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Martin J. Greenberg  
*Marquette University Law School*

James T. Gray

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# CITIZENSHIP BASED QUOTA SYSTEMS IN ATHLETICS

MARTIN J. GREENBERG\*  
JAMES T. GRAY\*\*

## I. INTRODUCTION

Over the last ten years, American sports leagues such as the National Basketball Association (NBA), National Hockey League (NHL) and Major League Baseball (MLB) have considered expanding their leagues into Europe, Central and South America as well as the Pacific Rim. For example, during the 1991, 1992, 1995 and 1996 seasons, the National Football League (NFL) placed its product in an international forum with the establishment of the World League of American Football.

Simultaneously, foreign players, such as the NBA's Dikembe Mutombo and Toni Kukoc, MLB's Hideo Nomo and Julio Franco, and the NHL's Jaromir Jagr and Pavel Bure all have made significant contributions to American professional sports. American men and women basketball players such as Danny Ferry and Teresa Edwards as well as American soccer players such as Alexi Lalas and Tab Ramos have successfully competed in European, South American and Asian leagues.

Sports leagues allow their members to recruit foreign players for team rosters for several reasons. Often times, depending upon the sport, foreign players can be perceived to be the best skilled athletes available. When so perceived, foreign players can generate increased public and media interest, fan support, game attendance, and television ratings.

In addition, the presence of foreign players can improve the strategy and skill of their national counterparts. For example, foreign and national players will be required to play with and against each other. Foreign players, usually superior in skill and experience, should assist in the

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\* Director, National Sports Law Institute; Adjunct Professor of Law, Marquette University Law School.

\*\* Assistant Director, National Sports Law Institute; Adjunct Assistant Professor of Law, Marquette University Law School. The authors wish to thank our Marquette University Law School colleague Professor Phoebe Weaver Williams for her expert review and input pertaining to this article. In addition, we are grateful for the research and assistance provided by NSLI research assistants Scott Lascari and William Miller. We also thank Professor Hayden Opie of the University of Melbourne Law School in Melbourne, Parkville, Victoria, Australia and Professor Simon Gardiner of Anglia Law School in Chelmsford, Essex, England for timely providing us with Australian and European Community law and court opinions, respectively.

improvement of the national players who face the daily competition of their foreign counterparts.

In addition, foreign athletes are expected to win championships immediately and are blamed for the lack of success a national team may experience. One commentator has stated that:

Regardless of the country and how much the foreign athlete is getting paid, he or she will be expected to carry the team. If the team is not performing well, then the foreign players may be blamed in the media and by management even if the foreign player is playing at 110 percent.<sup>1</sup>

However, if there are too many foreign players on a team, then those players have the potential to monopolize a particular league leaving national players to watch from the sidelines as nothing more than interested spectators in uniforms. This problem can be exacerbated when a league is established in a country without traditional support for that sport. Examples of sports leagues being established without traditional national support include the North American Soccer League and Major League Soccer in the United States, as well as various basketball leagues around the world where soccer, track and field, cricket or rugby are the national pastimes.

In order to equalize competition between foreign and national players as well as to retain fan and media support, most leagues will establish rules which limit the number of foreign players that may participate on a team, in a game or in a league on an annual basis. This article will examine these quota systems and their legal ramifications. Part II of this article will discuss the quota systems of the various leagues. Part III will examine United States employment law as it relates to foreign athletes competing in the United States, and Part IV will examine immigration law and the employment of foreign athletes in the United States. Part V reviews United States law as it relates to American athletes competing abroad, Part VI reviews Australian law and foreign player quotas, and Part VII reviews European Community law and the use of foreign player quota systems. Finally, Part VIII applies United States and European Community laws to citizenship-based quota systems in athletics.

## II. LEAGUE QUOTA SYSTEMS

The issue of professional sports leagues using foreign athletes to attract a national following occurred in the United States during the late

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1. Andris (Andy) Inveiss, *Playing Volleyball Abroad*, FOR THE RECORD (Nat'l Sports Law Institute, Milwaukee, WI), Feb./Mar. 1994, at 7.

1970s and early 1980s with the establishment of the North American Soccer League (NASL). The league employed a large number of foreign soccer stars such as Brazilian legend Pele and German great Franz Beckenbauer. These players were expected to attract significant fan and media attention based on their international reputations. One of the reasons that the NASL was unsuccessful was because of a lack of fan identification with the foreign stars combined with a minimal American soccer tradition at the time.

