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Editorial

By Simon Gardiner, Editor

This issue of the Sport and the Law Journal concerns a number of on-going and current topics. The Opinion and Practice section provides an interview with the Right Hon. Michael Beloff Q.C. by Stephen Boyd. Michael who is the current President of BASL, has played a significant role in terms of both the practice and academic study of sports law in the UK. There is also a short extract from the recent Deloitte's 'Annual Review of Football Finances' which provides a very useful 'snapshot' of the economic well being of the national game.


The Analysis section features two articles. Firstly, Simon Gardiner and Urvasi Naidoo's 'On the Front Foot against Corruption' focuses on the continuing response of the International Cricket Council to problem of match fixing in international cricket.

Secondly, a significant report by Professor Melchior Wathelet, of the Universities of Louvain and Liège and a former Member of the European Court of Justice, concerns the relationship between sport (and in particular professional football) and European Union law. This Report commissioned by the ASSER International Sports Law Centre in The Hague, was in response to a number of recent documents concerning the role of the EU in regulating sport. These importantly include the UEFA promoted "Independent European Sport Review", best known as the "Arnaut report", which was published in October 2006. This report strongly supports the increased autonomy of international sports governing bodies from EU Law.

Subsequently, in March 2007, the European Parliament adopted a resolution on "The Future of Professional Football in Europe", the content of which was partly based on the Arnaut report. On 11 July 2007, the European Commission published its "White Paper on Sport". On 13 July 2007, UEFA issued a joint press statement together with other European federations (ice hockey, basketball, handball, rugby and volleyball) calling for "firmer conclusions from the European Union to aid the future development of sport". In particular, these federations want "the appropriate inclusion of sport in the reform treaty", aimed at "fully recognising the autonomy and specificity of sport as well as the central role and independence of the sports federations in organising, regulating and promoting their respective sports".

Professor Wathelet was asked particularly to analyse the findings of the Arnaut report, in present and future perspectives, also taking into account the economic and political aspects of the issues at stake. The S&LJ acknowledges the kind permission of the Asser International Sports Law Centre to reproduce this Report.

Finally, the regular Sports Law Foreign Update by Walter Cairns can be found.

Finally, it must be stressed that the Journal welcomes contributions from all BASL members and other readers in any of the sections of the Journal including reviews of future sports law related publications. Please contact the Editor with any suggested offerings. 



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Opinion and practice



Interview with Michael Beloff QC

By Stephen Boyd, Barrister

SB Let's start with your background.

MB I'm the grandson of four immigrant grandparents three of whom were Jewish and an immigrant mother, all from Russia. I was educated at the Dragon School at Oxford and then I was a scholar at Eton and at Magdalen College Oxford where I read history and then law. In terms of sporting accomplishments, all I can claim is I did win the 100 yards (shows my age!) at Eton. I didn't run initially at Oxford because, when I came up, I went to see the head of my college athletics team and I found this guy with endless legs sitting on the sofa – another potential athlete. We reeled off what our best times were and he was much much faster than I. I thought, if this is college standard, God knows what university standard must be like, and so I gave up athletics entirely and took up politics and smoking instead and became President of the Union. This guy was Adrian Metcalfe who, later, was an Olympics silver medallist. Had I realised who he was, I might have gone on running and been his second string. So that was really it apart from a brief comeback for Oxford's Second Team (the Centipedes) against Cambridge, when the Captain was Jeffrey Archer, and I was so slow that they didn't even announce my time. I also ran in the first London marathon when I broke the four hour barrier and passed JPR Williams at the 23 mile mark. But in my second London marathon, while I passed John Conteh (a former client) at 15 miles, I was myself passed by four men dressed as a caterpillar up the Mall and decided not to repeat the experience. Oh, I did swim breast stroke for Eton and when I was President of Trinity managed my college side who won the College Cuppers three straight years.

SB So your interest in sports really focussed on running and swimming.

MB Yes, I followed track and field far earlier than I actually ran myself. As a child I was given a sort of encyclopaedia which contained profiles of Paavo Nurmi, the original Flying Finn, and Arnold Strode-Jackson who beat 7 Americans in the 1500 metre final in Stockholm (I met him years later at Oxford when he must have been about 80) and got absolutely hooked on their achievements. I don't remember the London Olympics but, certainly by the 1952 Olympics, I was following athletics very closely and ever since then it has been a real hobby. I know far more about track and field than I know about law. My juniors would probably agree about that.

SB So, people like Zatopek?

MB Yes. I remember Zatopek very well. I remember in Seville at the World Championships which I regularly attend as a guest of the IAAC, I met his widow who was an Olympic gold medallist in the javelin herself and asked for her autograph. She did it and then she drew a little picture of person throwing a javelin just in case I didn't know who she was!

I remember vividly two things about the 56 Olympics when I was still a schoolboy – the news coming in that Chris Brasher had been disqualified and then reinstated in the Steeplechase, and seeing a picture on the front of the Evening Standard about Derek Johnson just missing the gold in the 800. I got to know Derek quite well in later life. He never ever recovered from that. He always said 50 metres out he thought he'd won, he just switched off and the other guy ran himself into oblivion – and history! It's terrible how much your life can be changed by something like that. Then I remember hearing when Derek Ibbotson had just broken the world mile record. The first Olympics I went to under my own steam was the Rome Olympics in 1960. Then Munich and Barcelona when I also went privately. During the last three I have been an arbitrator, so I have done it in real style.

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SB How did you get into sports law?

MB This is Adrian Metcalfe again. At the end of the 60s there was a body called the International Athletes Club. They were probably the first sporting pressure group and they ran the first of these 'spectaculars', which have now been taken up by the Golden League. It was called the IAC Coke Meeting, broadcast by Independent Television and sponsored by Coca-Cola. The IAC got all the big names across. Then the Amateur Athletic Association, who ran the sport nationally, sold the television rights for the entire season to the BBC and there was a collision there between the two contracts. I went to an AAA meeting, over which Harold Abrahams, the Chariots of Fire guy, was the ageing presider. to help the IAC put their case, flanked on my one side by David Hemery, and on the other side by Mary Peters, two very distinguished gold medallists. There was a photograph of the three of us in the Evening Standard and I used to joke about readers asking: who on earth is guy in the middle? That's really what got me in on the ground floor when there was no such thing as sports law. After that – you know what barristers' clerks are like – : "Sports lawyer? Mr Beloff, he's your man!" So whatever sport it was, I was in a prime position to get it. I did a lot with athletes, for David Bedford, Seb Coe, Zola Budd, Tessa Sanderson, among others. I told my instructing solicitor when athletics was still all amateur, "this is going to become a big professional sport one day, just like tennis is now". I was right about that at least.

But there were other sports. I did a case for the British Judo Association, trying to argue that the sex discrimination exemption for sports would apply not just to participants, but to referees because a slip of a girl couldn't control a bout involving two giant men. I had two Olympic medallists as witnesses. Suddenly they staged an impromptu bout in front of the tribunal without telling me they were going to. In the end we lost. I also represented George Best. He was trying to move from Fulham to a Florida team called the Tampa Bay Rowdies, rather like David Beckham going to Galaxy. FIFA wouldn't re-register George and we managed to persuade the Court that this was in restraint of trade. It didn't do the Tampa team very much good because, after the third match, George was taken away to a detoxification unit and wasn't seen again that season.

My big breakthrough came when I started to prosecute in major drugs cases for the International Amateur Athletic Federation, which then had its own tribunal. The defendants were big names: Butch Reynolds, the 400 metre world record holder; Katrina Krabbe, the German sprinter double world champion; Dennis Mitchell, an Olympic medallist; Javier Sotomayor, the world high jump and Olympic champion; Mary Decker-Slaney, the double world distance champion from America; Merline Ottey, a multiple medallist. The first case was in Hans Crescent just behind Harrods, where the IAAF was located. Then Primo Nebiolo moved the Federation to Monte Carlo, in order to get away from the English courts. We preferred going to Monte Carlo rather than South Ken.

I did become, I won't say cynical, but fairly inured to the kind of defences that were put up both then and subsequently, when I became a member of the Court of Arbitration for Sport (CAS). I have arbitrated some major drugs cases for CAS, the Chinese World Championship swimmers in 1997, when syringes were found in their luggage at the airport in Perth and Michelle Smith (De Bruin), and I must have heard every excuse under the sun.

The Tour de France is topical at the moment. I was on a tribunal when David Miller's case up about whether his suspension should be reduced. He told us – and he's said so publicly since – that there isn't a single major cyclist these days in these long distance events who isn't on drugs. So I'm pretty sceptical about one or two very big names who claim to have been drug free. It is a terrible scourge. I've been asked twice this year, once by Colin Blakemore, the neuroscientist and Chairman of the Medical Research Council, and recently by Seb Coe and Colin Moynihan, to join committees which are looking at drugs abuse in sport; but had to decline for reasons of time. At the moment my view is that the use of these substances for performance enhancing purposes may have to be criminalised, but I'll think a little bit more about it before I make a submission to them.

SB Where do you draw the line? What about altitude simulation tents, which may only be available in rich countries?

