴⁸ Therefore both Dispute Resolution Chamber of FIFA and Court of Arbitration for Sport had to be reorganized. A similar problem emerged within the Formula One – namely whether a specific Contract recognition board was to be considered as an independent arbitral body. See KAUFMANN-KOHLER, Gabrielle – PETER, Henry: Formula 1 Racing and Arbitration : The FIA Tailor-Made System for Fast Track Dispute Resolution. In: *Arbitration International*, 17, 2001, 2, p. 174.

²⁴⁹ BLACKSHAW, Ian: Should Sports Disciplinary Proceedings Be Held in Public? In: *International Sports Law Journal*, 2005, 3-4, p. 54. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id80_1_ISLJ_2005-3-4.pdf (accessed on March 15, 2010).

²⁵⁰ SOEK, Janwillem: Termination of International Employment Agreements and the “Just Cause” Concept in the Case Law of the FIFA Dispute Resolution Chamber. In: *International Sports Law Journal*, 2007, 3-4, p. 31. Available online: http://www.asser.nl/sportslaw-webroot/cms/documents/cms_sports_id121_1_ISLJ%202007_3-4.pdf (accessed on March 15, 2010). Based on the following cases: 34325 of 24.3.2004, cases 114707, 114708 of 9.11.2004, 115236 of 2.11.2005, 16309 of 12.1.2006, case 16830 of 12.1.2006, case 861307 of 17.8.2006, cases 25485 of 4.2.2005, 55532 of 13.5.2005, 115236 of 2.11.2005, 16723 of 12.1.2006, 36619, 36882, 361145 of 23.3.2006, 106678, 106715 of 26.10.2006.

²⁵¹ REEB, Matthieu: The role of the Court of Arbitration for Sports. In: *International Law and The Hague's 750th anniversary*, p. 233.

²⁵² BLACKSHAW, Ian S.: *Mediating Sports Disputes: National and International Perspectives*, p. 170.

²⁵³ NAFZIGER, James A.R.: The Court of Arbitration for Sport and the General Process of International Sports Law. In: *International Law and The Hague's 750th anniversary*, p. 247-249.

the Highest Judicial Sport Committee in Cyprus, Arbitration Commission for Sport, created in Luxembourg in 1994,²⁵⁴ UK Sports Dispute resolution panel (established in 2000), or Australian National Sports Dispute Centre.²⁵⁵ The international bodies are Court of Arbitration for Sport and the bodies of international federations (FIFA has a Dispute Resolution Chamber). The mutual relationship and overlapping competence between the different arbitral bodies and courts can become a source of problems.

Concerning the competence, basically, the main bodies in the dispute resolution process in the sports are the national sports bodies (sometimes national laws allow for cases to be decided by the National Olympic Committee). Appeals against their decisions may be filed with the sporting International Federations. It is unclear, whether the International Olympic Committee (IOC) can overrule the decisions of International federations and therefore the IOC should represent a higher instance. It seems to represent a higher instance in disputes between a Federation and a National Olympic Committee, which are decided by the IOC, or CAS as the ultimately highest arbitration authority in sports, created by the IOC.²⁵⁶

A problem of overlapping jurisdictions appeared in the *Foschi v. United States Swimming, Inc.* A swimmer, Jessica Foschi challenged a decision of the United States Swimming, Inc. concerning her punishment for doping. The American Arbitration Association has decided there was no authority by USS nor by the *Fédération Internationale de Natation Amateure* (FINA). At the end of the day, FINA has overruled the decision of AAA and reimposed the two-year suspension. CAS has then lowered the suspension to 6 months in 1997 (case 96/156).²⁵⁷

This case clearly shows that ultimately the most important on the international level is the Court of Arbitration for Sport. Even in football, where FIFA only rarely submits its cases to CAS, during the summer Olympic Games, an *ad hoc* division of CAS is in charge over any disputes including the football ones.²⁵⁸ Otherwise, outside the period of Olympic Games, there is the FIFA Dispute Resolution Chamber and its appellate body, Arbitration Tribunal for Football (ATF) set by FIFA under the umbrella of International Court for Football Arbitration.²⁵⁹