According to American soccer journalist John Gonsalves, the NASL: attracted many large crowds, but they gave lip service to the fans by telling them that they were going to Americanize the game — saying they would use American players. Basically, they lied. They brought in too many foreign players, who did not have a vested interest in seeing the league survive. They came in, took their money, and went home.<sup>2</sup>

Using the NASL experience as guidance, the new United States outdoor professional soccer league known as Major League Soccer (MLS) has decided to encourage many American soccer players playing abroad to return home. In addition, MLS will limit teams to three foreign players each. The league will attempt to receive approval from United States Soccer to allow four foreign players to be on the field at the same time with a total of forty roster positions available for non-United States players.<sup>3</sup> Similarly, the Continental Indoor Soccer League permits a maximum of three foreign players per team and the National Professional Soccer League permits two Canadian and two foreign players per team.<sup>4</sup>

The issue of foreign athlete quotas is one that is worldwide. Foreign players are generally classified based on the player's eligibility to represent his country in international competition. Preparation and training of foreign athletes by national teams for international competitions such as the World Cup and the Olympic Games is controversial. For example, eight time Olympic champion Carl Lewis lashed out at United States colleges and universities who offer athletic scholarships and financial aid to foreign athletes. Lewis said:

We are bankrolling the world Olympic movement when we should be helping our Olympic movement. . . . If the foreign ath-

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2. Doug Chapman, *Crazy for Soccer*, PROVIDENCE JOURNAL-BULLETIN, June 12, 1994, at 8M.

3. Jerry Langdon, *MLS Considers Using Shootout As Tiebreaker*, USA TODAY, Jan. 31, 1996, at 6C; Jerry Langdon, *Young Brazilians Invited To Tryout*, USA TODAY, Feb. 2, 1996, at 4C.

4. Telephone interviews with CISL and NPSL representatives (Feb. 2, 1996).

letes want to come and pay their own way, or have their country help them, that is fine. But the money from scholarships needs to go to American kids. It's American taxpayers' money, its American sponsors' money, and it should go to American kids.<sup>5</sup>

Lewis also indicated that he would limit the number of scholarships United States college and universities could offer to foreign athletes to four, two for the men's team and two for the women's team.<sup>6</sup> Currently, there is no restriction on aid to foreign competitors attending American institutions of higher learning.

The Canadian Football League requires each team to ensure that twenty Canadian players are on the thirty-seven man roster. The three quarterbacks, however, can be of any nationality.<sup>7</sup> Women's basketball leagues in Italy, France, and Spain all have adopted a foreign player quota rule.<sup>8</sup> The Italian league permits two foreign players, with American players typically holding from twenty-eight to thirty of the available thirty-two spots.<sup>9</sup> In France, only the first two divisions allow foreign players.<sup>10</sup> Division 1A consists of twelve teams and allows two foreign players per team.<sup>11</sup> Division 1B consists of twelve teams and allows only one foreign player per team.<sup>12</sup> Of the thirty-six spots available to foreign players, nineteen were filled by American players.<sup>13</sup> However, during the 1992 season only seven Americans were playing in France.<sup>14</sup> In Spain, one of the teams consists of all-Spanish national team members; therefore only twenty-eight spots were available for foreign players, with Americans filling twenty-five of those spots.<sup>15</sup> In 1992, only fourteen Americans held a position with a Spanish team.<sup>16</sup>

An American coach and several Canadian players are doing wonders for the popularity of hockey in Italy and paving the way for what could be an influx of talent from North America. Ted Sator and Mark Napier,

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5. Gene Cherry, *Athletics-Lewis Lashes Out At Aid To Foreign Athletes*, REUTERS, LTD., June 2, 1994 (available in LEXIS, Nexis Library, REUNA File).

6. *Id.*

7. David Whitley, *Americans To Get Taste Of CFL Play*, SAN ANTONIO LIGHT, Jan. 13, 1993, at B1.

8. Jill Jeffrey, *Europe is Where it's at for Women Pro Basketball Players — Or is It?*, FOR THE RECORD (Nat'l Sports Law Institute, Milwaukee, WI), Apr./May 1992, at 7-8.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

the coach and star player of Italy's number one team, Lions Mediolanum, believe that the time is right for Italian clubs to lure more National Hockey League players the same way Italian basketball attracted National Basketball Association stars in the 1980s.<sup>17</sup> Each Italian hockey team is allowed a maximum of three non-Italians and up to eight foreigners of Italian ancestry.<sup>18</sup>

German sports leagues allow varied numbers of foreigners to play per-game, but the number varies from one to three. Some of the leagues, such as boxing and ice hockey, differentiate between foreigners who do not necessarily reside in Germany and those who reside there permanently or are naturalized and have established a separate quota for each group.<sup>19</sup> "One-fifth of 426, of the active players in the nine major [German] sports leagues, which include soccer, ice hockey, handball, basketball, volleyball, table tennis, wrestling, boxing and weight lifting come from another country."<sup>20</sup>

The German National Soccer League has "the most foreigners in absolute terms, while the highest percentage of foreigners play in the ice hockey league. The lowest percentage is in the National Handball League."<sup>21</sup>