MB It is difficult, isn't it? That's where you find some of the counter arguments. Athletes in some of the poorer countries, for example, Ethiopia or Kenya, are able to train at altitude, so in that area may be it all evens out. But altitude training, real or simulated,

Interview with Michael Beloff QC

is very different from doping which is harmful to the athlete. Any form of training is meant to enhance performance and if you're richer, you have more time to do it. When I was President of Trinity, I heard that El Guerrouj was going to come to Oxford to advertise one of these Crystal Palace spectacles and to meet Roger Bannister. I invited them both to lunch. Bannister said how he used to train for half an hour on a cinders track during a midday break while he was doing his medical exams. El Guerrouj described how every part of his day, resting included, was devoted to making himself a better athlete. So I asked El Guerrouj what time he thought Roger Bannister would have done had he trained in the way El Guerrouj had trained. El Guerrouj very courteously gave a time just a tenth faster than his own world record. One of the things I enjoy about going to all these world championships is that I've now become, on first name terms with all these legendary figures, like Alberto Juantorena; Kip Keino; Don Quarrie and on the home front Lynn Davies; Steve Cram; Brendan Foster. I've got photographs of me with all these people. I'm just like a teenage girl struck with Brad Pitt! I feel quite embarrassed at the age of 60 plus going up to these guys and asking for their autographs. Sometimes I pretend it's for my son, or grandson now, but usually I level with them. A lot of them are really quite pleased to be recognised at all and why not? Some of them still look very fit. But others, like Borzov the sprinter, he's like a balloon now. His wife was an Olympic gymnast and she's still a very attractive woman. Bubka still looks quite young.

SB Do you take a similar interest in football, boxing or anything else?

MB I follow most things. The great thing about sport is you see really great champions in so many different areas. Mohammed Ali was something else. I would not sleep the nights when he was fighting for a world title. I'd turn on the radio at 7.00am: and the main headline would be about his result. Steve Ovett is my all-time athletics hero. Some of the gymnasts and figure skaters are extraordinary too – the way their techniques have improved.

I used to watch quite a bit of tennis. My mother was very keen and she used to take me to Wimbledon to see people like Rosewall and Hoad. Or cricket – just watching Shane Warne, you knew you were in the presence of genius there.

Nowadays I fear when I go to sports events, it's because I'm invited to go to the directors' box or the equivalent. So I do all the rounds; Wembley, Lords, Twickenham, Henley, Crystal Palace, I've even done the Royal Box at Wimbledon. I'm just too old now to queue for tickets and I've been spoiled.

But yes, there are certain sports I like more than others. I prefer rugby to football but I will watch football at a very high level, if it's a World Cup or a European Cup. I enjoy watching swimming too – Thorpe, Phelps, Manadou and others at the Olympics. It's amazing how quickly the women are catching up – and that's another phenomenon in sport. When I was an arbitrator at the Melbourne games, I met Mike Wenden, who won a double gold at Mexico City and I was teasing him about this. I said "Any top girl in the pool now could have beaten you. "Absolutely" he said, "but look at their shoulders!"

SB If you had to pick out some favourite cases in an illustrious career, what would they be?

MB I gave you the list of the IAAF cases. As a pure sporting case the one I found most interesting was prosecuting Kenteris and Thanou, the two Greek sprinters who faked a motorbike accident on the eve of the Athens Olympics. I had a marvellous time cross-examining Mr Kenteris, even with the interruption of an interpreter. In the end both threw their hand in.

In domestic legal terms the most interesting was the issue about whether judicial review lies to sporting bodies. I argued two cases against the Jockey Club: one called Ram Racecourses and the other Massingberd-Mundy, in which some of the judges indicated that it was a good idea in principle but that there was a contrary precedent. Then the Aga Khan had me instructed and I advised that he wouldn't succeed on this. He promptly sacked me. He went to Sidney Kentridge QC, who duly lost on the same point. So I was right, but there it is. Put not your trust in princes, or indeed Agas!

I argued one very interesting case before the Court of Arbitration for Sport; the ENIC case, about multiple ownership of football clubs in European competition with a whole series of Community Law points, Convention points and Swiss law points and in the end they decided that public interest meant you shouldn't have one person owning two clubs.

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The biggest triumph I've ever had was getting Spurs back into the Cup and the First Division. There was a variant on "West Ham situation" about 10 years ago when it was suggested that the previous Tottenham management had been taking bungs. The FA chucked Spurs out of the Cup and docked them points, and they would have been relegated. We went to the High Court and got the FA to agree to an ad hoc arbitration, where I opposed Peter Goldsmith. To his obvious chagrin, he lost so Spurs got back into the Cup and the First Division. The case was profiled in all the sports pages. When I was invited to Spurs the fans confused me with Alan Sugar. It's the beard wot does it!

My two most important cases as a CAS arbitrator involved deciding the gold medal fates of two Athens Olympic events. One was the equestrian team event, which concerned the doping of a horse. We knew it was accidental, and indeed not performance enhancing, but nonetheless it involved a prohibited substance and we ruled, though I must say after a huge amount of agony, that we had to uphold the strict liability rule. The other case was the men's gymnastics all round gold medal where the Korean was mis-marked in the penultimate stage of the multiple equipment event. He contended that, if he'd been properly marked, he'd have got more points than the American who had won, and that we should therefore reverse the medal positions. In the end we decided that an external body simply couldn't interfere with a refereeing decision even if erroneous, unless it was tainted with bad faith and so on. It's all very well to say you just put on the points wrongly deducted but this was the only second last event. Supposing he had had those points in the bag, would he have bottled at the end? In the end, you couldn't tell. It would be interesting to know what we would have decided if he'd been docked the points wrongly in the last event: we might have come to a different conclusion. But we went through a long and elaborate analysis about the autonomy of sport's officials and the 'field of play' principle.

And then there's Mecca-Medina and Madjen over which I originally presided and about which the European Court of Justice has recently had some interesting things to say about EU law and Sport Discipline.

The great thing about the Bar is that you're able to appear for regulators and regulated. So I've had the

FA, FAPL, RFU, LTA, UK Athletics, British Boxing Board of Control, National Association of Bookmakers and Rugby League on the one side as clients, but also Lennox Lewis, John Conteh, Stefen Edberg, David Coulthard, Jenson Button, Dwain Chambers, Adrian Mutu, Mark Bosnich, Alain Baxter, old uncle Frank Bruno and all on the other.

SB Do you think that CAS is going to be adopted by more sports, do you think that would be a good thing, do you think that sport should stay out of the High Court?

MB I think yes, yes and yes is the answer to that. The late David Dixon, who was senior partner of Withers and ran the high hurdles for Britain, asked me in 1996 whether I'd like to join CAS and I said yes, although I didn't know very much about it. To my astonishment, the next thing I got was a letter saying I've been selected to be on the first ad hoc panel, for the Summer Olympic Games, and I've now done three in succession – a world arbitral record. CAS is a very large body now, but there is an inner core, of about 20 people, who get nominated time after time because the more you get nominated, the more people know about you and the more they're likely to nominate you. I've always found, with only a handful of exceptions, that there is agreement on the right result between the three arbitrators, even though by definition we come from different jurisdictions. This is particularly noticeable at the Olympic Games, when it's by design a global panel. There are very few who take what is the conventional American attitude, and perhaps a Behind-the-Iron-Curtain attitude that, if you're appointed by one party, you're meant to be arguing their case, if not deciding in their favour. That's an old-fashioned attitude and not one that's encouraged by CAS.

Various sports have in fact subscribed very recently to CAS. The IAAF were defendants in three cases in Sydney and were so pleased by the outcome that they wound up their own Tribunal and joined the party. Then UEFA and FIFA both followed, which has added hugely to the workload of the court.

In all these instances there are people adjudicating who are interested in sport with knowledge about sport and there is a development of what we call rather grandly a *lex sportiva*. In something like the Olympics, the whole purpose of it is to stop people racing off to some local magistrate and saying "I want an interlocutory injunction. Halt the Games while my right to participate in the quarter-finals of the synchronised swimming is adjudicated".

Interview with Michael Beloff QC

If someone went to a court and said 'wait a minute, this exclusion of access to a court is contrary to domestic public policy', I'm not certain what would happen; no-one ever has. On the whole the athletes know they're going to get justice from us, from a body prepared, if necessary, to sit through the night. It's "fast, fair and free" is our motto. – It's not even like one day cricket, it's like 20/20 cricket. The adrenalin really rushes.

SB Will you be in Beijing in 2008?

MB It was always going to be a toss-up: if they go for experience, then I'd be a shoo-in, but if they say 'look he's had this tremendous privilege, he's done it three times, it's about time someone else had a crack', I'd understand that. I've also done the World Cup football twice though we were never called upon. So we shall see.

SB But I guess you'd like to do London in 2012?

MB I hope to be alive in 2012, but maybe then I'd just like to watch and give adjudicating a pause... I've been a steward of the Royal Automobile Club for 6 or 7 years – that's also a dispute resolution mechanism – and during my time there, we've only had one case. The great advantage again is that we had people who knew the sport from the inside – Jackie Stewart and Gordon McLaren are members. It would be almost impossible, I think, for a mere lawyer to resolve that kind of a dispute without assistance from people with such technical expertise. It's rather like an Admiralty judge sitting with two Trinity House brethren – a very good blend. And I chair the ICC Code of Conduct Commission to stamp out corruption, and was on the World Cup Panel for that as well.