CAS, as the highest arbitral body in the world of sports was set up as an idea of Juan Antonio Samaranch, the president of the International Olympic Committee and judge Kéba Mbaye, in 1983. First, it was dependent on IOC to a large extent. Only after a case from 1993, decided by the Swiss Federal Tribunal, challenging a decision of CAS, a special International Council of Arbitration for Sport was established by the IOC, to supervise the CAS. From that moment on, the CAS started to be considered relatively independent. This was laid down in the Code of Sports-related Arbitration from 1994.²⁶⁰

The main function of the CAS is to decide disputes brought before the Court on the basis of a contract (arbitral) clause, or based on the agreement of the disputing parties. CAS also acts as an arbitral body for doping cases in the international level, as designated by WADA (World Anti-

²⁵⁴ CHAKER, André-Noël: *Study on national sports legislation in Europe*, p. 92-93.

²⁵⁵ BLACKSHAW, Ian S.: *Mediating Sports Disputes: National and International Perspectives*, p. 49.

²⁵⁶ *Ibid.*, p. 245.

²⁵⁷ *Ibid.*, p. 242-243.

²⁵⁸ *Ibid.*, p. 112.

²⁵⁹ *Ibid.*, p. 114.

²⁶⁰ REEB, Matthieu: The role of the Court of Arbitration for Sports. In: *International Law and The Hague's 750th anniversary*, p. 234.

Doping Agency).²⁶¹ Its hearings are not public and the awards are usually anonymous, with the exception of doping cases, which should have a deterrent effect. Another important function of the CAS is to decide on appeals from sports federations, by a specific Appeals Arbitration Division. And last but not least, the CAS gives advisory opinions when asked by sporting bodies, and provides mediation, if asked for it. What the CAS does not do, is resolving the technical questions relating to the rules of the game.²⁶²

The CAS has also created its subsidiaries in Australia and in the USA. It also established an already mentioned *ad hoc* division for the needs of summer Olympic Games (for the first time in Atlanta in 1996) and winter games (for the first time in Nagano in 1998). Since then, there is an *ad hoc* division present at every Olympic games.²⁶³

Enforcement of the decisions passed by the CAS depends on whether a country has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under condition that the national legislation recognizes a possibility of arbitral decision-making in sports. This may lead to a situation, when sport is considered an employment and a country does not allow arbitration in labour matters – this is a case of Germany or Belgium. Slovak Republic does not allow arbitration in labour relations either, but does not consider sporting as an employment.

To conclude, the “sporting family” has tried to establish its own autonomous system of dispute resolution with the aim to evade possible interference by national or regional courts (especially the Court of Justice of the European Union). However, the complete evasion is not possible, since the sporting does not represent an international organization (or internationally exempt activity) with immunities from any review by regular national or international judicial bodies. Since all the sportsmen are basically nationals of different countries, in case their fundamental rights are diminished by a sporting organization’s decision, they can invoke a protection of national or international law, safeguarding these rights. Finally, even the decisions of the CAS can be reviewed by a Swiss Federal Tribunal, in a process of reviewing arbitral rulings provided specific conditions are met, allowing for the review (as was the case in 1993 challenging the independence of the arbitral activity of CAS).

Therefore, it shows that the true safeguard of the players’ rights is not the sporting bodies, but rather courts, as it should be with every citizen. Arbitration in sporting matters is allowed just like in every other business relationship, and as long as it satisfies the standards guaranteed to citizens and human beings, there is no reason to be afraid of a judicial review of an arbitral award. The only problem arises when the standards are not respected. Then the court must follow the law.

A rather technical problem can be the enforcement of an arbitral award in countries, where arbitration in labour disputes is not recognized. Still, the advantage of the sporting arbitration remains in the offer of a speedy settlement of disputes. However, this advantage must

²⁶¹ GILSON, Eric T.: Exploring the Court of Arbitration for Sport. In: *Law Library Journal*, Vol. 98:3, 2006, p. 504. Available online: www.aallnet.org/products/pub_llj_v98n03/2006-28.pdf (accessed on March 15, 2010). The author also offers an overview of articles on the CAS.

²⁶² NAFZIGER, James A.R.: The Court of Arbitration for Sport and the General Process of International Sports Law, p. 239.

