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## Ethics and Sport Dispute Resolution in Sport: Athletes, Law and Arbitration

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ETHICS AND SPORT  
DISPUTE RESOLUTION IN SPORT: ATHLETES, LAW AND ARBITRATION  
By  
Zachary Burley\*

I. INTRODUCTION

*Ethics and Sport: Dispute Resolution in Sport: Athletes, Law and Arbitration* (“*Dispute Resolution in Sport*”) is authored by David McArdle, a senior lecturer in the School of Law at University of Stirling, United Kingdom.<sup>1</sup> McArdle wrote the book to offer a theoretical foundation for understanding the relationship between arbitration and litigation as it applies to disputes arising in sports.<sup>2</sup> Further, the book provides guidance on significant current issues and best practices for students, researchers, and practitioners working in various fields of sports law.<sup>3</sup> McArdle’s goal was to explore some of the key legal, arbitral, and policy developments that have impacted athletes’ participation rights, with a specific focus on North America and the European Union.

This book is an excellent tool for sports law practitioners because it offers analysis of the most contemporary legal issues in sports. Practitioners can use this book as a tool to educate themselves on present-day dispute resolution issues facing sports in America and Europe. While this book is slightly expensive at around \$120, which may be too costly for students, it is a reasonable price for practitioners.

II. OVERVIEW

*Dispute Resolution in Sport* is comprised of ten chapters which can be grouped into four parts. Part One discusses issues specific to the National Collegiate Athletic Association (“NCAA”), including recent student-athlete unionization efforts, and the NCAA’s governance structure and its impact on dispute resolution. Part Two focuses on the interaction of law and arbitration in sports. This section ultimately looks at the relationship between sporting entities (be they teams, leagues, or federations), the Court of Arbitration for Sports (“CAS”), and the traditional judicial system. Part Three discusses various sports topics as they apply to law and arbitration in the United States such as amateurism, collective bargaining, antitrust claims, competitive balance, union strikes, lockouts, and decertification. Part Four focuses on issues effecting European sports such as homegrown player rules, salary caps, financial “fair play”, young participants in sports, and others topics.

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<sup>1</sup> DAVID MCARDLE, *DISPUTE RESOLUTION IN SPORT: ATHLETES, LAW AND ARBITRATION* (2014).

<sup>2</sup> MCARDLE, *supra* note 1, at i.

<sup>3</sup> *Id.*

### III. PART ONE, CHAPTER ONE: WHITHER THE NCAA?

Chapter One examines the initiative taken in January 2014 by football players at Northwestern University in what was been called the first move towards the unionization of college student-athletes.<sup>4</sup> McArdle feels that the filing of union cards with the National Labor Relations Board by the student-athletes is a “bargaining-chip” that is principally designed to secure student-athletes greater rights in relation to the revenue from broadcasting, as well as better treatment for students not receiving beneficial scholarships.<sup>5</sup> McArdle uses these examples to show that the United States’ sporting model is characterized by a far more widespread resort to law than the European Union’s resort to alternative dispute resolution.<sup>6</sup>

The remaining sections of Chapter One focus on the governance and oversight problems that have tarnished the reputation of the NCAA’s current regime such as the Jerry Sandusky scandal and self-reporting standards.<sup>7</sup> The NCAA is perceived as having an inadequate governance structure that renders it “unable, or unwilling, to confront any issues that stray much beyond the basics of who gets to play and under what conditions.”<sup>8</sup>

McArdle illustrates the perceived inadequacies through the example of the Pennsylvania State University’s (“Penn State”) child abuse scandal involving Jerry Sandusky.<sup>9</sup> The NCAA sanctioned Penn State by fining the University \$60 million (the equivalent to one year’s gross revenue from the football program), a four-year postseason ban for the football team, and a four-year reduction in the number of grants that the

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<sup>4</sup> MCARDLE, *supra* note 1, at 4.

<sup>5</sup> *Id.*; see also *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (former and present student athletes challenge the NCAA’s rules restricting compensation for elite men’s football and basketball players. The student-athletes seek to challenge the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes’ names, images, and likenesses in videogames, live game telecasts, and other footage. The student-athletes’ contend that these rules violate the Sherman Antitrust Act.).

<sup>6</sup> MCARDLE, *supra* note 1, at 5.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 6-8; see Ian Simpson, *TIMELINE: Jerry Sandusky sex abuse case*. CHI. TRIB., (Oct. 9, 2012), [http://articles.chicagotribune.com/2012-10-09/business/sns-rt-usa-pennstate-timeline-update-111e8199cm-20121009\\_1\\_coaches-association-names-sandusky-university-police-interview-sandusky-jerry-sandusky](http://articles.chicagotribune.com/2012-10-09/business/sns-rt-usa-pennstate-timeline-update-111e8199cm-20121009_1_coaches-association-names-sandusky-university-police-interview-sandusky-jerry-sandusky) (discussing timeline of Jerry Sandusky’s sexual abuse on male children victims and subsequent arrest, trial, and sentencing, as well as the steps taken by the NCAA in responding to this scandal).

university could offer football players.<sup>10</sup> McArdle argues that the sanctions passed down from the NCAA to Penn State had no external oversight and failed to punish those truly responsible for the crimes committed and instead punished most directly the innocent past, present, and future student-athletes of the University.<sup>11</sup> The punishments primarily affected Penn State's football program and its current coaches and players and failed to punish in any real way those who were truly responsible for the crimes.<sup>12</sup> Perhaps this occurred because the NCAA felt compelled to act, but its infrastructure and disciplinary powers were unequipped for the challenge it faced.<sup>13</sup>