SB Are there any language problems?

MB Not for cricket or for motor sport! CAS operates in either English or French and the arbitrators have to speak one or other, and there are simultaneous interpreters if needed. Necessarily, I think, all the procedural law is Swiss procedural law. You can't have an ambulant system because otherwise it would become incoherent. But there are aspects of Swiss procedural law that, as a common lawyer, I sometimes find quite difficult to understand.

There are some within the CAS who want to domesticate as far as possible the substantive law and make it effectively Swiss. However, there are others who say 'look this is an international sporting body and we've really got to develop general principles.' It's a creative tension working

its way through the system.

But it's an admirable body; you only have to look down the list: they've got some real heavy hitters. The only worry about it is that they've now introduced strict rules about double roles to ensure that justice is seen to be done. It is not that you can never now appear before Court as an advocate if you are a member, but that there's a temporal cordon sanitaire. A few years back, someone took a case to the Swiss Federal Tribunal on the basis that there was too close a link between the CAS and the IOC which was involved in a skating dispute at Salt Lake City. The Swiss Federal Tribunal said, because the sporting legal world is quite a small world, if you were able to challenge the tribunal on the basis that they were acquainted with the advocate, you'd have no-one who could ever sit. So CAS has now become more purist than the Swiss Federal Tribunal.

SB Edward Grayson pioneered sports law, bringing out the first book on the subject, but your book made an important contribution.

MB To use a painting analogy, Edward Grayson did what one might call a medieval picture. I was probably (with my co-authors) the renaissance, with a sense of perspective and so on. Whether I'm ever going to produce a second edition, I don't know.

SB What year did your edition come out?

MB About 1999. It was a book mainly about principle and, therefore, it's worn quite well, but it doesn't have the detail of Lewis and Taylor which is the current bible, the new testament of sports law (if mine was the old)!

SB What thoughts do you have about the Olympics in 2012?

MB I agree with the Simon Barnes/Seb Coe analysis that there'll be five years of whingeing and a marvellous fortnight or three weeks. I think that there will be a great afterglow. The bid team have deliberately concentrated on this legacy issue, as the IOC wanted them to. I think they pitched that very well, and it should change a lot of infrastructure to the great benefit, I hope, of East London. But what it's going to do for British sport overall is another question. I have been involved because I was, and still am the Ethics Commissioner. My main role was to stop our bid team violating any bidding rules, which I did successfully because they shrewdly never got in

Interview with Michael Beloff QC

contact whenever they did something that was just a tiny bit close to the edge, but since everyone else was doing something equally close, it didn't matter and no-one actually stopped us. Now my role is rather like Jack Straw's as Lord Chancellor – it's a formal title. But the one specific function that I have is that if anyone detects any corruption in the assignment of contracts or deficiencies in health and safety issues, and they want to tell someone outside so they don't get into trouble, I'm the person they're meant to tell. Luckily I haven't had any approaches yet and I hope I won't.

SB How do you see your role as President of BASL?

MB It's more of a monarchical than a prime ministerial role. I'd obviously like to keep the profile of sports law high. People have become rather envious of sports lawyers because they get all these glamorous high profile cases. But what we still have to do is to persuade people that this is also a serious legal discipline, or amalgamation of disciplines, and make them realise that it is not just about doping, fines and so on: it's about major contractual and political disputes: sport is, of course, a global activity. I'd like to help with assisting getting speakers at the various meetings and otherwise just ensuring that the excellent people who are on the committee, and seem to be frightfully active, will go on being frightfully active. There may be opportunities for more international liaison. My ambitions don't stretch really beyond that. BASL has grown from its remarkably small origins very quickly. I thought last year's conference, the first one I attended, at the Emirates, was excellent, and I suspect Wembley will be very good as well. We've got things happening all the time and we've got the journal. It's humming.

SB Do you have any interesting cases on at the moment?

MB First of all I'm representing the ICC. Darrell Hair is bringing a case against them for race discrimination because he has not being reappointed for test matches since the episode at the fourth test match between England and Pakistan.

The next one, which is an ongoing and highly sensitive political case I've been running for about three years now is about getting the Gibraltar Football Association into UEFA. What stands behind (or against) this is Spain. We won twice in front of a very distinguished tribunal, chaired by a

member of the International Court of Justice in Austria. There's now going to be a third round and UEFA have objected to the tribunal saying – "Because they decided against us twice, therefore they can't be impartial". Stephen, if you and I could do that with judges we appear before, we'd have a marvellous time, wouldn't we!

And the third one, which has only just hit the press, which I'm doing on a pro bono basis, arises out of a scandal at this year's Boat Race. There's a memorandum of understanding between the two boat clubs by which eligibility criteria are designed to ensure that only bona fide students, or at least people called bona fide students, compete.

SB No ringers?


MB No ringers.

But the heaviest ever oarsman in the Cambridge crew, a German, rowed in the Boat Race and then one week later disappeared back to Germany and rowed in the national squad, so, we say, breaking the eligibility rules. Cambridge have refused him his blue. They have written a letter of apology, but what they have refused to do is to go to arbitration. But Oxford can't force Cambridge to arbitrate. In my view, the result of fielding an ineligible person in a team, is that the team forfeits the victory. Look at our 4 x 100 metre men in the European Athletics championship in 2002.

That reminds me of another really interesting case – which also went on for years – concerning a guy called Jerome Young, a 400 metre runner, who ran in the American 4 by 400 squad in Sydney. There were a huge amount of rumours going around to the effect that the Americans were running an ineligible guy. A special enquiry was set up. The Americans contended their laws of confidentiality never allowed them to report a "positive" to the IAAF until a person was actually convicted and so the IAAF couldn't investigate. Eventually years later the news leaked that he had in fact failed a pre-Games test. We succeeded in having him disqualified second time around, but then the issue in the third CAS hearing was whether we could get the team to forfeit their gold medals too. CAS decided no, because the rules didn't actually provide at that time for that as a sanction. There is a certain amount of justice on the US side because he only ran in the first round – he didn't run in the finals.

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SB You've had a fascinating life.

MB I really am very, very lucky: cross-examining Jose Mourinho ("Are you a football manager Mr Beloff? "No, but are you a QC?"), being wound up by Kerry Packer for not being Bob Alexander, declining an invitation to fly in Flavio Briatore's helicopter after a conference in Bennetton HQ in the Oxfordshire countryside, advising the Horse Race Owners Association from a box at the World Cup Final at Lords.... My interest in sport and my legal practice just coincided in that way and took me up avenues I never really dreamed of when I was younger. Yes and all because of Adrian Metcalfe and his long legs. 

Annual Review of Football Finance 2007 Highlights

By Sports Business Group at Deloitte. Please find details of full report at www.deloitte.com

Europe's premier leagues

- The European football market grew to €12.6 billion in 2005/06, a €1 billion increase on the previous year with the revenue growth of the 'big five' European leagues, which represents 53% of the market, and the impact of the 2006 World Cup being the major drivers of this growth.
- Combined revenues of the 'big five' European leagues totalled €6.7 billion in 2005/06, a €430m (7%) increase on the previous season.
- Whilst the English Premier League continues to generate the greatest revenues, which at €2 billion in 2005/06 were almost €600m above the next highest earner, the French Ligue 1 showed the largest absolute and relative growth in 2005/06, as we predicted last year, with an increase of €214m (31%) driving revenues to €910m.
- Although Italian Serie A revenues grew in 2005/06, the problems affecting Italian football are having a detrimental impact on many revenue streams, in particular matchday, leading to an unhealthy reliance on broadcasting income. Serie A is likely to lose its status as the second highest earning league when we report on the 2006/07 season.
- Looking forward, English Premier League revenues are set to exceed €2.5 billion in 2007/08, the first year of new broadcasting deals, which is likely to be €1 billion above the next highest earning league. This is a phenomenal contrast with Italy given the two leagues' revenues were almost equal at the turn of this millennium.
- UEFA Champions League revenues generated from centrally negotiated broadcasting and sponsorship deals totalled €610m in 2005/06, with €437m (72%) distributed to the 32 clubs participating in the group phase, over seventeen times the level distributed to clubs in 1992/93, the competition's inaugural season.
- Four of the 'big five' European leagues had increased wage costs in 2005/06, with the Spanish Primera Liga and French Ligue 1 showing double digit growth, whilst the Italian Serie A decreased wage

costs for the fourth successive season. The improvements in cost control made in recent years by clubs in most leagues is emphasised by only two leagues now having wage/turnover ratios over 60%. Two years previously every one bar the German Bundesliga was over that level, and had been for four successive seasons.

- The English Premiership (€200m) and German Bundesliga (€72m) were joined by the French Ligue 1 (€37m) in recording operating profits in 2005/06. This is the first time that the French Ligue 1 has achieved a profit since 1999/2000. It is testament to the sensible management of French football's new TV monies.