²⁶³ REEB, Matthieu: The role of the Court of Arbitration for Sports, p. 236-238. For current Winter Olympic Games in Vancouver (2010), cf. <http://www.lawinsport.com/index.php/news/editors-choice/668-the-court-of-arbitration-for-sport-cas-has-opened-its-office-in-vancouver> (accessed on March 15, 2010).

not be used as an excuse for not respecting the fundamental rights set by the international, supranational and national law.

Conclusions

The thesis concentrates on the problem of behaviour regulation in sports, which may be limiting the basic rights and freedoms such as freedom of work, freedom of speech and the right to privacy. The limitation of these basic rights may be justified by a specific character of sporting employment, e.g. due to the strive for promoting the “athlete as a hero” ideal. Due to the specific sporting interests it may namely happen that the standards of behaviour are different in sporting and in a regular life and a behaviour which would otherwise be considered perfectly moral and legal (allowed) needs to be limited (e.g. sexual activity during the training period) due to a potential negative effect on the employer or sporting in general. The clauses formulated in this manner would certainly be in breach with the right to privacy or other rights and freedoms were they used in other employment, but in sports they may be accepted provided that there is a balance (proportionality) between the rights of the players and the interests of the employer (the club) or of the sport itself. This is one of the aspects of so-called specificity of sports, discerning the sporting employment from every other employment. The specificity is often used as a reason for exemption from the general legal rules and principles. In this case it would be an exemption from the need to respect some basic rights and freedoms of athletes. However, every such exemption should be interpreted restrictively and should be proportionate with the recognized objectives.

The same applies also for the behaviour regulation in sports, which is important in order to specify conduct that could be used as a reason to impose a sanction despite being otherwise just a performance of basic rights and freedoms. Such a restriction on behaviour should always be formulated in advance and the employee should be informed on this, what usually happens at latest when signing a contract. From this point of view, this is a fulfilment of the basic principle of natural justice – *nullum crimen sine lege, nulla poena sine lege*. The rules of (prohibited) conduct are usually written down in disciplinary codes (or work rules), collective agreements or in the (employment) contracts. They take the form which I have termed here as behaviour clauses. They can also be laid down in law, but in this case they are usually very broad and abstract, in sense of a duty to protect the interests of the employer. In this case, a sanction for behaviour generally considered as allowed would have to be reviewed by a court which would decide on proportionality of both the sanction and of the prohibition of a behaviour due to an interest of employer. Not to give a chance to a court to decide on the proportionality in the negative, the restraints on the basic rights should be moderate.

The following principles should apply when formulating a behaviour clause (an ideal clause is in the Annex no. 8):

- 1.) the behaviour prohibited (or prescribed) should be made inherent to the sporting employment, that means to be explained in the contract or policy documents (code of conduct) as being necessary part of the sporting employment (e.g. to meet the “athlete as a hero” ideal)
- 2.) the behaviour used as a reason to sanction should not be assessed on subjective grounds (low performance in the match is considered as a subjective criterion by the arbitral bodies). The behaviour has to be assessed objectively (damage, drug use, etc.)
- 3.) the sanction has to be proportionate – not excessive.
- 4.) the procedure before a sporting (disciplinary or arbitral) body should meet the principles of fair trial and should be reviewable by a court. The applicable principles should comprise:

- trial by independent judges
- in due time
- right to receive information (access to the files)
- right to be legally represented (right to legal counsel)
- right to be heard (right to defence)
- trial in public
- uninfluenced witnesses
- legality, equality before the law, presumption of innocence, etc.

To use a practical example, the current Italian ban on swearing does meet the first principle – due to the fact that athletes are heroes, their expected standards of behaviour are higher than average. Their role (at least in Europe) is also social and educational (as put down in the Lisbon Treaty), not only of business interests. The second principle – of objectivity – is met as well. The swearing can be read from the lips of the players or heard, and everybody can say when a word is a swearing. Therefore it is not a subjective, but rather perfectly objective assessment of behaviour. The problem is with the fulfilment of the third condition – proportionality of the sanction. Namely, the players are supposed to get a red card (get suspended) for a single swearing. The FIFPro has taken a viewpoint that the said red card is not proportionate. However, the yellow card is considered proportionate by the FIFPro.²⁶⁴

The proportionality or balance between the basic rights and the sanction is often very difficult to strike. In the thesis, I have identified the basic forms of sanctions applied in sports. These are mainly fines, suspension and dismissal. Some of the sanctions, such as suspension, could potentially be in breach with the basic rights (e.g. the right to work). Therefore it is necessary that not only the type of sanction, but also the level of interference with the basic right (how long the suspension will take) is proportionate.

