Buchbesprechung

Internationale Dopingstrafen, von Jens Adolphsen, Verlag Mohr/Siebeck, 2003, XXXIX, 759 Seiten (Jus Privatum 78), € 124.00

I. Das Sportrecht als eine Querschnittsmaterie zwischen Vereins-, Arbeits-, Wirtschafts-, (insbesondere Kartellrecht) und Steuerrecht ist im innerstaatlichen Bereich inzwischen durch das Handbuch des Sportrechts (herausgegeben von *Pfister*, 1995) gut erschlossen. Anderes gilt für den internationalen Bereich. Dort haben sich in den letzten Jahren dramatische Entwicklungen vollzogen, vor allem durch das Aufkommen des Dopingmissbrauchs durch Sportler und den Versuchen der internationalen Sportverbände, den damit verbundenen Betrugshandlungen Einhalt zu bieten. Schadensersatzklagen prominenter Athleten (Katrin Krabbe, Dieter Baumann und zuvor Buch Reynolds) zeigen, dass es hier auch um erhebliche Beträge gehen kann. Gleichzeitig stellen diese Verfahren die Frage nach dem Verhältnis zwischen dem internationalen und dem nationalen Verbandsrecht, der Möglichkeit der Schaffung eines autonomen Sportrechts (das die Voraussetzungen und die Höhe von Dopingsanktionen einheitlich regelt). Auf der anderen Seite stehen die Kontrollvorbehalte der staatlichen Gerichtsbarkeit, die insbesondere die einzelnen Sportler gegen die übermächtigen Verbände schützen muss. Die staatlichen Gerichte werden zunehmend abgelöst durch eine internationale Sportschiedsgerichtsbarkeit, die ihren sinnfälligen Ausdruck im Court of Arbitration for Sport (CAS) (Lausanne) und in der World Anti Doping Agency (WADA) mit eigenen Verfahrens- und Sanktionsregelungen gefunden hat.

Adolphsen setzt seine Untersuchung des internationalen Sportrechts breit an.

1. Das erste Kapitel nimmt prominente Dopingfälle zum Ausgangspunkt, insbesondere den Fall „Baumann". Davon ausgehend zeichnet Verfasser zunächst die Organisation des Sports (als internationale Verbandspyramide) auf und beschreibt ihn sogleich als ein typisches Phänomen einer globalen Wirtschaft mit autonomen Organisationsformen. Das folgende Kapitel (S. 113 ff.) fragt nach den rechtlichen Beziehungen zwischen Sportler und internationalem Sportverband. Hier stellt Verfasser die entscheidenden Weichen, indem er unmittelbare Rechtsbeziehungen zwischen internationalem Verband (der häufig den Sportler unmittelbar sanktioniert) und dem Sportler, nämlich ein mitgliedschaftsähnliches bzw. gesellschaftsrechtliches Rechtsverhältnis, annimmt. Dies hat vor allem bei der kollisionsrechtlichen Einordnung (3. Kapitel, S. 253 ff.) Konsequenzen: Es ermöglicht nämlich die Einordnung von Verbands- bzw. Dopingstrafen nicht unter das Deliktstatut, sondern eine akzessorische Anknüpfung an das jeweilige Statut des internationalen Verbandes. Damit gilt einheitliches (oft schweizerisches) Recht für das weltweite Sportgeschehen. Der Sportler wird (höchstens) durch staatliche Eingriffsnormen geschützt.

2. Im Folgenden geht es um prozessuale Fragen, 4. Kapitel: Zuständigkeit (staatlicher Gerichte), das 5. Kapitel behandelt Sportschiedsgerichtsbarkeit, S. 484 ff., insbesondere das CAS, sowie um die Abgrenzung der Verbands- von der internationalen Sportschiedsgerichtsbarkeit. Angesichts der verfestigten Strukturen der Sportschiedsgerichte fragt der Verfasser nach der Herausbildung einer eigenständigen „lex sportiva", die strukturell der „lex mercatoria" entspricht. Angesichts der erheblichen Organisationstiefe, die eine zentrale Verbandsrechtsetzung ermöglicht, sind die Voraussetzungen zur Schaffung einer „lex sportiva" inzwischen gegeben. Das autonome Sportrecht wird von internationalen Verbänden erlassen und insbesondere durch die Verbandsgerichte, auf internationaler Ebene durch das CAS in Lausanne herausgeformt. Als verbleibende Gefahren der Sportautonomie sieht Verfasser zum einen die Eingriffe staatlicher Gerichte in das Sportgeschehen durch einstweilige Verfügungen sowie den Vorbehalt des staatlichen Kartellrechts, der eine Inhaltskontrolle von Sportregelwerken auslöst (dies ist insbesondere im europäischen und internationalen Fußballsport deutlich geworden).