A precedent for other leagues? The Italian Serie A continued to sustain the improvements in operating results shown in recent years by breaking even for the second year running.

- Whilst non 'big five' leagues tend to have a different revenue profile compared to the 'big five', they continue to show growth. Outside the 'big five', the Dutch Eredivisie generates the next highest revenues of any top-tier domestic league with income of €355m in 2005/06.

Revenue and profitability

- The top 92 English clubs' revenues increased by 4% (£66m) to £1,860m in 2005/06, with revenue increases in all four divisions.
- Premier League clubs' revenues increased by 3% (£45m) in 2005/06 to set another European record at £1,379m, an average of £69m per club.
- Championship clubs' revenues grew by 4% (£12m) to reach a new high of £318m in 2005/06, an average of £13m per club. League 1 clubs' revenues topped £100m for the first time since 2001/02, up £6m to £102m, whilst League 2 clubs' revenues also increased, up £3m to £61m.

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- The average revenue of the 'big four' Premier League clubs in 2005/06 was £144m, almost three times the £50m average for the other 16 Premier League clubs.
- Looking forward, Premier League clubs' revenues will exceed £1.4 billion for the first time in 2006/07 and are projected to rise to £1,765m in 2007/08 in the first season of the Premier League's new three year broadcast deals.
- The value of the Championship Play-Off Final in May 2007 will increase to around £60m due to the new Premier League broadcast deals – the biggest financial prize ever for a single game in world football.
- The gap between the average Premier League and Championship club's revenue was a record £56m in 2005/06 and is likely to increase to over £70m in 2007/08. Even the lowest Premier League club revenue figure is expected to increase to around £45-£50m in 2007/08 (from £35m in 2005/06).
- Operating profits in the Premier League fell for the first time since 1999/00 to £138m (down 15%) and the number of Premier League clubs reporting operating losses increased from two in 2004/05 (Chelsea and Fulham) to four in 2005/06 (Aston Villa, Charlton Athletic, Chelsea and Fulham).
- Manchester United's top ranked operating profits of £41m in 2005/06 were up from £33m in 2004/05 and were more than double those of second ranked Liverpool (£20m), but below their own record of £52m in 2003/04.
- Looking forward, the new Premier League broadcast deals will enable Premier League clubs' operating profits to break through £200m – an average of £10m per club – for the first time in 2007/08. Indeed, a level of £300m may be achievable with relative restraint in respect of wages growth.
- Operating losses in the Championship increased from £42m to £53m in 2005/06, an average of just over £2m per club. Losses in Leagues 1 and 2 (£15m and £5m respectively) also increased slightly.
- The number of Premier League clubs that reported pre-tax profits fell from 14 in 2004/05 to nine in 2005/06. Excluding Chelsea, the other 19 Premier League clubs' pre-tax profits fell from £62m in 2004/05 to £11m in 2005/06. Chelsea's pre-tax losses improved from £140m to £80m in 2005/06.
- Championship clubs' pre-tax losses improved from £65m to £47m and three of the overall top ten clubs ranked by pre-tax profits were Championship clubs in 2005/06 (Cardiff City, Leicester City and Norwich City).
- Having more than quadrupled in the last ten years from £149m in 1995/96, a record £647m in taxes were levied on English professional football clubs in 2005/06, up 8% (£46m) from 2004/05. Premier League clubs account for around 75% (£480m) of this total.
- Around 80% of the total tax take comes from employment taxes, with both PAYE (up 10% to £333m) and National Insurance Contributions (up 7% to £179m) increasing in 2005/06. VAT increased by £8m (7%) to £118m in 2005/06, whilst there was a 19% (£4m) reduction in corporation tax to £17m.

Wages and transfers

- Premiership clubs' total wage costs for 2005/06 increased by 9% (£69m) to £854m. This contrasts with the situation in 2004/05 when the clubs' total wage costs reduced (by 3%), for the first time in the history of the Premier League.
- The wages/turnover ratio, a key performance indicator, increased to 62% in 2005/06, which in general remains a comfortable level for the finances of clubs in England's top division.
- There continue to be five English clubs incurring total wages costs each season greater than £50m. The pack is led by Chelsea (£114m), with Manchester United (£85m) and Arsenal (£83m) narrowing the gap compared to 2004/05. Liverpool (£69m) and Newcastle United (£52m) are also in the top five payers, still well ahead of sixth placed Tottenham Hotspur (£41m).
- Whilst five Premier League clubs managed to reduce their wages costs in 2005/06 – in particular Fulham (down £3.8m) and Manchester City (down £3.3m) – that was outweighed by increases amongst the top five payers and at a number of clubs where a decision was made to "significantly invest in the playing squad". These clubs included Tottenham Hotspur (up £7.5m), Everton (up £6.1m), Charlton Athletic (up £5.3m) and Aston Villa (up £5.1m).

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- Looking forward, the significant increase in broadcasting rights revenue to Premier League clubs will fuel significant increases in wage costs over the short/medium term, albeit there may be relative restraint compared to the past. We expect that Premier League clubs total wage costs will exceed £1 billion for the first time in 2007/08.
- We expect the average annual gross annual earnings for a Premier League player in 2007/08 will be in the region of £1.1m (2005/06: £0.9m). During the timeframe of the new broadcasting rights deals there may be English football's first player to earn £10m per annum from a club, equivalent to £200,000 per week.
- Championship clubs' total wage costs for 2005/06 increased by 5% to £228m with the overall wages/turnover ratio remaining relatively stable at 72%.
- In the Championship, in 2005/06 four clubs had a wages/turnover ratio in excess of 100%. However, for two of these clubs the ratio was pushed over 100% due to significant performance bonuses to players and management for securing promotion to the Premiership – Sheffield United (£2.3m) and Watford (over £3m). There continues to be significantly less correlation between total wage costs and final league position in the Championship than in the Premier League.
- Total player costs for the top 92 clubs in English football exceeded £1 billion for the second time. Overall gross player wages were up 5% to £806m and net transfer fees to overseas clubs and payments to agents were up to £240m.
- Overseas clubs continued to be financial beneficiaries of the Premiership's success. Net transfer fees leaving the English game were £187m.
- Fees to agents from Premier League and Football League clubs in 2005/06 were estimated to be over £50m.
- The monies redistributed to Football League clubs from the Premier League increased to £48m in 2005/06 (2004/05: £28m); the highest level since the Premier League began.


Stadia development and operations

- At the headline level, 2005/06 represented the highest spending year since our analysis of stadium investment began (in 1992/93) with £233m being invested by English clubs.
- Manchester United and, more particularly, Arsenal were responsible for almost 85% (£171m) of the £204m invested by Premier League clubs. Arsenal have comfortably been the biggest spenders in the Premier League on stadia for four consecutive seasons now and have been responsible for over 60% of total Premier League clubs' investment between 2002/03 and 2005/06.
- Although it was just below £2 billion this time last year cumulative stadia investment by English clubs since 1992/93 is now well into its third billion (£2.2 billion). Premier League spending over the period accounts for over three-quarters of total stadium investment.
- In cumulative terms, 2005/06 was the season in which Football League clubs' investment exceeded the £500 million mark.
- It may surprise some people that over the past decade the top 92 professional clubs have each year, on average, spent £20m more on stadium investment than they have on net player transfer fees.
- Premier League clubs have spent over 15% of revenue generated since 1992/93 on improving their facilities whereas Football League clubs have spent over 12%. These are impressive amounts and again illustrate the fact that stadium investment, and the on-going financial benefits it can deliver, is a significant element of a successful football business strategy.
- Whilst there are already a large number of good quality stadia, with many clubs having completed major relocations or redevelopment projects, there is still a good proportion – up to 50% – of Premier League clubs who have publicly stated that they would like to undertake further significant investment in their stadium.
- Both Premier League clubs' average attendance (34,360) and capacity utilisation (93%) for the 2006/07 season are up on the previous year. 12 clubs in the Premier League operated at a utilisation of 96% or above, and 70% of Premier League clubs were over 90% full for home games.

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- In the Championship total attendances grew to over 10m in 2006/07 (average attendance of 18,213), the first time the 10m barrier has been achieved since 1951/52. This is a huge achievement. Half of the Championship clubs had average attendances over 20,000.