In the example of Italian swearing ban, FIFPro took the position this is unproportionate. Still, FIFPro is not a court and can not express its viewpoints on every case of a behaviour regulation and sanctions imposed. I have also offered some examples from among the decisions of the FIFA DRC and the CAS as to their understanding of proportionality of sanctions, allowing for dismissal in case of drug use, but not in a case of minor disciplinary trespass. Still, these bodies can not be considered independent courts, at least the DRC is definitely not independent. The CAS, attempting for impartiality, is only a private arbitral body, the decisions of which can be reviewed by a Swiss Federal Tribunal. In order to prevent unproportionate behaviour regulation and unproportionate sanctions, recourse to regular courts should be always guaranteed to review the (disciplinary) sanction and the proportionality of limitation of the basic rights.

The most important problem in this respect is the fact that the sporting bodies use their extra-legal power to force the sportsmen to accept the competence of these private dispute resolution bodies instead of courts and should a sportsman seek recourse with the court, the sporting organizations are able to end his career prematurely. This fact, together with the potential absence of impartiality of sporting arbitrators and secret ruling on the matters in dispute, represent a breach of the basic principles of fair trial which should be the last safeguard of protection of athlete's basic rights and freedoms.

My recommendations would therefore be:

- 1.) careful drafting of behaviour clauses
- 2.) careful application of sanctions

²⁶⁴ *FIFPro does not advocate cursing nor blasphemy.* Available online: http://www.fifpro.org/news/news_details/232 (accessed on March 26, 2010).

- 3.) amendments to the rules of procedure of the sporting arbitration to meet the criteria of fair trial
- 4.) access to ordinary courts
- 5.) respecting the judicial review by sporting organizations.

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Annexes

Annex no. 1

Standard Player's Contract. In: *NFL Collective Agreement*, p. 244-253
<http://www.nhl.com/cba/2005-CBA.pdf> (accessed on March 20, 2010):

2. ...

The Player further agrees,

(a) to report to his Club's Training Camp at the time and place fixed by the Club, **in good physical condition,**

(b) to keep himself in **good physical condition** at all times during the season,

(c) **to give his best services** to the Club and to play hockey only for the Club unless his SPC is Assigned, Loaned or terminated by the Club,

(d) to co-operate with the Club and **participate in any and all reasonable promotional activities** of the Club which will in the opinion of the Club promote the welfare of the Club and to cooperate in the promotion of the League and professional hockey generally,

(e) **to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally.**

...

4. The Club may from time to time during the continuance of this SPC **establish reasonable rules governing the conduct and conditioning of the Player, and such reasonable rules shall form part of this SPC and the Agreement as fully as if herein written.** For violation of any such rules or for any conduct impairing the thorough and faithful discharge of the duties incumbent upon the Player, **the Club may impose a reasonable fine upon the Player and deduct the amount thereof from any money due or to become due to the Player. The Club may also suspend the Player for violation of any such rules.** When the Player is fined or suspended, he shall be given notice in writing stating the amount of the fine and/or the duration of the suspension and the reason therefor. Copies of the rules referred to herein shall be filed at the main offices of the League and the National Hockey League Players' Association ("NHLPA").

...

6. The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey Player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages. The Player therefore agrees that the Club shall have the right, in addition to any other rights which the Club may possess, to enjoin him by appropriate injunctive proceedings without first exhausting any other remedy which may be available to the Club, **from playing hockey for any other team and/or for any breach of any of the other provisions of this SPC.**

7. The Player and the Club recognize and agree that the Player's participation in other sports may impair or destroy his ability and skill as a hockey Player. Accordingly **the Player agrees that he will not during the period of this SPC or during any period when he is obligated under this SPC to enter into a further SPC with the Club engage or participate in football, baseball, softball, hockey, lacrosse, boxing, wrestling or other athletic sport without the written consent of the Club, which consent will not be unreasonably withheld.**

...