3. Insgesamt hat *Adolphsen* eine sehr gründliche, umfassende Untersuchung des internationalen Sportgeschehens vorgelegt. Sie ist allerdings weniger aus der Sicht des Mannschafts- als vielmehr aus der des Individualsports, nämlich der Leichtathletik und des Reitsports geschrieben. Andere Sportarten sind freilich nicht ausgeklammert.

Alles in allem zeigt die Darstellung von *Adolphsen*, welch gewaltige Entwicklung das internationale Sportgeschehen, gerade aufgrund seiner Ökonomisierung und Verrechtlichung, in den vergangenen zehn Jahren genommen hat. Speziell im Bereich der Sportschiedsgerichtsbarkeit handelt es sich um die momentan gründlichste und gedankenreichste Studie. Die Monographie ergänzt und aktualisiert die bestehende Literatur in vorzüglicher Weise und ist gerade dem „Praktiker" im internationalen Sportrecht sehr zu empfehlen.

Prof. Dr. Burkhard Hess, Heidelberg

Veranstaltungsberichte

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Current Developments in Investment Protection Law

From the 15th to 17th of January 2004, the Ruhrgas Stipendienfonds of the Stifterverband für die Deutsche Wissenschaft in co-operation with the Transnational Economic Law Research Center (TELC), Martin-Luther-Universitiy Halle-Wittenberg, conducted a two-and-a-half day workshop on the subject "Current Developments in Investment Protection Law", in Halle.

The workshop brought together scholars and practitioners, including government and private-sector lawyers, from Norway, Belgium, Austria and the United States of America. The attendees addressed recent developments in Investment Protection and Arbitration of Investment Protection-related disputes, particularly with regards to the Energy Charter Treaty (ECT), Bilateral Investment Treaties (BITs), and Multilateral Trade Regimes (NAFTA/WTO).

Intended to be an intimate platform for the exchange of ideas and broad ranging discussions, the workshop was structured in a manner which allowed for key-note speakers to render perspectives on current issues and participants to explore issues in-depth in the ample time allocated for discussions.

Prof. Dr. Christian Tietje, LL. M., University of Halle and organizer of the conference, commenced the workshop with an incisive overview of contemporary Investment Protection law. The exponential growth of BITs, the increasingly multilateral nature of Investment Protection law, the possibility for future EU competency on investment measures, and jurisdictional issues were amongst the concerns noted by Prof. Tietje in his introductory speech.

Dr. Adnan Amkhan, Energy Charter Secretariat, Brussels, gave insights into "Current Developments under the Energy Charter Treaty (ECT)". *Amkhan* introduced the topic by underscoring the established and growing importance of the energy sector as the largest industry in the world. This was followed by a concise overview of the key principle provisions of the Treaty relating to investment promotion and protection (which are presently governed by separate re-

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gimes), transit of energy products and dispute resolution. Other principle provisions pertaining to trade, transfer of technology, access to capital, sovereignty over resources, environment, competition and taxation were also covered by *Amkhan*. In particular, the Article 26 ECT's robust dispute resolution procedures for the settlement of investment disputes between an investor and a contracting party were examined. These issues were reflected on via a sharing of *Amkhan's* professional and personal insights into recent noteworthy arbitration proceedings such as *Nykomb v. Latvia* at the Stockholm Chamber of Commerce, and *Palma Consortium v. Bulgaria* at the ICSID.

