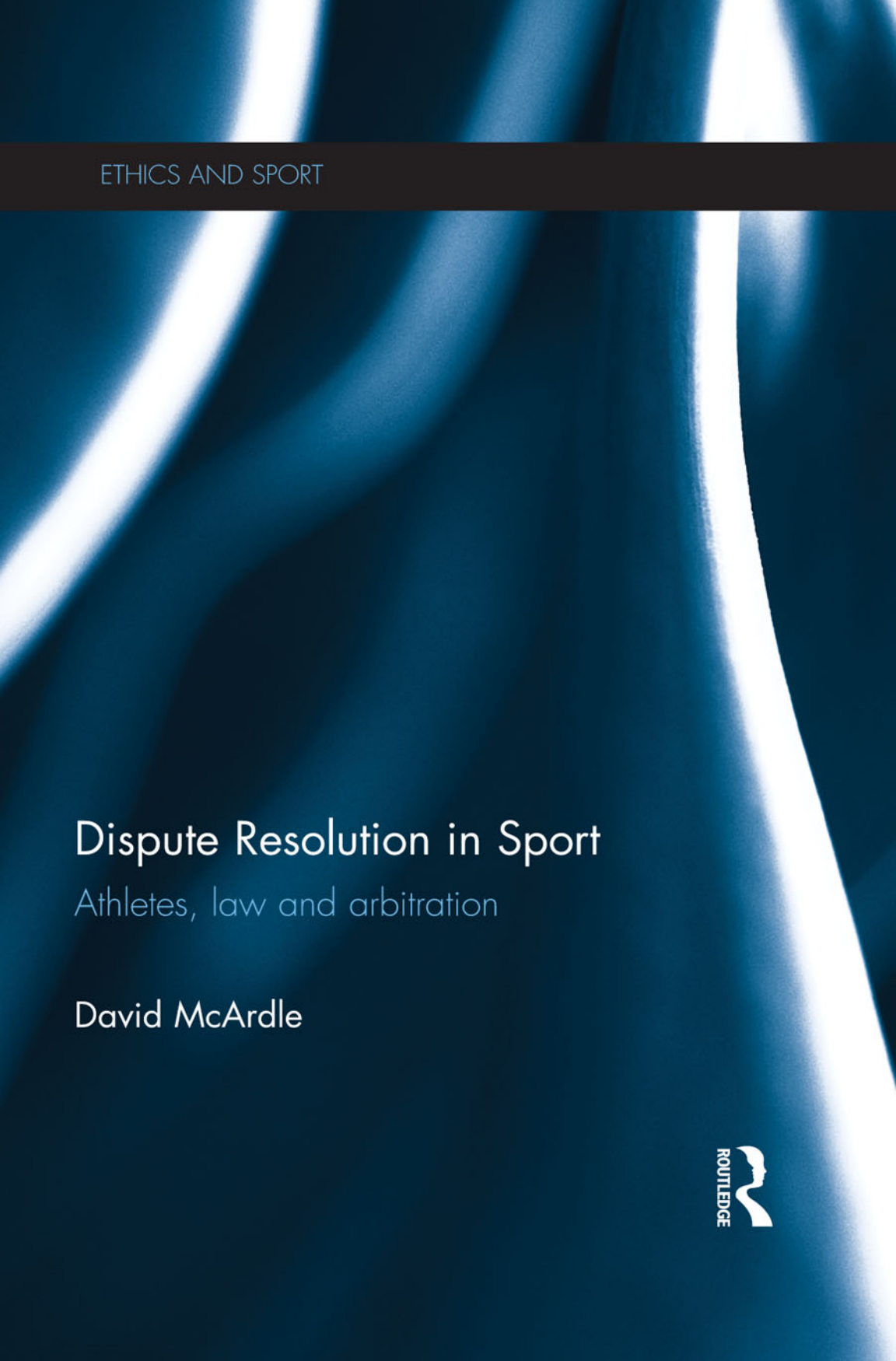
ETHICS AND SPORT
Dispute Resolution in Sport
Athletes, law and arbitration
David McArdle
ROUTLEDGE

Dispute Resolution in Sport

An increasing number of sport disputes are being resolved by way of arbitration. This is the first book to critically examine the processes and benefits of sport-specific arbitration as compared to litigation.