Finally, McArdle discusses the NCAA's governance structure which is based on its contractual relationship with its more than 1,200 US university and college members.<sup>14</sup> As a private association, its members jointly and contractually agree upon the rules of membership and determine sanctions applicable to its members in the event of a violation.<sup>15</sup> This contractual structure has traditionally given the NCAA some shelter from judicial oversight.<sup>16</sup>

Part One does an excellent job at discussing the fundamental troubles regarding the NCAA regime. McArdle uses the Jerry Sandusky scandal to illustrate that the current NCAA governance structure is inadequate at its oversight authority and often punishes students and coaches disproportionately when attempting to regulate institutional behavior. When viewing this book's layout as a whole, this chapter would have been better swapped with chapter two for two reasons: chapter two is a better introduction to courts and arbitration as they apply to sports and chapter one would have fit nicely alongside chapters three through six (Part Three) discussing dispute resolution in the United States.

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<sup>10</sup> MCARDLE, *supra* note 1 at 7; *see generally* BINDING CONSENT DECREE IMPOSED BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND ACCEPTED BY THE PENNSYLVANIA STATE UNIVERSITY, <http://www.ncaa.com/content/penn-state-conclusions> (last visited Oct. 26, 2014) (other sanctions include a five year probationary period, vacation of the football team's wins from 1998 to 2011, a waiver of transfer rules and grant-in-aid retention which allowed Penn State football players to transfer to another school and not be forced to sit out a year, and allowing the NCAA to penalize individuals after the conclusion of criminal proceedings).

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 9; *see also* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 267 (2010) (discussing the NCAA as a private association of four-year post-high-school educational institutions that derives its authority from the member institutions that created it).

<sup>15</sup> MCARDLE, *supra* note 1, at 9.

<sup>16</sup> *Id.*; *see* Bloom v. NCAA, 93 P.3d 621, 626 (Colo. Ct. App. 2004) (upholding the NCAA restrictions on students' endorsement and media activities); *but see* Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding NCAA rules limiting the salaries of assistant coaches violated antitrust laws because those rules served no legitimate sporting purpose and was a horizontal agreement to fix prices).

#### IV. PART TWO, CHAPTER TWO: THE COURTS, THE CAS AND THE “PROFESSIONAL” ATHLETE

The main focus of Chapter Two places importance on sporting entities seeking to limit the courts’ opportunities to review their decisions. Of all the chapters in *Dispute Resolution in Sport*, this chapter does the best job of accomplishing McArdle’s objective of understanding the relationship between arbitration and litigation as it applies to disputes arising in sports. The chapter demonstrates it is difficult for sporting entities to completely shield themselves against the possibility of court review and oversight. McArdle demonstrates the importance of the CAS and the courts having the authority to participate in independent oversight of sporting activities.<sup>17</sup>

This concept is best illustrated through Oscar Pistorius’ Olympic eligibility battle with the International Association of Athletics Federation (“IAAF”).<sup>18</sup> Oscar Pistorius won gold medals in the 100, 200, and 400-meter class-43 events at the 2006 Athletics World Championships using his prosthetic legs while competing against athletes without disabilities.<sup>19</sup> Pistorius then sought to be considered for selection in South Africa’s 2008 Olympic team in the 400-meter and the 4 x 400-meter relay.<sup>20</sup> Shortly after his Athletics World Championships success, however, the IAAF changed its rules on “technical aids” specifically to prohibit the use of devices that use springs, wheels, “or any other element that provides the user with an advantage over another athlete not using such a device.”<sup>21</sup> Following the rule change, Pistorius completed several tests for the IAAF to further perform research on his situation.<sup>22</sup> Based on these tests, the IAAF Council ruled that Pistorius was ineligible for Olympic selection because his prosthetic legs permitted him to exert less energy than able-bodied athletes and constituted an advantage over them.<sup>23</sup>

Thereafter, Pistorius appealed the IAAF decision to the CAS, asking the arbitrators to vacate the IAAF decision and rule that he could participate in IAAF-sanctioned events.<sup>24</sup> The CAS declared that Pistorius was eligible to compete in IAAF-

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<sup>17</sup> MCARDLE, *supra* note 1, at 19.

<sup>18</sup> See generally CAS 2008/A/1480 Pistorius v. The Int’l Ass’n of Athletics Fed’n (discussing the eligibility for an athlete with disabilities to compete in IAAF-sanctioned events alongside able-bodied athletes).

<sup>19</sup> MCARDLE, *supra* note 1, at 19.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also IAAF Introduces Rule Regarding “Technical Aids”, <http://www.iaaf.org/news/news/iaaf-council-introduces-rule-regarding-techni> (last visited Oct. 6, 2014).

<sup>22</sup> MCARDLE, *supra* note 1, at 19-20 (the tests included the “Rome Observations” involving video recordings of his performance at a specially organized race and the “Cologne Tests” involving analysis conducted by personnel at the German Sport University); see also OSCAR PISTORIUS, *BLADE RUNNER: MY STORY* ¶ 45 (2009).

<sup>23</sup> MCARDLE, *supra* note 1, at 20.