Club financing

- Capital employed by Premier League clubs – being the aggregate of debt financing and shareholders' funds – continued the rise of recent years to reach £1.5 billion at the end of the 2005/06 season.
- The financial gearing ratio for Premier League clubs increased to 220% (2005: 134%), being the ratio of debt (£1,035m) to shareholders' funds (£469m).
- The Premier League clubs' net debt figure at summer 2006 of £1,035m (2005: £674m) comprises net bank borrowings of £345m, other loans of £646m and finance leases of £44m.
- The Premier League clubs' net debt figure of £1,035m excludes the debt of the parent companies of Manchester United of £604m at 30 June 2006. Distinct from other clubs, this debt originally arose to help finance the acquisition of the club in 2005 by the Glazer family, rather than to provide new financing for the club itself.
- The increase in net debt was largely due to significantly more net debt at Arsenal (up £109m) and a reduction in Manchester United's net funds (down £59m). Some accounting reclassifications of balances (of £99m) from shareholders' funds to debt also increased the balance compared to previous years.
- Arsenal's borrowing arrangements for their new 60,000 capacity Emirates Stadium have significantly increased the club's overall level of debt in recent years. By the end of the 2005/06 season Arsenal's net debt was £262m, ahead of Chelsea (£180m), Fulham (£167m) and Manchester City (£94m).
- By the end of the 2005/06 season, Roman Abramovich had injected around £485m of new money into Chelsea, through a combination of debt and equity. This represents by far the largest contribution to football from any single benefactor.
- Three Premier League clubs other than Manchester United finished the 2005/06 season with net funds rather than net debt – Birmingham City, Charlton Athletic and Tottenham Hotspur.
- For the Premier League clubs in aggregate in 2005/06, net interest charges from finance providers were £52m (2004/05: £48m). Interest cover reduced to 2.7 times from 3.4 times. This excludes the interest costs of Manchester United's parent companies of £87m in 2005/06 (plus £28m debt issue costs written off).
- Clubs such as Blackburn Rovers, Chelsea and Fulham each have significant debt (included in other loans) the majority of which does not have an associated interest charge, as it is from a benefactor and more akin to shareholders' funds than debt.
- Total shareholders' funds reduced to £469m (2005: £503m). Whilst monies subscribed for new shares outweighed retained losses in the year, changes in accounting treatment meant certain balances had to be reclassified from shareholders' funds to debt.
- At summer 2006, Manchester United (£203m) topped the table for overall shareholders' funds – being the excess of assets over liabilities/debt – followed by Arsenal (£131m) and Chelsea (£81m).
- Based on the available information, the Championship clubs' aggregate net debt at the end of the 2005/06 season was around £300m.
- At least 11 Championship clubs have net debt of more than £10m and, in general, the prospect of a club significantly reducing that net debt in the short/medium term is dependent on either promotion to the Premiership or an injection of equity funding from a new owner.
- Below the top two divisions, managing the clubs' financial position remains a challenge from one season to the next. While, in general, the financial position has improved and become more stable over the past 3-4 years, legacy debt issues relating to past seasons remain at several lower division clubs. 

Analysis



On the front foot against corruption

**By Simon Gardiner, Leeds Metropolitan University and Urvashi Naidoo,
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In 2001 cricket was in crisis with corruption threatening to tear the fabric of the game apart. Research into the problem revealed that corruption involving match fixing linked to betting on international matches had been in existence for over 20 years. This corruption was permeating all aspects of the game and the international governing body, the International Cricket Council (ICC) was ill-equipped to deal with the magnitude of the problem.

Although gambling is legally prohibited in countries such as Malaysia, India, Pakistan and Sri Lanka¹ an estimated \$150 Million is bet on the unlawful market on an average One Day International (ODI) match anywhere in the world.² The sheer scale of the problem had been suppressed for years with each country's domestic cricket board dealing with it in their own way and often concealing events. There was no international structure in place to handle the corruption, no formal penalties to be applied and certainly no culture of integrity. The game was wide open to the corrupters.

The truth is that all sports are vulnerable to corruption. Around the world, horse racing, tennis and football have all recently made the headlines because of corruption scandals. In football, 26 year old German football referee, Robert Hoyzer was sentenced in 2005 to two years and five months in prison for his role in match fixing and banned for life by the German Football Association.³ In 2006, the Italian football authorities punished a number of Serie A clubs for collusion and match fixing.

This article looks at how the ICC tackled this ethical challenge and evaluates the various internal measures it took to address the problem of corrupt practices. In particular the ICC established a Commission to oversee and conduct enquiries and secondly it established a dedicated and largely independent anti-corruption unit. An evaluation will be made of how effective the ICC has been in engaging with corruption in international cricket and what other methods of legal and non-legal regulation operate in this area. Suggestions will be made as to what further reforms need to be made in this regard. What is clear is that governing bodies must put in place good governance structures and processes and personnel to manage them and this article will evaluate the debate around the need for improved sports governance. Lastly, the authors' interview with Jeff Rees the head of the ICC's Anti Corruption and Security Unit (ACSU) is appended. This provides some insight into the operation of the ACSU, evaluates

whether international cricket matches are still being fixed, what the ICC is doing now and how he sees the next few years unfolding.

Background

Cricket is no stranger to gambling. In the early part of the eighteenth century the game owed a great deal of its popularity to the gambling opportunities that it offered. His Royal Highness Frederick Louis, Prince of Wales' passion for gambling regularly drew him to cricket matches.⁴ Mason in "Sport in Britain" writes:

"in the early 19th century the relatively small number of professionals could exert a disproportionate influence on some cricket matches and they were occasionally bribed or removed from the game by false reports of sickness in the family. One professional was banned from Lord's in 1817 for allegedly selling the match between England and Nottingham. The gradual assumption of authority by MCC and the county cricket clubs, the improvement of the material rewards of the average professional cricketer and the increasing opportunities to bet on other sports – notably horse racing and after 1926, greyhound racing – probably killed off gambling on cricket by cricketers."⁵

It is likely that small scale betting by players continued but there is little evidence that it impacted upon result of games. One incident that gained considerable media coverage occurred in 1981 during the Test Match between England v Australia match at Headingley,

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when two Australian players, Dennis Lillee and Rodney Marsh placed a £15 bet at 500-1 on England to win. Against the odds, England pulled off a stunning victory and the Australians won their bet! No disciplinary action was taken against the Australians as it was believed that the bet was light hearted and there was no evidence that the Australians had not done everything within their power to try and ensure a win for Australia.⁶ At that time there were no rules about players betting on matches in which they were involved. In the light of events in the 1990's which are discussed below, that was changed and it is now a fairly rigid condition in first class cricket that players and officials are not allowed to bet on cricket matches in which they are involved. In 2000 this condition was extended to cover those involved in the administration of international cricket.⁷ In 2002 a Code of Ethics was introduced which applied the rule to all ICC Directors, Staff and Committee Members and extended it to state that they are not allowed to bet on any cricket matches at all.⁸

An accident waiting to happen

Despite this historical link between cricket and gambling, when revelations of corruption in the sport started to emerge in the 1990s, the sport and, in particular, the ICC had to face one of the greatest ethical challenges faced by any sport in the twentieth century. In 1995, Salim Malik, the former Pakistan captain, had allegedly attempted to bribe Australian players Mark Waugh, Shane Warne and Tim May to throw matches during their Tour of Pakistan in 1994.⁹ Malik was suspended in March 1995 by the Pakistan Cricket Board (PCB) whilst they investigated the allegations. He was initially cleared but due to repeated allegations and public pressure the PCB decided to constitute a further official inquiry into match fixing allegations. The inquiry released an interim report in September 1998 implicating Malik and additionally Wasim Akram and Ijaz Ahmed. The report called for the suspension of all three players until a wide-spread new investigation could be completed. The PCB appointed Justice Malik Mohammed Qayyum to head the investigation. The Quayyum investigation and subsequent report in 1998 turned out to be but the first in a line of major enquiries into corruption. In December 1998, the ACB admitted it secretly fined Waugh and Warne in 1995. It stated that both players agreed that they 'were stupid and naïve' but denied they gave information concerning team line-ups or tactics. The ACB convened an independent inquiry into any other possible involvement of players headed by former Chairman of the Queensland Criminal Justice Commission, Rob O'Regan. In February 1999, the

O'Regan Inquiry pronounced no evidence of Australian players' involvement in the practice of match fixing and players had always played to their optimum potential. The Report was critical of the ACB's handling of the Waugh/Warne affair and highlighted the way that the problem of match fixing had been largely suppressed by the authorities.

These events exposed a systematic flaw in international cricket. The ICC's constitution gave sovereignty to each individual country to determine their own rules on player discipline and this meant that the ICC were powerless to do anything about the allegations of corruption. Something had to be done fast to rectify this and give the ICC authoritative power to tackle the problem head on and ensure that confidence in world cricket was restored. In January 1999 the nine Test playing nations (increased to ten in 2001) agreed to relinquish an element of their sovereignty and arm the ICC with wide ranging powers to deal with match fixing, bribery and other serious ethical violations. The individual countries from that point on were to be bound by uniform penalties established and enforced by the ICC.¹⁰ It was also decided in 1999 that a commission, independent of any country cricket board would be convened to oversee investigations into allegations of corruption and recommend appropriate punishments.¹¹

The major turning point when the ICC realised it had a real problem and needed to act occurred in April 2000. On 7 April, the Indian Police claimed they had evidence that four South African cricket players, including the then captain Hansie Cronjé, had taken money for match fixing during their series against India in March 2000. In the course of a separate investigation, they had intercepted mobile phone calls between Cronjé and an Indian bookmaker, Sanjay Chalwa. Criminal charges were laid down against Cronjé, Herschelle Gibbs, Henry Williams and Nicky Boje. Cronjé initially denied the allegations. However on 11 April, he stated that he had not been 'entirely honest' in his earlier denials and had taken nearly US\$15,000 from bookmakers for 'providing information and forecasting'.¹² The United Cricket Board of South Africa (UCBSA) together with the South African Government set up the King Commission to carry out an investigation. The subsequent King Report led to disciplinary hearings for all four players. Cronjé received a life-ban for all playing and related activities in September 2000. He failed in his challenge of the life ban in the South African High Court.¹³ Gibbs and Williams were both banned for six months and fined.