American basketball star, Teresa Edwards, a member of the 1996 United States Olympic basketball team, had been the nucleus of the Mitsubishi Electric Corporation women's basketball team.<sup>22</sup> In 1993, however, Edwards was fired from the company team because the Japan Basketball Association decided to expel all foreign players from the twenty team league.<sup>23</sup> The Association's justification was "that women's

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17. *North Americans Boosting Italian Hockey*, THE RECORD, Nov. 26, 1992, at D3. See *Boston Celtics Ltd. Partnership v. Shaw*, 908 F.2d 1041 (1st Cir. 1990). The court required professional basketball player to rescind his contract with Il Messaggero of the Italian Basketball League and to play only for the Boston Celtics of the National Basketball Association during the term of his Celtics contract. *Id.* In addition, the Italian Basketball League was successful in signing Danny Ferry, who was the second player chosen by the Los Angeles Clippers in the 1989 NBA player draft. The Clippers later traded Ferry to the Cleveland Cavaliers for Ron Harper.

18. *North Americans Boosting Italian Hockey*, THE RECORD, Nov. 26, 1992, at D3.

19. *German Sports Leagues: Integration Out Of The Spotlight's Glare*, THE WEEK IN GERMANY, Jan. 15, 1993.

20. *Id.*

21. *Id.*

22. Yoshiaki Itoh, *Sports Associations Face Dilemma on Foreign Players; Another League Decides To Expel Non-Japanese*, THE NIKKEI WEEKLY, Jan. 18, 1993, at 1.

23. *Id.*

basketball [was] too dependant on foreigners which made it difficult for Japan to produce its own world class caliber Olympic basketball team."<sup>24</sup>

In Japan, each of the Professional Baseball League's twelve teams can place three foreign players on its roster.<sup>25</sup> In the ten team J-Soccer League, each team is allowed to sign five foreign players.<sup>26</sup> In 1990, foreign men and women were banned from playing in the Japan Volleyball League "[b]ecause the league should be the place to train players for the Olympics, [and] we decided not to allow participation by foreigners," said Tsutomu Koyama, managing director of the association.<sup>27</sup> Below is a Japanese sports league foreign athlete limitation listing:

<u>SPORT</u>	<u>NON-JAPANESE ATHLETES</u>	<u>CONDITIONS</u>
American Football	0	Ruled in 1990 that foreign players cannot play for corporate teams.
Professional Baseball	About 30	Three foreign players per team, two of whom can play per team per game.
Men's Basketball	More than 30	Each league team can have two foreign players.
Women's Basketball	More than 30	Two non-Japanese per team. But foreign players are banned in 1993 season.
Ice Hockey	0	Foreign players are banned in 1984.
Judo	About 10	No regulations on nationality for corporate teams.
Rugby	More than 50	Each corporate team can have two foreigners. Before 1991, no rule on nationality.
Soccer	More than 30	Each club can sign five foreign players. Three can play per team per game.
Sumo [Wrestling]	More than 30	No regulations on nationality.
Men's Volleyball	0	Foreign players banned in 1990.
Women's Volleyball	0	Foreign players banned in 1990. <sup>28</sup>

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

### III. UNITED STATES EMPLOYMENT LAW AND FOREIGN ATHLETES COMPETING IN THE UNITED STATES: TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against any individual "because of such individual's race, color, religion, sex, or national origin."<sup>29</sup> In *Espinoza v. Farah Manufacturing Company*, the United States Supreme Court addressed the issue of whether Title VII allowed private employers to promulgate a policy of hiring American citizens only.<sup>30</sup> The Court ruled that Title VII does not prohibit discrimination on the basis of citizenship where an employer has a rule against employing foreigners.

However, if a private employer decides to hire foreigners, the employer cannot prefer hiring those of one nationality over another. For example, if a company employs only those of Anglo-Saxon background and excludes employing those of Mexican or Spanish ancestry, Title VII would be violated.<sup>31</sup>

On the other hand, the Court has held that discrimination against Americans in the United States, based on their lack of citizenship in a foreign country, can be used to establish national origin discrimination under Title VII. In *Sumitomo Shoji America v. Avagliano*, a group of American secretaries sued Sumitomo Shoji America (Sumitomo) as it pertained to their policy of favoring hiring Japanese nationals for executive positions at the exclusion of American citizens.<sup>32</sup> Sumitomo claimed that their Japanese only executive promotion policy was exempted from Title VII by virtue of the United States/Japan Friendship Commerce and Navigation Treaty (Treaty).

In ruling for the secretaries, the United States Supreme Court held that the Treaty distinguished between Japanese subsidiaries incorporated in the United States and those Japanese companies operating in the United States. According to the Court, the Treaty only applies to Japanese companies which are considered to be operating in the United States.<sup>33</sup> Sumitomo was found to be a subsidiary incorporated in the United States where the Treaty did not protect the company's Japanese only executive policy from Title VII violations.<sup>34</sup>

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29. 42 U.S.C.A. § 2000e-2 (1991).

30. 414 U.S. 86 (1973).