<sup>24</sup> *Id.*

sanctioned events because he was not in violation of the new IAAF rule relating to technical aids on several grounds.<sup>25</sup>

The need for oversight and review of sporting bodies' decisions was further proven as necessary by the IAAF's actions following the CAS ruling.<sup>26</sup> The IAAF remained very hostile toward Pistorius as evidenced by IAAF officials stating that "[they] prefer that (South Africa) do(es)n't select him for reasons of athletes' safety" without advancing any evidence in support of that argument.<sup>27</sup> Without the oversight of the CAS, sporting entities would be left to their own devices, possibly to the detriment of athletes like Pistorius.

McArdle then shifts his focus from the need for external oversight of sporting bodies' decisions to the interplay between arbitration and courts in providing that oversight. McArdle discusses the nature of arbitral awards as binding on the parties that are ineligible for appeal by courts. This can be accomplished in one of three ways. First, national laws can be drafted to explicitly recognize arbitral awards as valid and can eliminate or limit the scope for national courts to set them aside. Second, contracting parties to an arbitration have freedom of contract and can agree to exclude national laws. Last, the legitimacy of an arbitral award can apply independently of national legal systems and the wishes of the contracting parties.<sup>28</sup> What makes sport arbitration unique is a distinction between international sports law and global sports law.<sup>29</sup> Among other distinctions, international sports law can be applied by national courts whereas global sports law suggests a claim of protection from national law.<sup>30</sup> The simplest way to view the distinction between international sports law and global sports law is to think of global sports law as having a "cloak of continued self-regulation by international sports federations" and as a right for non-intervention by both national legal systems and by international sports law.<sup>31</sup> McArdle argues that decisions by sports-specific arbitrators such as CAS arbitrators are prime examples of a move toward global sports law because while their judgments can in theory be subject to review by courts, appeals to courts very rarely happen in practice.<sup>32</sup>

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<sup>25</sup> MCARDLE, *supra* note 1, at 22 (the CAS criticized the IAAF for several reasons including that the IAAF tests did not take into account Pistorius' performance during the start or "acceleration" phase of a race, Pistorius' scientist being basically blocked from participation in the tests, egregious flaws in the IAAF Council's voting procedure, and the timing of implementing this rule especially because the prosthetics used by Pistorius had been used for over 10 years).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 22-23.

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.*

<sup>30</sup> MCARDLE, *supra* note 1, at 24; *see also* Foster, *supra* note 24, at 1-2 (discussing the differences between international sports law and global sports law).

<sup>31</sup> *See* Foster, *supra* note 24, at 2.

<sup>32</sup> MCARDLE, *supra* note 1, at 24.

While CAS decisions rarely are appealed, in theory this appeal procedure to national legal systems is more a function of international sports law and not global sports law. Sporting authorities cannot entirely protect themselves from the courts' appellate function and the intrinsic supervisory jurisdiction.<sup>33</sup>

As far as enforceability of arbitral awards, sports arbitration does not face the challenge of enforcement in the manner that commercial arbitration does.<sup>34</sup> This is best illustrated through the example of a Swiss football club, Sion FC. Sion FC disregarded a CAS ruling which cut off the club's eligibility to sign transfer players.<sup>35</sup> After Sion FC signed the players, the Federation Internationale de Football Association ("FIFA"), the international governing body for football, demanded that the Swiss Football Association ("Swiss FA"), the domestic governing body, punish Sion FC.<sup>36</sup> Because of the relationship between FIFA and Swiss FA, Swiss FA was compelled to comply with FIFA's demands or face severe sanctions, thus creating a system where compliance with arbitral awards is honored.<sup>37</sup> This power though a lack of resistance to arbitral award enforcement is a central aspect of both international and global sports law.

This chapter does an excellent job of demonstrating a courts' readiness to identify that sports disputes are best resolved by sporting organizations themselves— or, if need be, sports-specific arbitrators—such as the CAS, rather than by the courts. No matter how securely drafted the terms of a private contract may be, however, the supervisory jurisdiction of courts cannot be completely expelled.<sup>38</sup>

## V. PART THREE, CHAPTERS THREE THROUGH SIX: UNITED STATES DISPUTE RESOLUTION IN SPORT

In Chapter Three, McArdle concentrates on the structure of US "amateur" sports, with particular respect to the role of the courts and arbitral bodies in overseeing determinations that impact Olympic eligibility.<sup>39</sup>

The most prominent recent legislation regarding US oversight of its Olympic activities is the Ted Stevens Olympic and Amateur Sports Act of 1998 ("OASA")<sup>40</sup>

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<sup>33</sup> MCARDLE, *supra* note 1, at 26.

<sup>34</sup> *Id.* at 27; see generally Hong-Lin Yu, *Is the Territorial Link Between Arbitration and Country of Origin Established by Articles I and V Being Distorted by the Application of Article VIII of the New York Convention?*, 5 INT'L ARB. L. REV. 196 (2002) (discussing enforcement of arbitral awards in commercial arbitration).

<sup>35</sup> MCARDLE, *supra* note 1, at 27.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 35.