8. (b) The Player further agrees that during the period of this SPC and during any period when he is obligated under this contract to enter into a further contract with the Club, **he will not make public appearances, participate in radio or television programs, or permit his picture to be taken, or write or sponsor newspaper or magazine articles, or sponsor commercial products without the written consent of the Club which consent shall not be unreasonably withheld.**

...

14. **The Club may also terminate this SPC** upon written notice to the Player (but only after obtaining Waivers from all other Clubs) if the Player shall at anytime:

(a) **fail, refuse, or neglect to obey the Club's rules governing training and conduct of Players, if such failure, refusal or neglect should constitute a material breach of this SPC.**

(b) **fail, refuse or neglect to render his services hereunder or in any other manner materially breach this SPC.**

Annex no. 2

British Premier League Standard Contract:

"Gross Misconduct" shall mean serious or persistent conduct behaviour activity or omission by the Player involving one or more of the following:

(a) **theft or fraud;**

(b) **deliberate and serious damage** to the Club's property;

(c) **use or possession of or trafficking in a Prohibited Substance;**

(d) **incapacity through alcohol affecting the Player's performance as a player;**

(e) **breach of or failure to comply with of any of the terms of this contract**

or such other similar or equivalent serious or persistent conduct behaviour activity or omission by the Player which the Board reasonably considers to amount to gross misconduct.

...

3.2 The Player agrees that he **shall not:**

3.2.1 **undertake or be involved in any activity or practice** which will knowingly cause to be void or voidable or **which will invoke any exclusion of the Player's cover** pursuant to any policy of **insurance** maintained for the benefit of the Club on the life of the Player or covering his physical well-being (including injury and incapacity and treatment thereof);

3.2.2 **when playing or training wear anything (including jewellery) which is or could be dangerous to him or any other person;**

3.2.3 **except to the extent specifically agreed in writing between the Club and the Player prior to the signing of this contract use as his regular place of residence any place which the Club reasonably deems unsuitable** for the performance by the Player of his duties other than temporarily pending relocation;

3.2.4 **undertake or be engaged in any other employment** or be engaged or involved in any trade business or occupation or participate professionally in any other sporting or athletic activity without the prior written consent of the Club **PROVIDED THAT this shall not:**

3.2.4.1 **prevent the Player from making any investment in any business so long as it does not conflict or interfere with his obligations hereunder; or**

3.2.4.2 **limit the Player's rights under clauses 4 and 6.1.8;**

3.2.5 **knowingly or recklessly do write or say anything or omit to do anything which is likely to bring the Club or the game of football into disrepute** cause the Player or the Club to be in breach of the Rules or cause damage to the Club or its officers or employees or any match official. **Whenever circumstances permit the Player shall give to the Club reasonable notice of his intention to make any contributions** to the public media in order to allow representations to be made to him on behalf of the Club if it so desires;

...

4.2 **Whilst he is providing or performing the services set out in this contract (including travelling on Club business) the Player shall:**

4.2.1 **wear only such clothing** as is approved by an authorised official of the Club; and

4.2.2 **not display any badge** mark logo trading name or message on any item of clothing without the written consent of an authorised official of the Club **Provided that nothing in this clause shall**

prevent the Player wearing and/or promoting football boots and in the case of a goalkeeper gloves of his choice.

Annex no. 3

Collective Labor Agreement "Professional Players 2003" (*Traduzione in inglese a cura della Lega Serie A*) Between: Italian Basketball Federation, a League Basketball Association, Giba Association of Italian Basketball Players. Available online: <http://www.giba.it/index.php/foreigner/collective-labour-agreement-serie-a> (accessed on March 10, 2010):

13.4. The athlete must maintain, both on and off court, behaviour not only consistent with **good citizenship** but also in every circumstance based upon **fairness, honesty, professionalism, and fair play**. The athlete must conform with the **specific lifestyle guidelines** set by the club. These **guidelines must be justified in any case by the objective needs** of the professional athletic activities **and cannot be damaging to the human and professional dignity** of the athlete.

13.5. The athlete is also expected to sign an acceptance agreement and **respect the internal norms of behaviour** established by the club, a copy of which must be delivered to the athlete. It remains understood that the **internal norms can in no way go against the general state and sportive general principles of order or the sanctions in the present agreement or result oppressive or unjustly limit individual freedom**.