31. *Id.* at 95.

32. 457 U.S. 176 (1982).

33. *Id.* at 183.

34. *Id.*



However, the Court left open the possibility that a subsidiary might achieve the same protection by asserting the treaty rights of a foreign based parent corporation.<sup>35</sup> In *Fortino v. Quasar Company*,<sup>36</sup> Matsushita Electric Industrial Company of Japan (Matsushita), as part of the reorganization of its subsidiary, Quasar Company, fired American citizens from its workforce and replaced its American employees with Japanese citizens.<sup>37</sup>

The Seventh Circuit Court of Appeals held that the Treaty clearly provided Japanese companies with the "right to choose citizens of their own nation as executives because they are such citizens"<sup>38</sup> and ruled that Matsushita's dismissal of their former American employees were protected by the Treaty.<sup>39</sup> Therefore, Title VII did not apply. In balancing the rights of American employees and their Japanese employers the court concluded their opinion on this issue by stating:

If this conclusion seems callous toward the Americans who lost their jobs at Quasar, we remind that the rights granted by treaty are reciprocal. There are Americans employed abroad by foreign subsidiaries of U.S. companies who, but for the treaty, would lose their jobs to foreign nationals. Indeed, the treaty provision was inserted at the insistence of the United States. Japan was opposed to it.<sup>40</sup>

#### IV. IMMIGRATION LAW AND THE EMPLOYMENT OF FOREIGN ATHLETES IN THE UNITED STATES

In 1986, Congress passed the Immigration Reform and Control Act (IRCA). IRCA prohibits discrimination based on national origin or citizenship status in the hiring, recruiting, referral or discharge of individuals.<sup>41</sup> The law does not apply if an entity employs three or fewer employees, if national origin discrimination is already covered by Title VII and if discrimination occurs because of citizenship status as required by law.<sup>42</sup>

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35. *Id.* at 189 n. 19.

36. 950 F.2d 389 (7th Cir. 1991).

37. *Id.*

38. *Id.* at 392 (quoting *MacNamara v. Korea Airlines*, 863 F.2d 1135, 1144 (3d Cir. 1988)).

39. *Id.*

40. *Id.* at 393-94 (citing *Sumitomo*, 457 U.S. at 181 n. 6).

41. 8 U.S.C. § 1324b(a)(1) (1988).

42. *Id.* § (2)(A)-(C). Discrimination on the basis of citizenship status is permitted "in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an em-

IRCA specifically prohibits plaintiffs from filing unfair immigration-related employment claims if the same charge is presently under consideration with the Equal Employment Opportunity Commission under Title VII.<sup>43</sup> Conversely, plaintiffs cannot file an unfair immigration-related employment charge under Title VII if the same charge is being reviewed by the Special Counsel as provided under IRCA.<sup>44</sup>

IRCA also protects U.S. permanent residents, temporary residents, refugees and asylees who evidence an intention to become US citizens by completing declarations of intention to become a citizen.<sup>45</sup> "Thus, an employer who has a blanket rule denying employment to all who do not possess American citizenship will violate [IRCA] as to all non-citizens who fall into the category of 'intending citizen.'"<sup>46</sup>

However, there is an exception to the "intending citizen" rule. IRCA states:

Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.<sup>47</sup>

#### V. UNITED STATES LAW AND AMERICAN ATHLETES COMPETING ABROAD

The extraterritorial application of Title VII was addressed by the United States Supreme Court in *EEOC v. Arabian American Oil Company*.<sup>48</sup> In this case, an American citizen was employed by an American corporation which conducted business abroad. During the time which the American employee was working in Saudi Arabia he was discharged from his employment.

The employee claimed that he was fired because of his race, religion and national origin. The Court held that Title VII did not apply to the employment practices of United States employers who employ United States citizens abroad.

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ployer to do business with an agency or department of the Federal, State or local government." *Id.* § (2)(C).

43. *Id.* § (6)(b)(2).

44. *Id.*

45. *Id.* § (3)(B).

46. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 237 (1988).

47. 8 U.S.C. § 1324b(a)(4).

48. 49 U.S. 244 (1991).

However, 42 U.S.C. § 2000e-1 of the Civil Rights Restoration Act of 1991 (Act) rescinded the Court's *ARAMCO* holding and amended Title VII to extend to the employment of United States citizens working for United States employers in foreign countries. However, the Act affords no protection for foreign citizens employed abroad by United States companies.<sup>49</sup> Nor does the Act apply to the foreign operations of a foreign employer not controlled by an American employer.<sup>50</sup>

The Act specifies four factors to be considered in determining whether an American employer controls a foreign corporation:

1. Interrelations of operations
2. Common management
3. Centralized control of labor relations and
4. Common ownership or financial control of the employer and corporation.<sup>51</sup>

When applying the employer control test to the World League of American Football (WLAF) during the 1995 and 1996 seasons, all of the teams will be operating in Europe.<sup>52</sup> However, all of the teams will be owned and controlled by the NFL. For example, the final selection of coaches and players will be ultimately determined by those affiliated with the NFL. Thus, the employer control test will find that Title VII applies to WLAF operations.<sup>53</sup>

As one commentator has pointed out "[t]he control inquiry is fact-based. No one factor is dispositive, but courts generally place more

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49. 42 U.S.C.A. § 2000e-1(a) (1991).