Ingeborg Bergby, University of Oslo, addressed the specificities of the Norwegian concerns with regards to the Ratification of the Energy Charter Treaty (ECT). The ECT, which came into full force on 16 April 1998, has now been fully ratified by 47 of the signatories. Norway has not ratified the ECT. *Bergby* examined in detail the so-called constitutional issues Norway has with regards to its ratification of the ECT. The crux of the Norwegian constitutional problem with ratifying the ECT is that compliance with Article 26 ECT's Dispute Resolution Procedures would lead to a violation of Article 26 of the Norwegian Constitution. It is presumed under the Constitution that only Norwegian authorities can make legally binding decisions with effect in Norway. *Bergby* also cited other areas of Norwegian constitutional law where constitutional law concerns have been contended, such as with regards to the European Union, the EEA-Agreement, the Schengen-Agreement, and Bilateral Investment Treaties. The latter are shortly due for renegotiation. In what *Bergby* candidly interprets to be a question of balancing Norwegian national sovereignty with the necessities of international cooperation, the underlying 'unofficial' issues preventing ECT ratification lie with appeasing vested interests within the bureaucratic elements steering Norway on the ECT. *Bergby* also opined the need for some sort of, as yet absent, genuine utility or incentive for Norway ratifying the ECT to arise. *Bergby* concluded with noting that it remains crucial for Norway to be actively involved with the development of an international investment regime and, that in her analysis, it would be possible for Norway to ratify the ECT with a legal but reformed application of the according provisions of the Norwegian Constitution.

Prof. Henrik Bull, Universitiy of Oslo, chaired the concluding session of the day on "Investment Protection through Bilateral Investment Treaties".

Prof. Ola Mestad, University of Oslo, dealt with the subject "BITs and Current Developments from an International Law Perspective and a National Constitutional Law Perspective". *Mestad* demonstrated that BITs, developed to protect, and thereby encourage investment from developed countries in developing countries, have been a tremendous success. This observation is qualified with regards to the more debatable issue of whether or not BITs actually also render the additional effect of increasing investment in general. *Mestad* espoused that there exists no issue of compatibility between BITs and EU external investment policy. In this regard, it was noted that there has been a newly negotiated understanding between the US and the EU on eight existing US BITs with new EU member countries. *Mestad* also elaborated on the contractual and procedural content of BITs, and their development through arbitration and courts. It was noted that there are now approximately 120 ICSID BIT cases, of which two are against developed countries. Important areas of pending BIT cases cited by *Mestad* include the consequences of the Argentina Financial Crisis, challenges to tax policy, energy/natural resources investments, and compensation claims jeopardizing debt-relief eligibility for poor countries. *Mestad* went on to consider whether current developments implied the establishment of new international law standards for investment protection. In particular, *Mestad* mooted the interesting issue of whether the concept of expropriation has now been excessively broadened to take into consideration the concept of indirect measures tantamount to expropriation. *Mestad* concluded with reflections on the relevance of BITs in the context of increasing state intervention and protectionism, the standardising effect of BITs on the market-state relationship and the consequent impact of BITs on national constitutional protection for property, and in the face of all this, whether the Calvo doctrine should, perhaps, be re-introduced.

Louis Skyner, Ph. D., University of Oslo, shared insights on "Recent Practice in Russia with regard to Investment Protection". He introduced the topic by referring to the recent legislative reforms of President Putin in an attempt to close the gap between Russian and western market. *Skyner* went on to cite practical examples of the discrepancy between law and practice for investment protection in the context of Russia. In the context of the extractive industries, *Skyner* pointed out the frequent disparity between investor rights to exploration and what ought to be the subsequent right to extract. It was noted that Russia does recognise that in the face of big market actors impacting national legislation, there is the need for governmental transparency as a prerequisite to raising necessary off-shore capital. In conclusion, *Skyner* opined that Russia is gradually beginning to resolve the systemic deficiency of governmental transparency that is key to its continued development.

The last topic of the workshop, "Investment Protection and Multilateral Trade Regimes", was introduced by *Prof. Dr. Christian Tietje*, LL. M. (Michigan), University of Halle, who chaired the session of the second day.