The book explores, in depth, the development of alternative dispute resolutions in sports, paying particular attention to high-profile institutions such as the Court of Arbitration for Sport, the FIFA Football Dispute Resolution Panel and important national-level bodies, and their relationship with national and international-level actors such as the IOC, WADA and the European Union. It also examines in detail the legal frameworks within which sports arbitration systems operate, considers their similarities with other arbitral bodies and considers the extent to which ADR in sport can be seen as a consequence of, and perhaps a solution to, the 'juridification' of sports.

Offering a theoretical basis with which to understand the relationship between arbitration and litigation, as well as providing guidance on key contemporary issues and best practice, this book is important reading for students, researchers and practitioners working in sports law, sports management and administration, sports politics, sports ethics, and international organisation.

David McArdle LLB, PhD is a Senior Lecturer in the School of Law at Stirling University, UK.

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Dispute Resolution in Sport
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Dispute Resolution in Sport

Athletes, law and arbitration

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2015
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
McArdle, David, author.
Dispute resolution in sport : athletes, law, and arbitration / David McArdle.
pages cm. -- (Ethics and sport)
Includes bibliographical references and index.
ISBN 978-0-415-59567-4 (hardback) -- ISBN 978-0-203-13357-6 (e-book) 1. Sports--Law and legislation. 2. Dispute resolution (Law) 3. Athletes--Legal status, laws, etc. 4. Arbitration (International law) I. Title.
K3702.M37 2014
344.01'89143--dc23
2014009700

ISBN: 978-0-415-59567-4 (hbk)
ISBN: 978-0-203-13357-6 (ebk)

Typeset in Goudy
by Saxon Graphics Ltd, Derby

For Charity, Leo, Joshua, Emily, my parents and my sister. Cadillacs in our dreams.

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Preface

The purpose of this book is to explore some of the key legal, arbitral and policy developments that have impacted upon athletes' participation rights, with particular reference to North America and the European Union. It encompasses situations where individual participants who have become embroiled in personal disputes with employer clubs or international federations have been heard before the Court of Arbitration for Sport (such as the recent cases involving Oscar Pistorius and Matuzalem da Silva), those where athletes have been vulnerable to the outcome of disputes heard by the courts (Glasgow Rangers FC), and those where individual sports' own internal dispute resolution structures, rather than recourse either to the courts or the CAS, have provided the resolution. The procedures agreed under unionised North American sports' collective agreements and those forced upon participants by the putative 'consensual submission' to the jurisdiction of the NCAA or sports' own dispute resolution systems are of particular relevance in that regard.

By reference to these sources it is possible to properly interrogate the relationship between athletes, sports arbitral bodies and the law. Prior to the inception of the CAS and other avenues of dispute resolutions which went beyond those provided by particular sports themselves, the courts provided athletes with their only possible means of redress against irrational, biased or otherwise flawed decisions of sports' decision-makers. But in addition to the expense and the length of time that hearing such disputes would inevitably take (which would be enough to dissuade most athletes from pursuing their potential remedies) the courts were famously – and usually quite properly – loathe to intercede in sports bodies' determinations. While it is important not to understate the benefits that institutions such as the CAS or the American Arbitration Association can offer when compared to the courts, it is sometimes the case that the awards of those bodies can be enforced and challenged – at least in theory – through the 'ordinary' court processes. That being so, the distinction that sports law scholars and practitioners tend to make between sports arbitration and court-based processes must be regarded as an artificial one. Very recent decisions of the Swiss courts (which have oversight of the Court of Arbitration for Sport) in the *Matuzalem* case, and the US courts in their willingness to reject the agreement reached between management and unions in the ongoing NFL concussion

litigation, illustrate that sports dispute resolution is not immune from court intervention, although examples of such intervention will continue to be the exception. With that in mind, the book considers some of the arguments in favour of CAS reform and the distinction between the courts' appellate and supervisory functions in respect of sports dispute resolution. In the US context specifically, the provisions of the Olympic and Amateur Sports Act and key cases arising under its provisions highlight the impact of the courts' historic willingness to defer to arbitrators' decisions.