In addition the Central Bureau of Investigation of the Indian Police (CBI) produced a Report in 2000 and there

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were a number of quasi-judicial investigations in a number of the other Test playing countries.¹⁴ The ICC published the Condon Report in 2001.¹⁵ The sport had been severely damaged, three captains of the top nine teams had been banned for life in a short space of time.¹⁶ Stakeholders were understandably shaken.

Cricket's response

Lord Condon, ex-Commissioner of Metropolitan Police in London from February 1993 to February 2000, was appointed director of the International Cricket Council's Anti-Corruption Unit in June 2000 and became Chairman when the organisation was renamed the ICC Anti-Corruption and Security Unit (ACSU) in July 2003.¹⁷ His detailed and often disturbing report was probably the most comprehensive study to date as it tried to get to the heart of the problem¹⁸ and it also provided a list of 24 recommendations for the organisation and gave guidance as to how these recommendations should be implemented.¹⁹ A key phrase from Lord Condon's Report is that "Corruption in any aspect of life is caused by human weakness, greed and opportunity."²⁰ Although Lord Condon goes on in his Report to identify probable explanations for why corruption established such a strong foothold in the sport of cricket, it is clear that the sport does have some unique variables which make it susceptible to all sorts of spread betting, many sports are susceptible to corruption.

Radical and fundamental changes were necessary to achieve a turnaround and rapidly eradicate corruption and other practices prejudicial to the interests of the game. The ICC had to realise the enormity of the problem it faced and take serious internal measures which included the introduction of two bodies dedicated to that purpose. First, the ICC established a Commission to oversee and conduct enquiries and secondly it established a dedicated independent anti corruption unit.

ICC Code of Conduct Commission

The ICC Code of Conduct Commission (the Commission) was established as the ultimate authority sitting over the governing body and its Member cricket boards. The ICC wanted to put in place a formal mechanism to operate with similar weight and authority as a permanent Judicial Commission. Although it is a Committee of the ICC the Commission is totally independent of the ICC Executive Board of Directors and ICC Senior Management and has been given the specific task of making enquiries or overseeing enquiries into conduct which in the opinion of the ICC

Executive Board is prejudicial to the interests of the game of cricket and to make recommendations to the ICC Executive Board accordingly.

The Commission operates in accordance with detailed Terms of Reference which were approved by the ICC Executive Board in 1999.²¹ Lord Griffiths, was appointed the first Chairman of the ICC Code of Conduct Commission in April 1999.²² He remained in post until Feb 2002 when the Hon Michael Beloff Q.C was appointed. The Commission comprises one nominee from each Test Playing nation. The current Members include Richie Benaud, former Australian Captain and renowned commentator, Sir Oliver Popplewell, retired High Court judge and former President of Marylebone Cricket Club, Justice Dr Nasim Hasan Shah, retired Chief Justice of Pakistan and former President PCB and Justice Albie Sachs, current judge with the Constitutional Court of South Africa.

The first Code of Conduct Commission Official Inquiry arose in 1999 when the Commission was referred by the ICC Executive Board to review the findings of two investigations and to advise the Board if any further action was required. The investigation of the Board of Control for Cricket in India (BCCI) dated 17 November 1999 and the investigation of the Australian Cricket Board (ACB) dated February 1999 were referred for consideration.

Their unanimous report reached the following conclusion:

"It is troubling indeed that allegations should be made and widely publicised to the effect that players are approached by bookmakers not only to give inside information but to influence the outcomes of games. Such allegations are by their nature difficult to investigate, the more so when they relate to matters that have taken place some time previously and are based overwhelmingly on hearsay evidence"²³

The following recommendations were made:

- The Code of Conduct be amended to include an obligation on the part of players to report to the captain and team manager any approach made to them by bookmakers, or knowledge of such approach to any other player.
- Failure to make such a report be made a punishable offence.
- If a player is found guilty of accepting money from a bookmaker for any reason, the penalty should be a substantial suspension, and the reason should be made public, as should other serious breaches of the Code of Conduct.

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- National Cricket Boards be requested to ensure that all players are told in plain language that betting on matches is not permitted.
- Players should be warned that bookmakers and betting syndicates might try to corrupt them and be advised of the serious consequences of their ever taking bookmakers' money.
- Where approaches are made to players by or on behalf of bookmakers, the local police should be informed as soon as possible so that criminal investigations may take place.²⁴

These recommendations were adopted by the ICC and subsequent changes to the ICC Code of Conduct for Players and Officials were made. In particular stringent offences relating to betting and match fixing were included.²⁵ The Commission has been closely involved in reviewing all further investigations carried out by country cricket boards and making recommendations to ensure that corrupt practices are eradicated from the sport. Between August 2000 and July 2001 they reviewed the reports of the King Commission in South Africa and the penalties imposed by the United Cricket Board of South Africa (UCBSA) on Cronjé, Gibbs and Williams. The Code of Conduct Commission endorsed the findings of the UCBSA.

ICC Anti-Corruption and Security Unit

The ICC Anti-Corruption Unit was set up in 2000 to provide international cricket with a dedicated, professional operation to aggressively tackle and root out match-fixing and corruption and those involved in it.²⁶ The Terms of Reference for the Unit have been reviewed and amended to extend the remit of the Unit to include prevention as well as investigation of corrupt practices. With effect from July 2003, the Anti-Corruption Unit was renamed as the ICC Anti-Corruption and Security Unit (ACSU).²⁷ The change in nomenclature is slight but appropriate as the Unit takes on a broader mandate that gives equal weight to the tasks of prevention and investigation of corruption.

Its two principal roles therefore are:

- To assist the ICC Code of Conduct Commission and the Members of ICC in the eradication of conduct of a corrupt nature prejudicial to the interests of the game of cricket.
- To provide a professional, permanent security infrastructure to act as a long-term deterrent to conduct of a corrupt nature prejudicial to the interests of the game of cricket.

The ACSU is an operating division of the ICC Code of Conduct Commission. Lord Condon leads the Unit as Chairman. He acts in consultation with ICC Chief Executive, Malcolm Speed. Day-to-day operational responsibility rests with Jeff Rees who is General Manager and Chief Investigator of the Unit. The Unit has an annual budget of over \$US1 million. In addition to the Chairman and General Manager, there is a full time staff of five Regional Security Managers (based in Australia, India, Pakistan, South Africa and the UK), two investigators, an intelligence officer and an administrator. In August 2005 the whole Unit relocated, with the ICC, to Dubai in the United Arab Emirates.

The preventative work of the Unit falls into three main areas: education, physical security, and the appointment of security personnel. Extensive education and awareness programmes have been introduced. The Unit works with the younger players in world cricket briefing them and warning them about what to look for, how they might be approached and seduced into corruption. The "Bounce Corruption Out of Cricket" campaign was launched at the ICC's annual conference of 2002. It involved distributing brochures, posters and videos throughout the cricket playing nations. The professionally made video features high profile international players Steve Waugh, Sachin Tendulkar and Shaun Pollock who all pledge their support for the anti-corruption campaign.

The Unit has had to respond sensitively and pro-actively to the needs of all ICC Members. For example in March 2001 as a result of allegations in the CBI report and elsewhere relating to matches in Sharjah, the United Arab Emirates Cricket Board commissioned an inquiry.²⁸ This inquiry was headed by George Staple QC, from England assisted by Clive Lloyd, the former Captain of the West Indies and Brigadier Mohammed K Al Mualla from Sharjah. This Commission was appointed to conduct an Official Inquiry into a number of specific allegations which related to alleged match fixing and/or related activities which it is said have either:-

1. Taken place in Sharjah
2. Effected cricket matches held in Sharjah or
3. Been carried out by persons involved in the organisation of international cricket matches in Sharjah.

Lord Condon expressed concern in his report in 2001 about what had happened in the past at the fringe tournaments in places like Sharjah.²⁹ As a direct result of the work of the Unit the authorities in Sharjah re-organised the security aspects there. The authorities implemented every single recommendation that the

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Unit made and also allowed the Security personnel of the Unit to attend the triangular tournament of October 2001 and both the triangular one-day tournament of April 2002 and the rescheduled Test matches between Pakistan and West Indies in February 2002.

In relation to the appointment of regional security personnel the ICC benefits from appointments which span the respective cultures and countries that make up world cricket. Ex-police officers were recruited for the Australia/New Zealand region, the South Africa/Zimbabwe/Africa region and West Indies/England while India and Sri Lanka now have as their regional security manager one of the CBI officers who previously worked on cricket corruption, the remaining region Pakistan/Bangladesh has a high-calibre ex army officer appointed to them. The Regional Security Managers act as the ICC's own 'police force' and attend every international cricket match and ensure that the physical security protocols are being adhered to. They also report any unusual incidents which the investigators in Dubai would follow up on.