13.6. In any case, the athlete **must abstain from the following**:

- damaging acts, declarations or behaviour either towards self or the League;
- disparaging acts, declarations or behaviour towards self or the League;
- acts, declarations or written texts that instigate a lack of respect for the sporting regulations and the League;
- acts, declarations or written texts that suggest in any way the differing of principles of loyalty and good sportsmanship.

13.7. The athlete must furthermore **respect the norms of behaviour established by the FIP** in their regulations.

...

14.5. The athlete must at all times safeguard his physical and mental well being by leading a **healthy lifestyle** consistent with that of a professional athlete. In case of sudden sicknesses, slight ailments, or injuries, the athlete must notify the club immediately and put himself under the care of the club's medical personnel.

14.6. The athlete must maintain at all times **a balanced diet**. Furthermore the athlete must meticulously respect the diet prescribed to him and the menus outlined by the club's doctors.

14.7. **The use of psychotropic or doping substances, even casually, is strictly forbidden**. The list of such substances with relevant updates will be fixed by the club, on the notice board situated in the location where training is held. The GIBA, will in turn make sure the list is circulated among the athletes.

...

15.1. During practice sessions and competitions, the athlete **must wear the uniform** supplied by the club in a suitable manner.

15.2. If requested, the athlete must wear the club's uniform when entering and exiting the sports stadium on occasion of competitions, as well as during official events. The uniform must not be utilized for occasions or purposes other than those foreseen.

15.3. The athlete is responsible for all material given to him by the club and is responsible for such material in case of loss or deterioration not resulting from normal use or uncontrollable circumstances.

15.4. Except in specific agreed cases, the athlete **must utilize the shoes** supplied by the club.

16. Relations with the Media

16.1. Although the right to free speech is recognized, the athlete must in no case express opinions or release statements during interviews with the press, television, or radio, that could result to be damaging to the club, the FIP or the League and respective managers, employees, collaborators and members.

16.2. The managers in charge of the club, in the same manner, must not in any case express opinions or release statements to the press that could result to be damaging to the reputation and professionalism of the athlete.

16.3. The athlete, except for serious and founded reasons, cannot refuse to give interviews during sports events and during other occasions organized by the club. In the latter case, the athlete must be given reasonable prior notice.

17. Other Work or Sports Activities

17.1. The athlete cannot engage in any other working or entrepreneurial activity incompatible with competitive sports practice. The athlete must notify the club in writing of any working or entrepreneurial activity undertaken or intended to be undertaken in line with the rapport.

17.2. The athlete cannot engage in other competitive sports activities or sports activities involving elevated personal risk without the previous written consent of the club. Sports activities considered at high are: skiing, water skiing, flying or hang gliding, parachuting, underwater sports, mountain climbing, motorcycling, and, in general, any activities defined as hazardous in the mandatory injury insurance policy.

Annex no. 4

FIFA Disciplinary Code:

Article 46 Minor infringements

A player is cautioned if he commits any of the following offences (cf. Law 12 of the Laws of the Game and art. 17 of this code):

- a) unsporting behaviour;*
- b) dissent by word or action;*
- c) persistent infringement of the Laws of the Game;*
- d) delaying the restart of play;*
- e) failure to retreat the required distance when play is restarted with a corner kick, free kick or throw-in;*
- f) entering or re-entering the field of play without the referee's permission;*
- g) deliberately leaving the field of play without the referee's permission.*

Article 47 Serious infringements

A player is sent off if he commits any of the following offences (cf. Law 12 of the Laws of the Game and art. 18 of this code):

- h) serious foul play;*
- i) violent conduct;*
- j) spitting at an opponent or any other person;*
- k) denying the opposing team a goal or an obvious goal-scoring opportunity by deliberately handling the ball (this does not apply to a goalkeeper within his own penalty area);*
- l) denying an obvious goal-scoring opportunity to an opponent moving towards the player's goal by an offence punishable by a free kick or a penalty kick;*
- m) using offensive, insulting or abusive language and/or gestures;*
- n) receiving a second caution in the same match (art. 17 par. 2).*

Annex no. 5

Premier League Uniform Player's Contract:

4. Disciplinary Penalties

4.1 At a disciplinary hearing or on an appeal against a disciplinary decision the Club may dismiss the allegation or if it is proved to the Club's satisfaction may:

4.1.1 give an oral warning a formal written warning or after a previous warning or warnings a final written warning to the Player;

4.1.2 impose a fine not exceeding the amount of the Player's basic wage for a period of up to two weeks for a first offence (unless otherwise approved by the PFA in accordance with the Code of Practice) and up to four weeks for subsequent offences in any consecutive period of twelve months but only in accordance with the provisions of the Code of Practice;

4.1.3 order the Player not to attend at any of the Club's premises for such period as the Club thinks fit not exceeding four weeks;

4.1.4 in any circumstances which would entitle the Club to dismiss the Player pursuant to any of the provisions of clause 10 of this contract dismiss the Player or impose such other disciplinary action (including suspension of the Player and/or a fine of all or part of the amount of the Player's basic wage for a period not exceeding six weeks).

Annex no. 6

Collective Labor Agreement "Professional Players 2003" (*Traduzione in inglese a cura della Lega Serie A*) Between: Italian Basketball Federation, a League Basketball Association, Giba Association of Italian Basketball Players. Available online: <http://www.giba.it/index.php/foreigner/collective-labour-agreement-serie-a> (accessed on March 10, 2010):

26. Disciplinary Penalties

26.1. An athlete who has not fulfilled responsibilities to the club, can be subjected to the following disciplinary measures, depending on the gravity of the violation:

- a verbal reprimand;*
- a written reprimand;*
- a fine by means of withholding part of remuneration;*
- suspension of activities, even from practice sessions or preseason training;*
- early cancellation of the contract.*

...

26.4. The parties agree that, considering article 7, first paragraph, of law no. 300, 1970, the clubs are obliged to affix the internal norms of behaviour, if existing, in a location visible to the athlete, with any relative penalties, as well as the "disciplinary code" in which articles 2104, 2105 and 2106 of the civil code, article 7 of the workers' statute, the norms of this contract relative to the general duties and specifics of the athlete and discipline (articles 13, 14, 15, 16, 17, 19, 23, 26, 27, 28) must be present.

Annex no. 7

FIFA Disciplinary Code:

Article 10 Sanctions common to natural and legal persons

Both natural and legal persons are punishable by the following sanctions:

- a) warning;
- b) reprimand;
- c) fine;
- d) return of awards.

Article 11 Sanctions applicable to natural persons

The following sanctions are applicable only to natural persons:

- a) caution;
- b) expulsion;
- c) match suspension;
- d) ban from dressing rooms and/or substitutes' bench;
- e) ban from entering a stadium;
- f) ban on taking part in any football-related activity.

Article 12 Sanctions applicable to legal persons

The following sanctions are applicable only to legal persons:

- a) transfer ban;
- b) playing a match without spectators;
- c) playing a match on neutral territory;
- d) ban on playing in a particular stadium;
- e) annulment of the result of a match.

Annex no. 8

The Premier League Uniform Player's Contract could serve as an example in coining the term Gross Misconduct as a reason to dismiss:

"Gross Misconduct" shall mean serious or persistent conduct behaviour activity or omission by the Player involving one or more of the following:

- (a) *theft or fraud;*
 - (b) *deliberate and serious damage to the Club's property;*
 - (c) *use or possession of or trafficking in a Prohibited Substance;*
 - (d) *incapacity through alcohol affecting the Player's performance as a player;*
 - (e) *breach of or failure to comply with of any of the terms of this contract*
- or such other similar or equivalent serious or persistent conduct behaviour activity or omission by the Player which the Board reasonably considers to amount to gross misconduct.*

The Italian Collective Agreement could be a pattern for attempt to cope with the respect of basic rights of the players, including the lifestyle and freedom of speech - Collective Labor Agreement "Professional Players 2003" (*Traduzione in inglese a cura della Lega Serie A*) Between: Italian Basketball Federation, a League Basketball Association, Giba Association of Italian Basketball Players. Available online: <http://www.giba.it/index.php/foreigner/collective-labour-agreement-serie-a> (accessed on March 10, 2010):

13.4. The athlete must maintain, both on and off court, behaviour not only consistent with good citizenship but also in every circumstance based upon fairness, honesty, professionalism, and fair play. The athlete must conform with the specific lifestyle guidelines set by the club. These guidelines must be justified in any case by the objective needs of the professional athletic activities and cannot be damaging to the human and professional dignity of the athlete.