The book also highlights the truism that no forum can satisfactorily resolve disputes that concern athlete selection or field-of-play decisions (and it is right that both the courts and the arbitrators avoid intervening with such decisions in almost all situations), while the emergence of collective bargaining in North American professional sports highlights the limited utility of antitrust and contract law in much the same way as the rulings of the European Courts since *Bosman* have provided, at best, temporary solutions to difficulties that are an inevitable consequence of the way in which international sport is organised and governed. Instances of US sports' collective agreements breaking down in the recent past also mean that the implications for the parties of unions decertifying is no longer of purely theoretical interest but has very significant implications for the relationship between sport and antitrust law. The emergence of social dialogue in the European sporting sector is identified as having the potential for a similar impact on sports' relationship with both free movement and competition law at the European level, and while scarcely comparable to the US experience, there are examples of strong unions within some European sports' domestic federations and an increasingly strong movement towards more effective representation at the European level, whether working within the social dialogue or within more traditional collective labour structures. European employers and sports federations' continued reliance on (clearly unlawful) player nationality quotas and (possibly unlawful) home-grown player rules as a means of controlling athletes' movement opportunities is explored by reference to the schemes that operate within professional football and basketball, while Rugby Super League provides an example of how salary caps can be imposed with barely a murmur of opposition, especially within sports where the union base remains weak. But, again, their legality remains questionable – partly as a consequence of this failure to formally secure the players' support for them.

The legal and policy developments which led to the establishing of FIFA's Dispute Resolution Chamber (DRC) is the best European example of how the fusion of sports dispute resolution and traditional court processes has led to the creation of entirely new structures to deal with player movement disputes in a specific sport, and it is significant that its emergence was a consequence of the European Commission compelling governing bodies to work more closely with players' representatives in a manner that may be repeated under social dialogue structures. Consequently the book examines some of the key cases in which the DRC, the CAS and, ultimately, the Swiss courts have considered decisions

relating to contract stability, unilateral extension clauses and unilateral breaches of contract.

Perhaps the most important point to emerge from those cases is the impossibility of discerning an approach by the CAS which is remotely analogous to the doctrine of legal precedent, so that earlier decisions give some meaningful guidance as to the likely outcome of later disputes. To the contrary, the CAS appears keen to avoid a situation in which parties in breach can predict with any certainty what the applicable damages will be, the apparent rationale being that an ability to ascertain that figure with any degree of certainty would, of itself, encourage breaches and thus undermine contract stability. The CAS's contingent approach in that regard raises particular concerns in respect of the status of younger elite athletes in Europe, whether they move from one member state to another or from a third country to the EU in order to pursue playing opportunities within its borders. While these concerns were explored by the CAS in *Midtjylland* the Court of Justice of the European Union in *Bernard* accepted that young players have a commercial value which 'training clubs' are entitled to recoup. While there may be several new ways through which athletes can seek to resolve grievances with employers and sports federations the outcomes are likely to remain the same: courts, arbitrators and tribunals will remain loathe to interfere with initial determinations and it will fall to players' representatives – whether through unionisation or via more novel means of representation – to advance their legitimate interests.

Introduction

In January 2014 the Eastern District of Pennsylvania heard a Motion for Preliminary Approval of the concussion settlement reached by the National Football League and the NFL's retired players (in *Re: National Football League Players' Concussion Injury Litigation* MDL No 2323, 12-md-2323). Over the previous three years some 4,500 retired players had filed lawsuits, contending that the NFL had failed to take reasonable action to protect players from the risk of concussive head injuries. The proposed settlement had been the consequence of those claims being consolidated before a single judge, Judge Anita Brody, who had ordered the parties to enter mediation in July 2013. The settlement potentially applied to some 20,000 retired football players and totals $760 million (plus the retirees' legal fees) over 20 years, with the potential for an additional $37.5 million in the event of there being a shortfall. In addition to earmarking $10 million for safety and injury-prevention initiatives, it made provision for those who had already received, or who subsequently receive, a 'qualifying diagnosis' of early or moderate dementia, Alzheimer's Disease, Parkinson's Disease, amyotropic lateral sclerosis and/or death with chronic traumatic encephalopathy (CTE) to receive payments of between $1.5 million and $5 million.

In class actions, a court should deny preliminary approval only if there are reasons to doubt an agreement's fairness or if there are other glaring deficiencies. There is an initial presumption of fairness if negotiations have occurred at arm's length, where there has been 'sufficient' discovery of legal and other documents, where the proponents of the settlement are experienced in similar litigation and where only a small fraction of those covered object to the settlement. Judge Brody, while accepting the parties had negotiated at arm's length and in good faith, felt there were still 'obvious deficiencies' because there was no guarantee that all those who received qualifying diagnoses in the future would be paid, despite the vast sums of money involved and the potential for top-up payments. 'Even if only 10 per cent of all retired NFL players eventually receive a qualifying diagnosis it is difficult to see how the Fund will have the funds available over its lifespan to pay all claimants at these significant award levels', and while the mediator (appointed by Brody herself) had cited independent analyses to justify his belief that $760 million would be enough, Judge Brody said no such analyses

had been provided to her; she ordered the parties to share their documentation with the court 'as a first step toward preliminary approval'.