<sup>39</sup> MCARDLE, *supra* note 1, at 36.

which gave a private body, the United States Olympic Committee (“USOC”), monopoly status and specified requirements for its member national governing bodies for individual sports.<sup>41</sup> The decisions of the USOC and the individual sport governing bodies appointed by the USOC have intermittently given rise to court proceedings.<sup>42</sup> These cases show that, in the US, the sports experts in the American Arbitration Association (“AAA”) rather than the courts, are the central figures because judicial challenges to the AAA’s decisions are hardly realistic.<sup>43</sup>

Arbitration does not have unlimited authority, however, evidenced prior to the 2000 Olympic Games in Greco-Roman wrestling.<sup>44</sup> A dispute arose over who would represent the US in the men’s 69-76kg category after Keith Sieracki defeated Matt Lindland in the final eliminator, but Lindland immediately challenged the officials’ decision claiming that Sieracki used an unlawful hold and also attempted to flee a hold, in violation of the applicable rules.<sup>45</sup> After exhausting his internal appeals procedures, Lindland further appealed to the AAA and initiated an arbitration proceeding in Chicago, arguing that USA Wrestling did not provide procedures for the prompt and equitable resolution of disputes.<sup>46</sup> The Chicago arbitrator agreed with Lindland and ordered a rematch as opposed to having the appeal committee reconsider the match.<sup>47</sup>

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<sup>40</sup> Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501-220529 (1998) (this legislation was also important for several reasons including the fact that amateurism is no longer a requirement for competing in most international sporting event, the expansion of the United States Olympic Committee’s role to include the Paralympic Games, increased athlete representation, and protected the United States Olympic Committee from lawsuits arising out of athletes’ right to participate in the Olympic Games).

<sup>41</sup> MCARDLE, *supra* note 1, at 36.

<sup>42</sup> *Id.* at 36-37.

<sup>43</sup> *Id.* at 37; *see generally* DeFrantz v. United States Olympic Committee, 492 F. Supp. 1181 (D.C. Cir. 1980) (holding that the USOC had the authority to decide not to send an American team to the Olympics and confirmed the USOC’s exalted position); *also see generally* Armstrong v. Tygart, 886 F. Supp. 2d 572 (W.D. Tex. 2012) (Armstrong challenged the US Anti-Doping Agency’s authority to require him settle disputes through AAA arbitration and were a restriction on his due process, but the court held that due process was satisfied by AAA arbitration rules if applied reasonably).

<sup>44</sup> MCARDLE, *supra* note 1, at 49.

<sup>45</sup> *Id.* (Lindland protested according to the general procedures of USA Wrestling to a protest committee which refused to overturn the officials’ decisions. Lindland further appealed to the USA Wrestling’s Standing Committee for the Greco-Roman discipline, but they ruled against him citing that mat officials’ decisions were non-reviewable.).

<sup>46</sup> MCARDLE, *supra* note 1, at 49; *see* Lindland v. USA Wrestling, AAA No. 30 190 00443 00 (Aug. 9, 2000) (D. Burns, Arb.) (Sieracki was not able to be a party to the arbitration and present his arguments under the OASA which caused the spiral of court and arbitral proceedings).

<sup>47</sup> *Id.*



Before the rematch occurred, Sieracki filed for his own arbitration in Denver against USA Wrestling seeking to secure his nomination.<sup>48</sup> The rematch occurred, under protest by Sieracki, and Lindland won, but USA Wrestling merely made Lindland an alternate and left Sieracki as the nominee.<sup>49</sup> This resulted in a series of litigation that culminated in Lindland being named the US nominee just two weeks before the Olympic Games after a total of thirteen separate court and arbitral hearings.<sup>50</sup> As a result of all of the proceedings between Lindland, Sieracki, and USA Wrestling, the USOC bylaws were amended to allow any athlete submitting an eligibility dispute to the AAA to supply a list of persons whom he or she believes may be adversely affected by the outcome, to allow for a single arbitration proceeding.<sup>51</sup>

These events illustrate that courts can provide oversight to arbitral proceedings. More importantly, however, they demonstrate that courts may be unable to handle sporting decisions in a satisfactory manner.<sup>52</sup> Generally, US courts have readily deferred to sports' own dispute resolution systems, not only because OASA obliges the courts to do so, but also because they appear to be unable to handle sports disputes in an effective and efficient manner.<sup>53</sup>

Chapter Four focuses on the strength of US professional sports players' unions.<sup>54</sup> Players unions, specifically in the four major US professional sports – football, baseball, basketball, and hockey, have been able to negotiate with their respective leagues and establish mandatory recourse to arbitration and other forms of dispute resolution that prevent many disputes from going to court.<sup>55</sup> Because of the power of the players' unions in these sports, they have been able to secure dispute resolution structures that are more favorable to their athletes/members than those within Europe or athletes operating under the purview of OASA.<sup>56</sup>

McArdle argues that US professional sports players' unions have been able to attain favorable outcomes for their athletes because they have gained authority and influence of their incredibly high membership levels and the financial power. High

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<sup>48</sup> MCARDLE, *supra* note 1, at 49; *see* Sieracki v. USA Wrestling, AAA No. 30 190 00483 00 (Aug. 24, 2000) (A.B. Campbell, Arb.)

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; *see* Lindland v. United States of America Wrestling Ass'n, 230 F.3d 1036 (7th Cir. 2000); *see also* Lindland v. United States of America Wrestling Ass'n, 227 F.3d 1000 (7th Cir. 2000).

<sup>51</sup> MCARDLE, *supra* note 1, at 50.