13.5. The athlete is also expected to sign an acceptance agreement and respect the internal norms of behaviour established by the club, a copy of which must be delivered to the athlete. It remains understood that the internal norms can in no way go against the general state and sportive general

principles of order or the sanctions in the present agreement or result oppressive or unjustly limit individual freedom.

...

14.5. The athlete must at all times safeguard his physical and mental well being by leading a healthy lifestyle consistent with that of a professional athlete. In case of sudden sicknesses, slight ailments, or injuries, the athlete must notify the club immediately and put himself under the care of the club's medical personnel.

14.6. The athlete must maintain at all times a balanced diet. Furthermore the athlete must meticulously respect the diet prescribed to him and the menus outlined by the club's doctors.

14.7. The use of psychotropic or doping substances, even casually, is strictly forbidden. The list of such substances with relevant updates will be fixed by the club, on the notice board situated in the location where training is held. The GIBA, will in turn make sure the list is circulated among the athletes.

...

16.1. Although the right to free speech is recognized, the athlete must in no case express opinions or release statements during interviews with the press, television, or radio, that could result to be damaging to the club, the FIP or the League and respective managers, employees, collaborators and members.

...

17.1. The athlete cannot engage in any other working or entrepreneurial activity incompatible with competitive sports practice. The athlete must notify the club in writing of any working or entrepreneurial activity undertaken or intended to be undertaken in line with the rapport.

The uniform Premier League's Player Contract could be used again to limit the absolute prohibition of other activities when coining a non-competition clause. It could also be an inspiration in leaning on the insurance policy when limiting a risky behaviour (hobbies), and in limiting the possibility to make an advertisement for clothing other than officially allowed for by the Club:

3.2.4 undertake or be engaged in any other employment or be engaged or involved in any trade business or occupation or participate professionally in any other sporting or athletic activity without the prior written consent of the Club PROVIDED THAT this shall not:

3.2.4.1 prevent the Player from making any investment in any business so long as it does not conflict or interfere with his obligations hereunder; or

3.2.4.2 limit the Player's rights under clauses 4 and 6.1.8;

...

3.2 The Player agrees that he shall not:

3.2.1 undertake or be involved in any activity or practice which will knowingly cause to be void or voidable or which will invoke any exclusion of the Player's cover pursuant to any policy of insurance maintained for the benefit of the Club on the life of the Player or covering his physical well-being (including injury and incapacity and treatment thereof);

...

4.2 Whilst he is providing or performing the services set out in this contract (including travelling on Club business) the Player shall:

4.2.1 wear only such clothing as is approved by an authorised official of the Club; and

4.2.2 not display any badge mark logo trading name or message on any item of clothing without the written consent of an authorised official of the Club Provided that nothing in this clause shall prevent the Player wearing and/or promoting football boots and in the case of a goalkeeper gloves of his choice.

Finally, the U.S. NFL standard contract is an example of how to set the penalties of fines and of termination of employment in the contract - Standard Player's Contract. In: *NFL Collective Agreement*, p. 244-253 <http://www.nhl.com/cba/2005-CBA.pdf> (accessed on March 20, 2010):

4. The Club may from time to time during the continuance of this SPC establish reasonable rules governing the conduct and conditioning of the Player, and such reasonable rules shall form part of this SPC and the Agreement as fully as if herein written. For violation of any such rules or for any conduct impairing the thorough and faithful discharge of the duties incumbent upon the Player, the Club may impose a reasonable fine upon the Player and deduct the amount thereof from any money due or to become due to the Player. The Club may also suspend the Player for violation of any such rules. When the Player is fined or suspended, he shall be given notice in writing stating the amount of the fine and/or the duration of the suspension and the reason therefor. Copies of the rules referred to herein shall be filed at the main offices of the League and the National Hockey League Players' Association ("NHLPA").

...

14. The Club may also terminate this SPC upon written notice to the Player (but only after obtaining Waivers from all other Clubs) if the Player shall at anytime:

(a) fail, refuse, or neglect to obey the Club's rules governing training and conduct of Players, if such failure, refusal or neglect should constitute a material breach of this SPC.

(b) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this SPC.