50. *Id.* § (c)(2).

51. *Id.* § (c)(3)(A)-(D).

52. During the 1995 and 1996 seasons, the National Football League will own and operate the following teams: Amsterdam Admirals, Barcelona Dragons, Dusseldorf Rhein Fire, Frankfurt Galaxy, London Monarchs and Scottish Claymores. Telephone Interview with Andrew Fink, NFL Public Relations Department (Feb. 2, 1996).

53. The establishment of the Orlando franchise is a good example of the tight control which the NFL exerts over the WLAF:

The WLAF franchise agreement calls for the league to pick players and coaches, set salaries, keep network TV revenue and pay for the players and travel. But it also gives the local owner only "input" in the choosing of front-office personnel. WLAF owners will be permitted to sell tickets and local sponsorships that don't conflict with national sponsors and must bear all day-to-day and game operational expenses. It's a 10-year deal, but there is a clause that empowers the league to buy out any WLAF owner anytime the league so chooses.

Larry Guest, *WLAF Works Too Hard To Hold The Trump Card*, ORLANDO SENTINEL TRIB., June 25, 1990, at D1.

weight on the first three factors, concerning control over business and employment practices, than on ownership or financial control."<sup>54</sup>

The Act protects United States employers from liability under Title VII if compliance with those laws would cause the employer "to violate the law of a foreign country in which such workplace is located."<sup>55</sup> Thus, an American employer could comply with foreign laws imposing nationality, religious or gender requirements for certain types of employment within those jurisdictions without facing Title VII liability.

In Japan, for example, the "Labour Standards Law of Japan prohibits an employer from having a large percentage of its female employees work longer than a certain amount of time on holidays, or at night from 10:00 p.m. until 5:00 a.m."<sup>56</sup>

However, it is imperative to distinguish between a nation's custom as compared to a nation's law. For example, an employer may refuse to hire or promote an American citizen because of the cultural resistance of the host country to the employees' gender, race, religious or ethnic background.

In *Abrams v. Baylor College of Medicine*,<sup>57</sup> Baylor Hospital agreed to provide medical services to King Faisal Hospital in Riyadh, Saudi Arabia.<sup>58</sup> However, Baylor Hospital refused to send two of its Jewish doctors to Saudi Arabia. Baylor indicated to its doctors that it would be unable to secure an entry visa which would permit them to enter Saudi Arabia.

The Fifth Circuit Court of Appeals found no evidence to support Baylor's claim because they failed to ascertain the official position of the Saudi government on this issue, "in part, by its desire not to 'rock the boat' of its lucrative Saudi contributors."<sup>59</sup> As a result, the court held that:

These exclusionary practices were undertaken unilaterally by Baylor administrative officials. There is no evidence to show that

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54. David A. Cathcart and Mark Snyderman, *The Civil Rights Act of 1991*, C108 ALI-ABA 251 at 307 (citing National Labor Relations Board v. Welcome-American Fertilizer Co., 443 F.2d 19 (9th Cir. 1971)). Other cases which implemented the employer control test but did not emphasize one factor over another are Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965); Baker v. Stuart Broadcasting Company, 560 F.2d 389 (8th Cir. 1977).

55. 42 U.S.C.A. § 2000e-1(b).

56. Ryuichi Yamakawa, *Territoriality and Extraterritoriality: Coverage of Fair Employment Law After EEOC v. Aramco*, 17 N.C.J. INT'L L & COM. REG. 71 (1992).

57. 805 F.2d 528 (5th Cir. 1986).

58. *Id.*

59. *Id.* at 533.

Baylor officials took any appropriate steps to determine the actual policy of the Kingdom of Saudi Arabia toward Jews participating in the program. Moreover, Baylor took no steps to alleviate or rectify the effects of any perceived discriminatory practices and policies on the part of the Saudis. . . we must conclude that the college intentionally excluded Jews from its . . . program at Faisal Hospital.<sup>60</sup>

## VI. AUSTRALIAN LAW AND FOREIGN PLAYER QUOTAS

The issue of foreign player restrictions was at issue in *Henderson v. National Basketball League*.<sup>61</sup> In this case Kelvin Henderson arrived in Australia as an American citizen and had a desire to play professional basketball for the Australia's National Basketball League (NBL).<sup>62</sup> Later Henderson applied for and was granted Australian citizenship.<sup>63</sup>