The most difficult role is that of physical security. Without making it intrusive to the players or supporters, the aim was to make it far harder for the corruptors to carry out the sort of activity they had in the past through ease of access to participants. That included installing a small number of closed-circuit TV cameras outside doors to dressing rooms, and establishing better control of access to the dressing rooms and players' areas. Stringent security measures were introduced, for example restricting the players and officials use of mobile phones in dressing rooms.³⁰

The small but dedicated security unit acts together with staff at the ACSU to ensure the game remains clean of corruption this is no easy task. The worldwide market in illegal gaming has continued to grow as cricket's popularity has risen. As an example, it is estimated that during each One Day International match of India's home series against Pakistan in 2004 around US\$500 million changed hands through the illegal betting market.³¹ More wagers, more money and more bookmakers add up to greater pressure on the game and those who play it. Turf wars between rival bookmakers have resulted in gangland killings.³²

Recent preventative measures and the infrastructure put in place by the ACSU for the ICC tournaments have proved successful and Lord Condon has said that the outcomes of recent matches have not been tainted by corruption.³³

Additional steps taken by the ICC

Codes of Conduct & Ethics

The ICC's drive to exercise its new found powers extended to ensuring that clear and consistent penalties were in place to deal with corruption. The ICC Code of Conduct for Players and Team Officials (the Code) was re-written specifically to include offences such as betting on cricket matches, inducing someone else to bet on matches, contriving or attempting to contrive the result of any match and failure of a player to perform on his merits during a match. The Code is applied to all international cricket matches conducted under the auspices of the ICC. This includes all Test Matches, One Day Internationals and international tournaments such as the ICC Champions Trophy, the ICC Cricket World Cup and the ICC Under19 World Cup.

The Code is a constantly evolving document. Since 2000 it has been amended several times to include wide reaching corruption offences and to prescribe appropriate penalties for such offences. It was even recently amended to provide that it may be a valid defence to a charge of corruption if a player or official can show that his conduct was the result of an honest and reasonable belief that there was a serious threat to the life or safety of himself or any member of his family. Due to betting links with the criminal underworld and the vast sums of money involved the possibility of threats to the players was a real possibility so this provision was introduced to offer them some re-assurance that they would not be penalised if this occurred?

The ICC strengthened its internal and external audit processes. An internal Auditor was employed in April 2002 and at the same time a separate Audit Committee was formed to review ICC processes.

A comprehensive and explicit Code of Ethics was also put in place. This Code sets out the ethical responsibilities and duties which apply to all ICC Directors, Committee Members and Staff.

"The overriding objectives of the Code are to enhance the reputation of the ICC, to foster public confidence in the ICC's governance and administration of the sport of cricket worldwide and in particular to strengthen its authority to deal with corruption. As the guardians of the sport internationally and because Directors operate in the public spotlight, they are expected to conduct their affairs on a basis consistent with the great trust that has been placed in them. This requires their behaviour to conform to the highest standards of honesty, impartiality, equity and integrity when discharging their duties and responsibilities.

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Directors' actions must be dedicated to the promotion and development of the sport of cricket worldwide. The Code of Ethics should be read and understood as a minimum standard of acceptable conduct.³⁴

In 2003 Chetram Singh, president of the Guyana Cricket Board and the then forerunner for the post of president of the West Indies Cricket Board (WICB), withdrew from the elections amidst controversy about his bookmaking business. The ICC Code of Ethics clearly states that no director "shall be engaged or actively involved in, directly or indirectly, any conduct analogous to... gambling or any other form of financial speculation."

Singh, in a media release, said that he had "accepted the nomination for the post out of my love for West Indies cricket and my desire to continue to serve wherever I am most needed. It is that same love of this game and our region that has prompted me to withdraw from this election."³⁵

This is illustrative of the far reaching effect that the ICC Code of Ethics has had over the sports administrators and that it is a respected aspect of the corporate governance of the organisation.

Improved Internal Governance

Historically in many sports, two strong traditions have operated. Firstly, voluntarism where sports administrators have generally been unpaid or lowly paid and have worked their way up into positions of authority in organisations from the grassroots. Secondly, sports have managed themselves on the basis of having a great deal of autonomy and exercising self-regulation. However when faced with financial corruption in the guise of activities such as match fixing, it has become clear that sports bodies have been unable to engage effectively with this problem. Pressure has been brought upon sports bodies such as the ICC to bring about internal change, comply with external legal rules and norms and support an ethical environment to uphold the integrity of sport.

These historical traditions and a culture of obfuscation have meant that at best sports bodies have attempted to deal with these problems in-house; at worst ignored them. The pressure for improved and effective internal governance has very much been on the agenda of external regulators such as national governments and supra-national bodies such as the European Union. The debate within European sport is instructive in this regard and was crystallised by the 2001 conference entitled 'The Rules of the Game – Europe's first conference on

the Governance of Sport'.³⁶ It has been recognised as in the corporate world generally, the values of openness, integrity and accountability are important aspirations but are not an exhaustive list.³⁷ Other terms can be substituted for these listed- values such as transparency are closely linked to openness. Transparency is partly about openness, but also allows outsiders to see, for example in sport, as to how disciplinary procedures operate and how decisions are made. It is also about the need for effective communication of key information in a form and way that is meaningful to target audiences. With companies, this is constructed in terms of the rights of the shareholders vis a vie the directors of a company. Some sporting bodies and clubs may have shareholders, but it is more accurate to talk of 'stakeholders' in sport including, players, administrators, fans, media and commercial interests.

In recent years sport governance has fallen into disrepute primarily because of the involvement of sports federations not only in the rules of the game but also in wide ranging commercial activities. Because of the monopolistic position of virtually all sports federations, this distinction which appeared so clear in the past when governing sport for the 'good of the game' has become blurred by commercial activities. The EU Commission and the European Court of Justice have on several occasions drawn attention to this dichotomy (rules for the governance of the game on the one hand and rules that have a commercial impact on the other).³⁸ As Jaques Rogge has argued:

"Governance is about clarification between the 'rules of the games' and the economic and commercial dimension related to the management of a sport. Because sports is based on ethics and fair competition, the governance of sport should fulfil the highest standards in terms of transparency, democracy and accountability."²⁰

A major development that has facilitated improvements in internal governance has been the supplanting of voluntarism with increased levels of professional expertise. The ICC is a leading exemplar with both organisation and the personnel of the body almost indistinguishable from the 1990s. Lord Condon commenting in his 2001 Report on the structure and operation of the ICC claimed:

"If the ICC continues as a loose and fragile alliance it is unlikely to succeed as a governing body. It must become a modern, regulatory body with the power to lead and direct international cricket"³⁹ ... the ICC has tried to address 'conflict of interest' issues for those who serve on the Executive Board of the ICC. The matter has not been resolved satisfactorily and needs to be revisited."⁴⁰

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Memoranda of Understanding

The ICC and, in particular the ACSU has worked extremely hard to build a network of good working relationships with governments, police forces, betting exchanges, gambling boards, other sports and all other relevant entities.

Since January 2004 the organisation has signed a number of agreements with internet betting exchanges, including Betfair in the UK. Betfair is an online betting exchange which acts as an intermediary and claims a commission on all bets struck. Unlike traditional betting companies it allows members of the public to “lay” as well as “place” bets.⁴¹ Information which they supply can assist in identifying unusual betting activities and patterns which may be cause for concern.⁴² Betfair has signed “Memorandum of Understanding” with several sport governing bodies in addition to the ICC. This has included the Jockey Club and the Association of Tennis Professionals (ATP), whose security departments will have access to individual identities and betting records of Betfair gamblers when a race or match produces unusual betting patterns or competition results. Betfair points out that by developing internal policing relationships with relevant sport governing bodies, sports corruption will be deterred because electronic transactional records will help investigators catch any wrongdoers, and, therefore create “safe” Internet gambling sites. The downside is that if an exclusive commission is paid to sport governing bodies when they recommend that gamblers deal with “official” or “approved” betting exchanges a conflict of interest can be created where sports contest integrity is sacrificed in order to maximise sports related gambling revenues. The ACSU has also formed similar collaborations with organisations in Australia, New Zealand and South Africa.

As these Memoranda of Understanding play a pivotal role in the investigation of corruption in sport, it is inevitable that at some point in time they will be scrutinised by a criminal or civil court, whether in the UK or abroad. Under many jurisdictions there may be privacy issues relating to exchange of data. For example, in the UK, the Data Protection Act 1998 provides the regulatory framework over the transfer of data (for example unusual patterns of betting on a particular match including information on who made certain bets) that would be provided by Betfair to a sports governing body such as the ICC. Currently, the transfer works on the basis that “the data subject has given his explicit consent to the processing of the personal data”. The legal arguments behind this approach are strong, both resting on the fact that Betfair’s website terms and conditions extract explicit

consent for the transfer. However, it may be that what is essentially a private form of regulation involving commercial bodies such as bookmakers and sports bodies, requires a new, clear statutory gateway be created to permit these data transfers. Such a gateway would make lawful the transfer of personal data from any organisations concerned with gambling to any licensed organisation concerned with the investigation of corruption in sport. This may be an appropriate development especially on reinforcing the reliability of this data on evidential grounds especially where there is increased criminalisation in the area (see below).