<sup>52</sup> *Id.* at 53.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 56.

<sup>55</sup> *Id.*

<sup>56</sup> MCARDLE, *supra* note 1, at 56.

membership levels and financial power allows players' unions to negotiate collective bargaining agreements from a position of great strength, whether that power stems from the threat of strike action, decertification, or lockouts.<sup>57</sup>

The emergence of players' unions in professional sports has led to several distinct arenas of concerted action, the most important being the mandatory use of arbitration to resolve grievance and salary disputes that arise out of the collective bargaining agreements.<sup>58</sup> The mandatory route to arbitration customarily provides for the use of an independent arbitrator to resolve labor-related disputes.<sup>59</sup>

Another interesting side-effect of collective bargaining in US professional sports is the emergence of individuals who are independent of both the league and the players' union and who possess far-reaching powers to rule on the application of the collective bargaining agreements' terms.<sup>60</sup> The role of the Commissioner dates its inception to the gambling scandal by the 1919 World Series, when the Chicago White Sox allegedly took bribes to "throw" the game so gamblers could make large returns on their bets.<sup>61</sup> Owners wanted to eradicate the negative perception of their sport and vested the powers in a single Commission instead of the previous body that had multiple owners, some of which were allegedly involved in the 1919 World Series scandal.<sup>62</sup> The owners agreed to waive their right to challenge any decision by the Commission through the courts, they gave him the power to be the final arbiter of all disputes involving the leagues, clubs, and players, and they permitted him to impose whatever sanctions he deemed appropriate in the circumstances; thus the extensive powers of a sport Commissioner were born.<sup>63</sup> US professional sports Commissioners have retained much of this power as situations stand today, with very rare challenges to their authority being held as valid.<sup>64</sup>

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<sup>57</sup> MCARDLE, *supra* note 1, at 56.

<sup>58</sup> *Id.* at 67.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 76.

<sup>61</sup> MCARDLE, *supra* note 1, at 76.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> MCARDLE, *supra* note 1, at 78; *see* Milwaukee American Ass'n v. Landis, 49 F.2d 298 (N.D. Ill. 1931) (stating that both the history of the Commissioner's office and the language of the baseball code gave him nearly unlimited discretion to determine whether certain conduct conflicted with the game's best interests and to determine the appropriate sanction); *see also* Finley v. Kuhn, 569 F.2d 527 (7th Cir., 1978) (holding that the district court was correct in determining that the Commissioner was still vested with the power to decide whether any action was in the best interests of the game and to take whatever remedial action he considered justifiable); *but see* Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005) (holding that the Commissioner's decision was open for review, thus restricting, however slightly, the powers of the Commissioner).

In one of the most critical decisions involving antitrust law as applied to sports law, the 8<sup>th</sup> Circuit in *Mackey v. National Football League* established a three-prong test which established a “non-statutory labor exemption to antitrust laws.”<sup>65</sup> Collective bargaining agreements in sports are exempt from antitrust laws as long as (1) the restraints on trade primarily affect only the parties to the agreement, (2) the issues concern a mandatory subject of collective bargaining, and (3) the agreement was reached through a collective bargaining process.<sup>66</sup> This test was adopted by other circuits and eventually confirmed by the US Supreme Court in *Brown v. Pro Football, Inc.* when the Court reasoned that in order for effective collective bargaining to take place in sports as in any other industry, “some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.”<sup>67</sup>

This non-statutory exemption has a very different impact on sports’ labor agreements than it does on other industries.<sup>68</sup> In a majority of industries, workers join unions to gain wages which would be higher than they would be paid in a free market where workers with the same skill set are competing with one another for limited job opportunities.<sup>69</sup> Sports unions, on the other hand, were established as a result of the owners’ anticompetitive practices such as salary caps,<sup>70</sup> player drafts,<sup>71</sup> and reserve

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<sup>65</sup> MCARDLE, *supra* note 1, at 82; *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (professional football players sued the NFL and commissioner alleging that league rule requiring a team acquiring a player whose contract had expired to pay the player’s former team compensation violated the Sherman Act and the court held that professional sports collective bargaining agreements are exempt from antitrust laws if they satisfy a three-prong test).

<sup>66</sup> *Mackey*, 543 F.2d at 614.

<sup>67</sup> MCARDLE, *supra* note 1, at 82.; *Brown v. Pro Football, Inc.*, 518 US 231, 237 (1996).

<sup>68</sup> *Id.* at 83.

<sup>69</sup> *Id.*

<sup>70</sup> Thomas C. Picher, *Baseball’s Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORTS L. 5, 37-38 (1997) (discussing how salary cap provisions in professional sports establish maximum team salaries based on a predetermined percentage of the defined gross revenues to the text of the note of the league. As defined gross revenues of the league increase, the players’ salaries increase at a rate proportional to the predetermined percentage).