In order to increase his chances of playing in the NBL Henderson decided to pursue his career as an Australian citizen. The evidence indicated that Henderson was unlikely to make any NBL team as a foreign player.<sup>64</sup>

The NBL has a rule which allows only two foreign players to compete per team. NBL Rule 10.1.2 states: "each club shall be limited to not more than two players per team who are not eligible to represent . . . [Australia]. . . in the Main Official Competition of FIBA, pursuant to all FIBA regulations as determined from time to time."<sup>65</sup> If a player decides to change his citizenship and become an Australian national, the FIBA has another rule which requires the player to wait three years before NBL eligibility is granted.<sup>66</sup> The three year wait rule was applied by the NBL to Henderson.<sup>67</sup>

In response, Henderson claimed that the three year wait rule violated Section 9(1) of the Australian Racial Discrimination Act of 1975 (RDA).<sup>68</sup> The RDA states:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on . . . national or ethnic origin which has the purpose or effect of nullifying or impair-

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60. *Id.* at 535.

61. (1992) E.O.C. 92-435.

62. *Id.* at 79,067.

63. *Id.*

64. *Id.*

65. *Id.* at 79,066-67.

66. FIBA Regulation 6.4.

67. *Henderson*, (1992) E.O.C. 92-435 at 79,063.

68. *Id.*

ing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>69</sup>

The Australian Human Rights and Equal Opportunity Commission (Commission) stated that the NBL did not violate the RDA when applying their three year wait rule. The Commission held that:

[The three year wait requirement] is not imposed on [Henderson] by reason of the country of his origin but simply because he has changed his legal nationality. Mr. Henderson is required to complete the same three year waiting period as a player who elects to change his nationality to one which he is entitled to claim by birth. The three year delay applies to any change of basketball nationality irrespective of the national origin of the player.<sup>70</sup>

## VII. EUROPEAN COMMUNITY LAW AND THE USE OF FOREIGN PLAYER QUOTA SYSTEMS

Since the 1960s, many European sports leagues established rules which restricted the number of foreign players which could compete per team. Three European Court of Justice cases have addressed the issue of foreign player limitation rules as applied by European Community law.

In *Walrave v. Association Union Cycliste Internationale*,<sup>71</sup> foreign player limitation rules were at issue with respect to the sport of motor paced bicycle racing. This sport consists of one person on a motorcycle, known as the "pacemaker," followed by another on a bicycle, known as the "stayer."<sup>72</sup> The pacemaker creates a vacuum for the stayer who can then achieve speeds of up to 100 kilometers per hour.<sup>73</sup>

The Union Cycliste Internationale (UCI) had a rule which stated that the pacer and stayer must be of the same nationality.<sup>74</sup> This rule was challenged by two Dutch pacers who wanted to sell their services as pacemakers to German and Belgian stayers.<sup>75</sup> The Court held that the UCI foreign athlete limitation rules violate the European Community Treaty if the sport constitutes an economic activity.<sup>76</sup>

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69. 1975 Austrl. C. Acts 52, § 9(1).

70. *Henderson*, (1992) E.O.C. 92-435 at 79,070

71. 1974 E.C.R. 1405.

72. *Id.* at 1421.

73. *Id.*

74. *Id.* at 1422.

75. *Id.*

76. *Id.* at 1420.

However, the Treaty is not violated if the composition of a team is made purely based on a sporting interest.<sup>77</sup> For example, team selection based upon a sporting interest is established when athletes are chosen to represent their country in either Olympic or World Cup competition. On the other hand, competitions which are not based solely on nationality and where professional athletes are paid for their services are deemed to be those which encompass economic activity. Examples of economic activity include teams that pay their players and leagues that focus on maximizing revenues, fan support and media interest. In the *Walrave* case the Court held that the UCI nationality rules were in violation of the Treaty.

In *Dona v. Mantero*,<sup>78</sup> the Court reviewed the rules of the Italian Football Federation which permitted only those of Italian nationality to compete in their league.<sup>79</sup> The Court held that the "activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service" benefit from the "provisions of Community law concerning freedom of movement of persons and of provision of services."<sup>80</sup> The Court concluded that foreign player limitation rules are in violation of the Treaty unless team selection is limited to a sporting interest as compared to selecting players which are of an economic nature.<sup>81</sup>

Following the *Dona* decision, the Union of European Football Associations (UEFA) established a rule which limited each team to select two foreigners to play in a soccer match. This restriction was not applicable to players residing within the territory of the relevant league for five years.

In 1991, UEFA adopted the "3 + 2" rule. Beginning on July 1, 1992, the number of foreign players whose names appeared on the team roster would be restricted to not less than three per team, plus two additional players who competed within the country for five uninterrupted years, including three with junior teams. While the UEFA rule constituted a minimum standard, many European soccer leagues strictly enforced the rule. Such enforcement was further encouraged by the fact that the rule applies to any club matches organized by UEFA.