Tillman Rudolf Braun, M. P. A., Federal Ministry of Economics and Labour, Berlin, addressed the new developments of Trade and Investment Protection under WTO-Law in the aftermath of Cancun. *Braun* noted that in spite of a well-functioning extensive network of BITs and federal guarantee schemes – Germany supports foreign direct investments of German enterprises with more than 115 BITs in force – the German Government always supported the development of a multilateral framework of protection for direct investment. The speaker pointed out the necessity of a multilateral investment framework in building a more transparent, stable and predictable global investment environment. He outlined the possible content of a Multilateral Framework of Investment Protection, as discussed in the WTO-working group on "Trade and Investment", which proposes a multilateral investment agreement which should be aimed at defining the rights and obligations related to (long-term cross border) investment, including those of foreign investors, investment host-countries, and governments. It is suggested that this framework should include elements such as multilateralism among the participating nations, exclusivity of applicability and contents, transparency clauses, non-discrimination rules, and legally-binding dispute settlement procedures. *Braun* came to the conclusion that a multilateral framework for investment would indeed provide potential investors with lasting legal security, protect them against unilateral measures, and reduce transaction as well as information-costs. With regards to the recent developments after the "failure" of Cancun, he stated that the strict consensus principle will be hard to maintain amongst the 148 WTO-members. *Braun* concluded by touching on the new initiatives which are beginning to unbundle the Singapore-issues and aim at the next step in plurilateral negotiations.

Prof. Todd Weiler, University of Windsor, Canada, spoke on current concerns pertaining to NAFTA and Investment Protection. *Weiler* outlined the most significant developments arising out of the disputes in recent NAFTA experience. Based on a review of the most significant arbitral awards in this issue, namely *S.D. Myers, Inc. v. Canada*, *Pope & Talbot, Inc. v. Canada*, *U.P.S. Corp. v. Canada*, and *Raymond L. Loewen v. United States of America*, he considered that now being ten years into the ratification of NAFTA, the time is ripe to evaluate by-far the most controversial and important chapter of the agreement: Investment under NAFTA – Chapter 11. NAFTA Chapter 11 permits private parties to sue

governments for regulatory action that violates its provisions: such as "fair and equitable treatment", "national treatment" and "compensation for expropriation." *Weiler* noted that expropriation is not the only provision for which there is an interesting amount of existing "law". Furthermore, he dealt with Articles 1110, 1102, and 1105. Of particular interest, *Weiler* proposed the concept of an uninformed interpretation of Article 1110. With regards to Article 1102 – a regulation greatly influenced by GATT/WTO jurisprudence – he explained that *de facto* treatment is rejected by all three NAFTA parties but is universally accepted by the tribunals. NAFTA's national treatment provision provides greater certainty regarding the types of conduct that are consistently found to be in breach of NAFTA. NAFTA Article 1105 (1) provides that NAFTA parties must treat investments "in accordance with international law, including fair and equitable treatment and full protection of security". It thus appears to provide tribunals with considerable discretion to determine, based upon the facts of each case, whether the treatment was fair and equitable in the ordinary sense of the terms. Although the NAFTA parties have attempted to narrow the scope of the provision, this has notwithstanding validated the existence of a customary standard applicable to NAFTA Article 1105. *Weiler* concluded that the NAFTA experience demonstrates how the dynamics of international economic law dispute settlement is pre-disposed to the sort of cross-fertilisation of jurisprudential perspectives amongst jurists involved in different treaty platforms.

In sum, the Ruhrgas – TELC workshop served as an effective platform for a meeting of minds and exchange of insights on current developments in Investment Protection law and its arbitration-related developments.

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Symposium "Choosing the Right Arbitrator: A Key Decision"

On 26 March 2004 the Symposium organised by the German-American Lawyers' Association (Working group: Arbitration, Litigation, Mediation) and the Frankfurt Arbitration Circle (FAC) in cooperation with the German Institution of Arbitration (DIS) took place. The topic of this year's Symposium was "Choosing the Right Arbitrator: A Key Decision." Some 100 participants, predominantly professionals, listened to speakers and panel members who are leading practitioners in the field of arbitration and participated in lively debates.