<sup>71</sup> John J. Siegfried, *Sports Player Drafts and Reserve Systems*, 14 CATO J. 443-44 (1995) (describing a sports draft as a process used to allocate certain players to sports teams. In a draft, teams take turns selecting from a pool of eligible players. When a team selects a player, the team receives exclusive rights to sign that player to a contract, generally for up to one year, and no other team in the league may sign the player).

clauses<sup>72</sup> which allow owners to pay lower wages than players might command on the open market, given the demand for their unique skill set.<sup>73</sup>

Sports' unions accept these anticompetitive practices because the agreements they enter into benefit them in other areas such as healthcare benefits, some ability to enter free agency (a period in which an athlete can sign with any team because he or she is not under contract with any one particular team), and guaranteed rookie salaries.<sup>74</sup>

Frequently, the argument in support of these anticompetitive practices is one of "competitive balance."<sup>75</sup> Competitive balance, in sports terminology, is achieved when all teams within a league are evenly matched with regard to playing ability.<sup>76</sup> Competitive balance is achieved by preventing the wealthiest clubs from buying the best players and dominating the competition.<sup>77</sup> The idea is that, from an economic perspective, a sports league should operate with a "profit-maximizing motive" which can be achieved if their "product" appeals to consumers.<sup>78</sup> James McKeown<sup>79</sup> argues that competitive balance implies "the ability to predict (or more specifically, not to predict) the outcome of the match before the event begins or to predict the league champion before the season is played...the success of a league requires that teams be relatively even matched in terms of playing ability" and that this unpredictability will result in more consumers being interested which results in higher profits.<sup>80</sup>

Chapter Six discusses how the threat of potential strikes, lockouts, and decertification can push the two sides to a collective bargaining process to reach a settlement lest they suffer conceivably irreparable harm.<sup>81</sup> The 2011 NFL lockout and subsequent union decertification is analyzed thoroughly in an effort to illustrate these

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<sup>72</sup> Siegfried, *supra* note 71, at 443 (reserve clauses "reserved" to the team the right to unilaterally impose a new contract on a player if the team and formerly contracted player could not reach a mutual agreement for a contract extension. This clause perpetuated a team's right to a drafted player over the player's entire career.).

<sup>73</sup> MCARDLE, *supra* note 1, at 83.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 84.

<sup>76</sup> *Id.* at 87.

<sup>77</sup> *Id.* at 84.

<sup>78</sup> MCARDLE, *supra* note 1, at 87.

<sup>79</sup> James T. McKeown is the Chair of the Antitrust practice group of Foley & Lardner, LLC and an Adjunct Professor at Marquette University Law School. He was counsel of record for the Amici Responding Economists in *American Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

<sup>80</sup> MCARDLE, *supra* note 1, at 87; James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 521 (2011).

<sup>81</sup> MCARDLE, *supra* note 1, at 100.

strategic maneuvers. Specifically, in 2011, NFL team owners opted out of their current collective bargaining agreement that was intended to run through 2013, stating that the distribution of funds between players and teams no longer made financial sense.<sup>82</sup> The NFL players union was unwilling to accept the teams' demand for changes to the split of television monies because the teams did not provide any evidence that they were struggling financially.<sup>83</sup> Once the current agreement ended, NFL teams commenced a lockout for the first time since 1987 in an effort to gain negotiating powers for a new agreement, in which they wanted a larger portion of the league's \$9 billion annual revenue.<sup>84</sup>

At the same time, the players union established a plan for decertifying their union, which could allow their players to challenge the lockout through antitrust proceedings.<sup>85</sup> This plan meant that this dispute moved beyond the agreement's provisions for dispute resolution and into the realm of court hearings and external mediation.<sup>86</sup>

An interesting result arising from the lockout/decertification period was *White v. National Football League*.<sup>87</sup> The litigation involved an agreement reached by the NFL to the effect that television networks would pay the NFL "lockout insurance" of \$4.5 billion if the league and the players' relationship broke down and resulted in a strike or lockout, which would result in no games for the networks to televise.<sup>88</sup> None of this money would go to the players and the players argued that this contingency insurance provided the teams with a financial stability which allowed them to commence the lockout and not bargain in good faith.<sup>89</sup> The case was eventually dismissed when the 2011 collective bargaining agreement was agreed upon; however, the court did state that the 2006 collective bargaining agreement required the parties to seek to maximize total revenues for the shared benefit of both parties; it is not permissible for one party to a collective bargaining agreement to pursue its own interests at the expense of the other party.<sup>90</sup>

In July 2011, the parties agreed in principle to a new collective bargaining agreement and the teams ended the lockout after a third and final mediation effort.<sup>91</sup> This

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<sup>82</sup> MCARDLE, *supra* note 1, at 100.

<sup>83</sup> *Id.* at 101.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> MCARDLE, *supra* note 1, at 101.

<sup>87</sup> *Id.* at 102; *see generally* *White v. Nat'l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011).

<sup>88</sup> MCARDLE, *supra* note 1, at 102; *White*, 766 F. Supp. 2d at 948.

<sup>89</sup> MCARDLE, *supra* note 1, at 102; *White*, 766 F. Supp. 2d at 948.

<sup>90</sup> MCARDLE, *supra* note 1, at 102; *White*, 766 F. Supp. 2d at 950.

<sup>91</sup> MCARDLE, *supra* note 1, at 105.

third mediation proceeding involved face-to-face dialogue and joint discussions, agreeing not to discuss the mediation details with the media, and keeping lawyers out of the process until as late as possible.<sup>92</sup> This lockout and collective bargaining process serves as an example of the benefits to be achieved with good faith dealings, even when the parties' relationship seems severely strained, as well as proving that mediation does have a role in sports dispute resolution and that arbitration is not the only alternative to the courts.<sup>93</sup>

Part Three is structured fairly well in that its chapters generally build off of one another. For example, collective bargaining is discussed in Chapter Four and is then further analyzed in relation to antitrust and competitive balance in Chapter Five. Chapter Six brings collective bargaining to an appropriate conclusion by focusing on how residual dissatisfaction at particular terms to collective bargaining agreements can lead to labor disputes such as strikes, lockouts, and decertification while the collective bargaining agreement is still in effect because both parties to the agreement want to jockey for a stronger position and the other party prior to negotiating a renewal.