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77. *Id.*

78. 1976 E.C.R. 1333.

79. *Id.*

80. *Id.* at 1339.

81. *Id.* at 1340.

In *UEFA v. Bosman*,<sup>82</sup> Jean-Marc Bosman, a professional soccer player, wanted to transfer from his Belgian team to a French one. However, the transfer did not occur because of the French club's inability to pay a transfer fee and the UEFA foreign player limitation rule.<sup>83</sup> Bosman was later suspended from his Belgian team and opted to play in various obscure leagues.<sup>84</sup> As a result of his suspension, Bosman was not permitted to play for any club within UEFA jurisdiction.<sup>85</sup>

The Advocate General reviewed the application of the European Community Treaty (Treaty) to foreign player limitation rules in soccer. The first two paragraphs of Article 48 of the Treaty state:

1. Freedom of movement for workers shall be secured within the Community . . . 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.<sup>86</sup>

While conceding that foreign player limitation rules conflict with Article 48, UEFA offered the Advocate General three justifications for the continued legality of this rule. First, UEFA argued that a majority of national players on league teams help with fan identification. Second, the rule develops national players for international competition. Third, UEFA explained that the rule provides a competitive balance among clubs. Without such restrictions only larger teams would attract the best players.<sup>87</sup>

While addressing UEFA's "national aspect" argument, the Advocate General decided that "[t]he right of freedom of movement and the prohibition of discrimination against nationals of other Member States are

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82. Case C-415/93, Sept. 20, 1995, E.C.R. Opinion of the Advocate General. When this article was written, the European Court of Justice opinion in *Bosman* was not available in the United States. Instead, the authors relied upon the *Bosman* European Court of Justice Advocate General opinion. This opinion is not legally binding, but often more detailed than the final judgment of the European Court of Justice and has strong persuasive guidance to the judges in the *Bosman* case and later cases. Ultimately, both the Advocate General opinion and the European Court of Justice opinion are substantially similar to one another and both concluded that the UEFA player quota systems are in violation of European Community law.

For an examination of the *Bosman* European Court of Justice decision, see Simon Gardiner, *The Bosman Case: Impact on European Soccer*, FOR THE RECORD (Nat'l Sports Law Institute, Milwaukee, WI), December 1995/January 1996, at 2-4, and F.A. Premier League Seminar Materials on the *Bosman* Case, as published by the British Association for Sport and Law, January, 1996.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* ¶ 135.

87. *Id.* ¶ 141.



among the fundamental principles of the Community order.”<sup>88</sup> Thus, these fundamental principles outweighed the value of team selection based on favoring national players and excluding foreign ones.

As it pertained to spectator identification with teams, the Advocate General analyzed this argument from a public policy perspective. The Advocate General noted that “the great majority of a club’s supporters are much more interested in the success of their club than in the composition of the team.”<sup>89</sup> In other words, spectators will identify with winners on the field, regardless of their nationality. In support of its finding, the Advocate General offered numerous examples of foreign players well-received by fans of national teams due to their on-the-field success.<sup>90</sup>

In addition, the Advocate General found that a team’s success was primarily the responsibility of soccer managers, not the players. Under UEFA rules, managers enjoyed freedom of movement under Article 48 of the EC Treaty while the players did not.<sup>91</sup>

After reviewing the UEFA’s international competition justification reason for foreign player rule limitations, the Advocate General agreed that a national team for European competition should consist of a majority of nationals from the State.<sup>92</sup> With eleven players on the field at one time, however, only six players would have to be of the nationality to constitute a majority, with the remaining five being foreign or national, which would be left to the team’s discretion.<sup>93</sup>

As to UEFA’s player development argument, the Advocate General noted “[n]othing has been demonstrated that the development of young players would be adversely affected if the rules on foreign players were dropped.”<sup>94</sup> In fact, the Court believed that talented players move upward through the ranks by participating on teams for whom the restricting rules do not apply.<sup>95</sup> As a result, any unavailability of national

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88. *Id.* ¶ 142.

89. *Id.* ¶ 143.

90. *Id.* “One of the most popular players ever to play for TSV 1860 Munchen was undoubtedly Petar Radenkovic from what was then Yugoslavia. The English international Kevin Keegan was for many years a favourite of the fans of Hamburger SV. The popularity of Eric Cantona at Manchester United and of Jurgen Klinsman at his former club Tottenham Hotspur is well known.” *Id.*

91. *Id.*

92. *Id.* ¶ 144.

93. *Id.*

94. *Id.* ¶ 145.

95. *Id.*

players for teams arises from a lack of talented national players, not the unavailability of players in general.