The District Court's rejection does not mean the settlement is dead, but it will mean the retired players' opportunity to reflect and comment has been delayed until documentation which satisfies the Judge that there are adequate funds is adduced. However, Judge Brody's cautious approach reflects the obligations on US District Courts to scrutinise class action settlements very carefully, and while some might regard her denial of the motion as over-cautious, it is not excessively so.

But perhaps the Judge's caution reveals more than the courts' obligations to class action litigants: the significance of the NFL concussion litigation is hard to overstate, and not just in the context of North American sports. Clearly it will provide a template for concussion settlements in other professional sports, in college sports and possibly high school sports too; but at the time of writing both codes of rugby are taking steps towards effective concussion management policies, Gaelic games are being especially proactive and, globally, one can discern a long-overdue acknowledgement in many contact sports – not just collision sports like boxing and the NFL – that failures of concussion management and prevention place event organisers, equipment manufacturers and possibly coaches and managers vulnerable to litigation. While time is clearly of the essence for many NFL players who have already sustained irreparable long-term damage as a consequence of playing their sport, it is right for Judge Brody to want to see the detailed evidence upon which the settlement is based; and it is right that the rest of the sporting world pays close attention both to the details of the settlement and the wider medical and legal issues that have led to it.

For those working outside North America, it beggars belief than a judge with several years' experience of litigation arising from NFL collective agreements can regard the prospect of a minimum of ten per cent of its players receiving life-changing brain injuries that are so severe as to result in their using the fund, as not at all fanciful. The links between collision sports or certain contact sports and brain injury is well-established, but for event organisers it has taken the threat of litigation for the issue to become worthy of attention. As an academic and practitioner discipline, 'sports law' has developed far too unhealthy an obsession with the commercial legal aspects of elite-level sports – especially men's elite sports – and 'athlete rights' matters such as injury prevention and management, child protection, abusive athlete/trainer relationships, hostile working environments or wider equalities issues are largely irrelevant until wider publicity and scrutiny compels attention and action (Freeh, 2012; Weis, 2014), and a sufficiently strong possibility of litigation focuses the collective mind. Similarly, athletes rarely dope, gamble or 'fix matches' in isolation; they are usually caught up in much bigger networks – often because they are stupid, vulnerable, or ill-advised – but it is too often the case that athletes are easier to blame rather than take the wider issues of doping and match-fixing out of the 'too difficult to deal with' box. There is little incentive to change the culture of blaming the athlete and failing to address their real and legitimate concerns while event organisers,

broadcasters, fans, media and other stakeholders make money and enjoy the spectacle.

This book doesn't provide a panacea for resolving athletes' legitimate grievances and neither does it recommend any particular form of dispute resolution. The Court of Arbitration for Sport, court-mandated mediation or collective agreements' dispute resolution structures clearly have advantages over protracted and expensive litigation. There is much to commend the argument that sporting disputes should be resolved within the sporting rather than the juridical field, but the concussion litigation shows that the importance of the courts retaining a role over sporting disputes is considerable and should not be relinquished lightly, either by the contracting parties or by the courts themselves when exercising either their appellate or supervisory functions. Lord Denning, MR was right to say, in *Enderby Town FC v The Football Association* [1971] Ch 591, that in sporting disputes justice can often be better achieved by a good layman than a bad lawyer, but the concussion settlement shows that even when good laymen (and the occasional laywoman) work together and in good faith, there is still a role for the law to play. Antitrust/competition law, collective labour law, contracts between (especially) amateur elite athletes and event organisers, and the social dialogue framework within the European Union all have benefits and disadvantages just like sports' own dispute resolution systems do. But any effective exploration of athletes' rights and responsibilities must necessarily place sports' own dispute resolution structures just as much at the centre as the legal remedies. The concussion settlement shows just how closely interwoven the two have become – so much so that, whatever the concept of 'sports law' connotes, the wider the role of sports dispute resolution and its interplay with 'the law' is too significant to be regarded as of secondary importance.

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