#### VI. PART FOUR, CHAPTERS SEVEN THROUGH TEN: EUROPEAN DISPUTE RESOLUTION IN SPORT

The focus in Chapter Seven shifts from a primarily US sports focus to European sports and the unique issues facing European sports, laws, and dispute resolution. Chapter Seven begins by examining the landscape of European sports following a case that signified the end of sports' quota systems and the restrictions on player movement, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* ("Bosman").<sup>94</sup>

Homegrown player rules instituted by the Union of European Football Associations ("UEFA") bear a strong resemblance to quota systems<sup>95</sup> that were banned under *Bosman*.<sup>96</sup> Clubs must submit a list of their 25-member squad prior to the start of a tournament and the clubs must contain at least four "club-trained" players and four

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<sup>92</sup> MCARDLE, *supra* note 1, at 105.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 113; *see generally* Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v Bosman*, 1995 E.R.C. I-4921.

<sup>95</sup> Lindsay V. Briggs, *UEFA v The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439, 440-41 (three players on each team's starting lineup had to be citizens of the country in which the club was located and two could be foreigners that had lived in the country for a certain number of years. This policy became known as the "3+2 Rule").

<sup>96</sup> MCARDLE, *supra* note 1, at 116.

“association-trained” players, as of the 2009-2010 season.<sup>97</sup> UEFA’s homegrown system is an effort to address its concerns for competitive balance and the development of young players while complying with *Bosman*.<sup>98</sup> McArdle anticipates that there may be a challenge to this rule in the future and that it will be “very hard to argue” that the *Bosman* rules of recruiting and training young athletes have been addressed by the homegrown player rules and that the rules’ benefits justify restricting athletes’ free movement.<sup>99</sup>

The discussion then shifts to salary caps within European sports.<sup>100</sup> Within some sports, salary caps have been regarded as a feasible means of securing “competitive balance” and encouraging financial stability while being compliant with European law.<sup>101</sup> The example of the Rugby Super League, however, indicates that, as with homegrown player rules, there is no guarantee of either competitive balance or financial stability.<sup>102</sup> Clubs have been permitted to breach their salary cap by £100,000 to attempt to prevent their players from leaving the league in order to pursue better contracts in other leagues.<sup>103</sup> Salary caps can help keep a club internally competitive, but can harm the quality of the league and make weaker leagues grow weaker.<sup>104</sup>

Chapter Eight discusses some of UEFA’s responses to *Bosman* and follows a series of cases revolving around unilateral options for extensions, mainly in the context of football.<sup>105</sup> In the direct aftermath of *Bosman*, UEFA abolished their quota system and the payment of transfer fees for players within the EU/EEA who moved when their contracts concluded.<sup>106</sup> It followed that clubs, in an attempt to circumvent this rule, began to extend the lengths of proven players’ contracts, encouraged them to enter into new contracts before the expiration of the existing contract, and sought to extract extremely high transfer fees for players transferring while under contract.<sup>107</sup>

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<sup>97</sup> MCARDLE, *supra* note 1, at 116. (club-trained players are those who, regardless of their nationality, have been registered with their current club for a period, which need not be continuous, of either three entire seasons or 36 months between the ages of 15 and 21 while association-trained players are those who meet those requirements but have been with another club within the same association).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 118.

<sup>100</sup> *Id.* at 120.

<sup>101</sup> *Id.* at 120.

<sup>102</sup> MCARDLE, *supra* note 1, at 120.

<sup>103</sup> *Id.* at 121.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 135. (unilateral contract options give the club the autonomous power to decide whether to keep a player when the initial contract comes to an end).

<sup>106</sup> *Id.* at 127.

<sup>107</sup> MCARDLE, *supra* note 1, at 128.

As far as unilateral options for extensions are concerned, it has been the general rule that CAS will not uphold unilateral contract extensions because persons will not be compelled to perform an employment contract against their will.<sup>108</sup> Unilateral contract extensions, however, are not invalid as a matter of law; factors to be considered to determine the validity of unilateral contract extensions include (1) if a player accepts a previous extension without protest; (2) the period of extension coverage is reasonable; and (3) if both the team and the player make concessions in the employment agreement.<sup>109</sup>

In the past several years, young athletes in Europe and their international transfers has increasingly become an issue.<sup>110</sup> The 2001 FIFA Regulations provided that contracts with minors (those under the age of eighteen) could not have a duration longer than three years. Additionally, the Regulations barred clubs from within the EU/EEA from signing minors who were not residents of an EU/EEA member state, unless the child had moved to a member state for reasons not associated with football.<sup>111</sup> These Regulations were highly criticized for not protecting minors carefully enough, principally in respect of their education and training. In 2005, Regulations established some improvements for youth participants.<sup>112</sup>

A famous case regarding youth movement of football players into Europe was heard by CAS in 2008 in *FC Midtjylland v. FIFA*, and is still the only case involving the movement of third-country minors that has been heard by CAS.<sup>113</sup> International transfer of minor athletes can occur only in extremely rare circumstances, and the athletes in this case were merely moving for football purposes.<sup>114</sup> One such circumstance that would allow for third-country movement of minors would be when an athlete moves for purely educational purposes to pursue their studies.<sup>115</sup>

The new regulations (both in 2005 and 2010) have taken great strides to protect youth participants in sports. The Regulations now require the Players' Status Committee

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<sup>108</sup> MCARDLE, *supra* note 1, at 139-40; see CAS 2006/A/1100 *Eltiab v. Club Gaziantespor*.