Turning to UEFA's final justification concerning competitive balance between clubs, the Advocate General agreed that this concern was justifiable.<sup>96</sup> Without foreign player restrictions, larger clubs could indeed secure the services of the best players, permitting the bigger clubs to distance themselves both competitively and economically from the other clubs. The Advocate General believed that there are other means by which this balance objective can be attained without affecting a player's freedom of movement.<sup>97</sup>

The Advocate General concluded "that the rules on foreign players are of a discriminatory nature. . . . Those players are thereby placed at a disadvantage with respect to access to employment, compared with players who are nationals of that Member State. . . . The rules on foreign players are therefore incompatible with the prohibition of discrimination under Article 48(2)."<sup>98</sup>

#### VIII. APPLICATION OF UNITED STATES AND EUROPEAN COMMUNITY LAWS TO CITIZENSHIP BASED QUOTA SYSTEMS IN ATHLETICS

From the abovementioned summary of United States and European Community laws as it pertains to the implementation of citizenship based quota systems in professional sports several guidelines become apparent.

First, American sports leagues can establish rules which prohibit the employment of all foreign athletes in the United States. Second, if an American sports league decides to hire foreign players, employment discrimination based upon their lack of United States citizenship is prohibited. For example, leagues cannot employ Korean athletes and exclude Japanese ones. Third, American sports leagues can establish employment preferences for hiring American nationals over those without American citizenship status if the employment candidates are equally qualified.

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96. *Id.* ¶ 147.

97. *Id.*

98. *Id.* ¶ 135. As a result of the *Bosman* decision, "German soccer teams have adopted a 'voluntary' limit of three foreign players, maintaining earlier restrictions adopted by the Bundesliga. League officials contend foreign players denied roster slots will be unable to sue because there is now no official policy in conflict with the court's decision throwing out roster restrictions among European Union countries. However, some franchise officials warned public pressure could force clubs to sign the best available players, regardless of nationality." *From the Boardrooms*, SPORTS INDUSTRY NEWS, Jan. 12, 1996, at 16.

When an American sports league implements a foreign athlete quota rule it would appear that the Immigration Reform and Control Act is violated. For example, in either the National Professional Soccer League (NPSL), Central Indoor Soccer League (CISL), or Major League Soccer (MLS) there is a large number of foreign soccer players to choose from in the selection of team members. Some of these players may be better than their American counterparts even though the soccer skill level has been improved in the United States as evidenced by the American team performance during the 1994 World Cup. Thus, foreign athletes could demonstrate that their qualifications are greater than an American candidate by virtue of personal game statistics, honors and experience in leagues which have greater competition than either the NPSL, CISL or MLS.

On the other hand, an American soccer league can argue that players possess "unique athletic skill" in which soccer success is often determined by team chemistry, work ethic and players willing to perform within defined roles. For example, when free agency was established in Major League Baseball in the late 1970s, the owner of the New York Yankees, George Steinbrenner, purchased the best players available to compete for his team. This strategy was successful by virtue of the Yankees winning the 1977 and 1978 World Series. However, this success proved to be short term. Despite, their continual strategy of purchasing the best players available, the Yankees have not been able to win another World Series in eighteen years.

Another example of team chemistry is the success enjoyed by the 1995-96 Chicago Bulls of the National Basketball Association. The Bulls which are led by superstars Michael Jordan and Scottie Pippen as well as a great rebounder in Dennis Rodman, had lost only three games out of forty-one played by the end of January, 1996. The Bulls' success is largely attributed to the mix of players who are superstars and those who are journeyman players performing a defined role.

As it pertains to foreign sports leagues employing Americans in the United States, the determination as to whether the United States has entered into a Friendship, Commerce and Navigation Treaty with another nation which the foreign league is based is extremely important. If a Treaty has been established, the definition of who is an "executive employee" is key.

Once executive employment is defined, foreign based sports leagues establishing operations in the United States can hire and promote their nationals at the exclusion of American citizens for executive positions only if protected by Treaty.

For example, among professional sports teams there is a general organizational structure which includes the owner, team president, general manager for team operations, vice president for business operations, head coach, assistant coaches, scouting personnel, equipment managers and players. When applying the holdings of the *Sumitomo* and *Fortino* courts, a foreign league could exclude American citizens from hiring and promotion which include the positions of team president, general manager, vice president and head coach.

Assistant coaches, scouting personnel, equipment managers and players could be excluded from the treaty executive hiring preference rules because of their limited input into the team decision making process and their lack of authority as to the ultimate direction of the team from a business and playing perspective. Thus, those who are filling these employment classifications could not be either hired or fired solely because of their American citizenship status.

When United States sports leagues employ American athletes abroad, the employment protection of Title VII applies. It is imperative that sports leagues distinguish between a nation's law and a nation's customs. A copy of the law which permits discriminatory employment practice in the host country or a formal government or court ruling should be obtained to protect United States sports leagues from Title VII application.

While United States law would not protect foreign players from citizenship based preference as provided by Title VII, those who are citizens of European Community nations enjoy legal protection from employment based discrimination based on nationality as a result of the *Walrave*, *Dona*, and *Bosman* European Court of Justice decisions.