Dr. Christean Wagner, Minister of Justice of Hessen, introduced the Symposium. After an illuminating short history of arbitration dating back to antiquity he highlighted the growing importance of arbitration in today's commercial world. He emphasised that in his view Frankfurt ought to become a more important centre of international arbitration.

The three panel discussions that took place in the course of the day concerned the issues of Independence of Arbitrators, whether Judges, Government Officials and Law Professors can and should be appointed Arbitrators and, lastly, How to Choose a Qualified Arbitrator.

Independence of Arbitrators

The members of the panel concerned with Independence of Arbitrators were *Stephan Jagusch, Dr. Carl Salans, Hilmar Raeschke-Kessler* and *Otto de Witt Wijnen*. The panel discussion was moderated by *Robert Hunter* and *Dr. Günter Pickrahn*. *Hilmar Raeschke-Kessler* gave an introduction into the concepts of impartiality and independence, arguing that both concepts are to be observed by arbitrators. While this may appear uncontroversial to the audience present at the symposium, these concepts are sometimes interpreted very differently in other parts of the world.

The panel presented a number of case scenarios which centred around the issue of what independence and impartiality mean in a given case scenario. During the debate that ensued with regard to the case studies the need was emphasised to distinguish between a situation giving rise to a duty by the arbitrator to declare a potential conflict of interest on the one hand and the duty to refuse to arbitrate in a matter which gives rise to a conflict on the other hand. Different standards would have to be applied in these two respective instances. *Hilmar Raeschke-Kessler* suggested the red ear test as a good guideline: an arbitrator should disclose a potential conflict of interest if a non-disclosure would, should it become known to both parties, cause the arbitrator to get red ears.

Judges, Government Officials and Law Professors as Arbitrators?

The second panel discussion which concerned the question whether Judges, Government Officials and Law Professors can and should be appointed Arbitrators was moderated by *Prof. Dr. Mathias Habersack* and *Dr. Rolf Trittmann*. Members of the panel were *Prof. Dr. Klaus-Peter Berger, Prof. Dr. Juan Fernandez-Armesto, Dr. Rudolf Fiebinger* and *Thomas Kehren*. The members of the panel set out how the approaches to judges as arbitrators differ in different jurisdictions: in Germany, for example, judges can sit as arbitrators if, having been appointed by all the parties to the dispute, they receive the necessary consent from the appropriate judicial body. In Spain, by contrast, it is most unusual for judges to sit as arbitrators. With regard to government officials and law professors the practice differs as well in different countries.

A number of case studies were presented focusing on the issue of whether judges, government officials and law professors could sit as arbitrators in certain circumstances and which procedure would have to be followed prior to their appointment.

How to Choose a Qualified Arbitrator

The third panel considered the question how parties ought to choose a qualified arbitrator. Panel members were *Dr. Hans-Dirk Krekeler, Jens Bredow, Dr. Klaus-A. Gerstenmaier* and *Dr. Markus Wirth*. The session was moderated by Richard Kreindler. The presentation of the members of the panel, the case studies and the contributions of the audience highlighted a range of issues that need to be taken into account when choosing an arbitrator.

The importance of an arbitrator's knowledge of the applicable law was particularly emphasised and highlighted as indispensable. The ability to understand the relevant technical issues and to speak the language of the parties were also emphasised as important. The following issues were also identified as important ones to consider when choosing an arbitrator: whether he or she has leadership qualities and, if more than one arbitrator is appointed, is compatible with the other arbitrators; whether the envisaged arbitrator has sufficient time and the required infrastructure to deal with the case adequately; what the background and experiences are of the envisaged arbitrator. In summary: it is important to look at the case and the parties very closely and to choose an arbitrator accordingly.

The closing remarks of the Symposium were made by *Arthur L. Marriott, QC*. He summarised the highlights of the day most eloquently and added the Anglo-Saxon perspective to a number of the issues. He emphasised the need for devising common standards in arbitration and referred to the efforts that have already been made in this respect. Those who attended the Symposium will agree that it highlighted the variety of views on the individual topics and furthered the understanding between practitioners who work in the field of arbitration.

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