<sup>109</sup> MCARDLE, *supra* note 1, at 138; see CAS 2005/A/973 *Panathinaikos v. Sotirios Kyrgiakos*.

<sup>110</sup> MCARDLE, *supra* note 1, at 155.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 156; see generally *FC Midtjylland v. Fed'n Nat'l Football Ass'n*, CAS 2008/A/1485 (a Danish club had an arrangement with a Nigerian club that gave the Danish club the option to purchase the Nigerian club's player contracts. Three seventeen-year-old Nigerian players' contracts were purchased and they were brought to play for the FC Midtjylland under short-term educational visas which did not permit them to work. The players received minimal education while training with the club. CAS upheld a sanction placed on the club by FIFA's Dispute Resolution Chamber because there was no evidence that the relocation of the players was related to their education).

<sup>114</sup> MCARDLE, *supra* note 1, at 156-57.

<sup>115</sup> *Id.* at 157.



to create a subcommittee on the international transfers of minor players and to rule on the status of those players between the ages of twelve and eighteen.<sup>116</sup>

Chapter Ten discusses European collective bargaining in sports and the impact that McArdle thinks social dialogue can have on that process.<sup>117</sup> Social dialogue in Europe refers to discussions, consultations, negotiations, and joint actions involving organizations representing the two sides of industry (employers and workers).<sup>118</sup> McArdle refers to the movement towards the use of social dialogue in European sports as a very important development.<sup>119</sup> Social dialogue offers opportunities for influence and contribution to develop not only policies that are beneficial to both clubs and athletes, but also to develop structures that can help resolve disputes which impact upon their current and future membership.<sup>120</sup> Beyond the ability to develop dispute resolution structures, social dialogue can help create significant changes to other areas of sports such as the status and transfer of players, protection of minor athletes, image rights, pension funds, etc.<sup>121</sup> Finally, social dialogue can help impact recourse to CAS through internal systems of dispute resolution should parties seek this review.<sup>122</sup>

Part Four highlights the similarities and differences facing sports in Europe compared to the United States. Homegrown player rules as well as transfer rules are very complex and pose serious legal issues for European sports teams, whereas United States teams don't "transfer" players under contract and don't have limitations on the nationality of the on their teams. This section serves as a great comparative analysis between sports in the United States and Europe.

## VII. CONCLUSION

*Dispute Resolution in Sport* is a book designed to offer an understanding of the relationship between law and arbitration as well as provide guidance on key contemporary issues. McArdle excels at the latter objective through his use and examination of timely issues, arbitral decisions, and court decisions. His examination of Northwestern University's players' attempted unionization, the Jerry Sandusky scandal,

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<sup>116</sup> MCARDLE, *supra* note 1, at 160; see Regulations on the Status and Transfer of Players, Protection of Minors (2010), [http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010_e.pdf).

<sup>117</sup> MCARDLE, *supra* note 1, at 164.

<sup>118</sup> Social Dialogue, <http://ec.europa.eu/social/main.jsp?catId=329&langId=en> (last visited Oct. 16, 2014).

<sup>119</sup> MCARDLE, *supra* note 1, at 165.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 169.

<sup>122</sup> *Id.*

and the Lance Armstrong doping cases, just to name a few, are extremely attractive to a reader of this book because of the timeliness of the events. Almost all sports enthusiasts are aware, on some level, of these events.

McArdle does a wonderful job at explaining the basics of relationship between the law and arbitration, especially with regards to CAS. Chapter Two accomplishes McArdle's objective to show the intersection of law and arbitration better than any other chapter in the book. By showing how and when sports organizations try to shield themselves from oversight and review, McArdle uses brilliant examples to prove that these organizations cannot entirely accomplish this, nor should they be able to accomplish this goal. In general, courts will leave this oversight to sports dispute resolution systems, such as CAS, as they are the experts in the field.

While this book is a fairly easy read, it lacks organization and can sometimes leave the reader lost, even within a chapter, as McArdle jumps from topic to topic without smooth transitions. While some chapters built off of the previous chapter(s), others chapters lacked foundation that would provide guidance to the reader. This allows for less retention of the previous topics and an sense of brokenness throughout the book.

I would recommend this book to any student, practitioner, or researcher working or interested in sports law. *Dispute Resolution in Sport* is a must read in order to properly stay abreast of the current issues affecting the field. In terms of the novice or recreational sports law enthusiast, this book assumes prior knowledge of certain areas of the law or sports and fails to lay a proper foundation and can leave the reader wanting for more background.

*Dispute Resolution in Sport* successfully accomplishes its goals of elaborating on the relationship between law and arbitration within the field of sports law. McArdle uses contemporary issues to achieve that goal. This style of book could easily be replicated by McArdle every few years to bring readers up-to-date on relevant topics in sports law.