The External Legal Framework.

The criminal law can be a rather blunt instrument in bringing prosecutions for corrupt sports-related activities such as match fixing. An array of imprecise common law offences and confusing criminal statutory provisions has been employed to prosecute those involved in cheating in sport. There have been incidents of match fixing in sport over many years. One of the most notorious was the fixing of the 1919 baseball World Series which led to eight Chicago White Sox players (collectively re-named the “Black Sox”) being banned. The players were faced with criminal charges but despite being acquitted never played baseball again.⁴³

In Britain, football players Peter Swan, David Layne and Tony Kay were convicted of fraud and given prison sentences in 1964.⁴⁴ More recently in 1994, three Premiership players, corruption scandal in football concerned the allegations of match fixing against Bruce Grobbelaar, Hans Segers and John Fashanu were prosecuted with conspiracy to defraud.⁴⁵ At their first trial, the prosecution allegations were that Grobbelaar whilst playing for Liverpool FC and Segers for Wimbledon FC, let in goals to try to achieve certain results and thereby fix matches in Premier League games during the 1993–94 season. In addition it was alleged that there was a conspiracy involving Fashanu acting as a middle-man in the payment of sums to the two goalkeepers for a Malaysian businessman, Heng Suam Lim. At their first trial, lasting 34 days, the jury could not reach a verdict. At their second trial, with the prosecution only relying on the conspiracy to defraud charges, the four were acquitted. It has been estimated that the two trials cost more than £10 million.⁴⁶

As with fraud trials generally, there are significant problems with adducing appropriate evidence that will lead to convictions. When the conduct of individuals in sporting activity is questioned, for example a batsman deliberately getting himself out, or as was one of the

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issues in this footballing case, whether goalkeepers Grobbelaar and Segers were purposefully letting in goals, there is likely to be conflicting evidence. A major factor in the failure of the prosecution was the conflicting expert evidence of past-goalkeepers. For example World Cup 1966 England keeper Gordon Banks, argued that the video replays of the questionable incidents provided evidence that the goalkeepers threw the game. In addition, there will always be problems over admissibility of evidence. In India, bookmaker Gupta's allegations, which were the basis of the claims of the CBI Report, have not been repeated on oath and therefore could not be used in a court of law.

In the UK after a long investigation, the Crown Prosecution Service has stated that a number of flat racing jockeys will finally come to trial in September 2007. Leading jockey, Kieren Fallon, and five fellow riders, are charged with conspiracy to defraud punters of internet firm Betfair by ensuring horses lost races. The offences are alleged to have taken place between December 2002 and September 2004.⁴⁷

New Gambling Legislation- criminal liability

The alternative to the general criminal law is to enact specific criminal offences of cheating in gambling. Under English law there have been long-standing statutory offences in the Gaming Act 1845, but it was little used and certainly not in the area of sports corruption. The new Gambling Act 2005 introduced a specific offence to punish those who for do anything to enable another to cheat at gambling, this would include under performing in sport.

Section 42: Cheating

1. A person commits an offence if he:
 - (a) cheats at gambling, or
 - (b) does anything for the purpose of enabling or assisting another person to cheat at gambling.
2. For the purposes of subsection (1) it is immaterial whether a person who cheats-
 - (a) improves his chances of winning anything, or
 - (b) wins anything.
3. Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with:
 - (a) the process by which gambling is conducted, or
 - (b) a real or virtual game, race or other event or process to which gambling relates."⁴⁸

The word "cheating" under the Act is not defined but has its normal, everyday meaning. The offence is committed by both cheating directly or by doing something for the purpose of assisting or enabling another person to cheat. Lord Condon felt that the introduction of this legislation was a major step for the ICC although the ICC had sought tougher penalties to help protect the integrity of sport.

"I am of the view that legislation and, therefore, regulation of betting on sport provides a more effective framework for dealing with the total criminalisation of the activity. If betting is effectively regulated by governments then effective penalties can be introduced to deal with corruption."⁴⁹

In South Africa similar provisions of sports specific criminalisation can be found in the Prevention and Combating of Corrupt Activities Act [No. 12 of 2004]. Whether Criminalisation is the answer is a moot point. We will see whether these provisions are meaningfully used resulting in more prosecutions. They may of course merely have a symbolic value backing up other quasi and non-legal measures.

Regulation of Gambling

Gambling and sport have almost been inseparable and gambling has been subject to considerable regulation by the State. Gambling is part of the general commercialisation of sport and has a close relationship with corrupt practices in sport such as match fixing. Sports-related gambling has become a huge industry today, with the development of new forms such as spread betting and the availability of new mediums such as via the internet. Around the world, there are different mechanisms in place for the state regulation of gambling. In some countries around the world such as on the sub-continent, gambling is essentially prohibited. It of course flourishes as an 'illegal underground activity'. In others it is prohibited in some areas and regulated in others through strong and enforceable government legislation, e.g. in the United States, where there are many instances of specific sports gambling legislation to govern the behaviour of people within and outside sports. In a third grouping of countries a liberal regulatory framework exists, e.g. as in Britain, where over the last few years an increasingly liberal approach has been adopted. At a time when the administration of sport has become more complex than ever before, and vast amounts of new money are flowing into sport from sources such as the selling of media rights,⁵⁰ it is essential that more effective regulatory frameworks are developed in the sporting world to counter the impact of gambling on particular sports and players. It is also

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vital that there is effective policing of these new regulatory frameworks.

In Britain, the current popularity in sports-related gambling is nothing new – gambling was endemic in 18th century Britain. During the nineteenth century, a puritanical reaction, aimed particularly at working class betting, grew culminating in what was probably the greatest achievement of the anti-gambling lobby, the Street Betting Act 1906. Subsequently, gambling on sport has been increasingly raided by governments to provide income for the State and has also played a crucial role in the financing of the major sports of football and horse racing.

The government set up a Gambling Review Body in 1999 under the chairmanship of Sir Alan Budd.⁵¹ A wide ranging review of the legislation on gambling in Britain, it submitted its report in June 2001. This led to the Gambling Act 2005 and can be seen as generally a liberalizing law relaxing controls on when and where gambling can take place. But the match fixing scandal in cricket shows that there is a need for an effective regulatory framework concerning gambling and sport. The ACSU had provided input to an All Party Committee in the UK, which had been established to consult on this proposal

Conclusion

Five years ago corruption threatened to tear international cricket apart. The sport was on its knees with new revelations and allegations of malpractice seemingly emerging somewhere in the world on a weekly basis. Since then working for the good of the sport the ICC brought about fundamental governance and structural changes and campaigned hard to establish a culture of zero tolerance to corruption. The ICC has developed a working infrastructure to prevent corrupt practices occurring at cricket matches under its control. Cricket is now back on the right path and the sport seems largely free from serious corruption but the risk remains.

“Cricket has come a long way in tackling the evils of corruption. It has had to grow up quickly, but it can never relax and become complacent. If it does, the problem will inevitably return. No one at the ICC is prepared to allow that to happen and the newly-defined role and remit of the ACSU is proof of that long-term commitment.”⁵²

The Code of Conduct Commission and the ICC ACSU have been instrumental in achieving a successful turnaround of what could have been the end of international cricket. The two bodies now provide the ICC with the skills, knowledge and resources to act on

and implement the mandate given to the ICC by its Members to protect the sport from the all too real threat of corruption. There continue to be periodic allegations of misconduct but there have been few disciplinary actions. In 2004 Maurice Odumbe of Kenya was banned for five years by his Home Board, the Kenyan Cricket Association after being found to have ‘received money, benefit or other reward’ which could bring the game into disrepute. This decision followed an extensive investigation by the ACSU and a hearing in Nairobi chaired by Justice Ahmed Ebrahim, a former Zimbabwe High Court Judge.⁵³ At the time of writing, allegations have been made against the West Indies player, Marlon Samuels, which are under investigation.⁵⁴

More recently ICC liaisons with governments and relevant authorities have shown that more can be done to tackle corruption. In April 2005, in a speech to other heads of sports, ICC Chief Executive Officer Malcolm Speed urged governments to follow the UK’s example and legislate to criminalise cheating in sports.⁵⁵ He also strongly urged sports to put pressure on governments to take stronger measures to regulate sports gambling and then punish those who operate outside or against such regulations. His message was quite clear, be vigilant, take internal steps to protect yourselves and make sure that governments and all relevant agencies are working with you to prevent corruption striking at the integrity of your sports.

The ICC can be held out as exemplar of good practice for sports bodies engaging with corrupt practices. It has responded to a problem and has effectively upheld the integrity of international cricket. However, it is vital that engaging with corrupt activities is an on-going process and constant monitoring of policies and procedures is crucial.

Urvashi Naidoo (In House Lawyer at the International Cricket Council, Dubai) & Simon Gardiner (Reader in Sports Law at Leeds Metropolitan University, Leeds UK and Visiting Senior Research Fellow at the Asser International Sports Law Centre, The Hague).

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Appendix

Interview with Jeff Rees, Chief Investigator and General Manager of the ACSU.

Jeff Rees served as a London police officer for 35 years, spending his last 10 years as one of a very small number of senior investigators at New Scotland Yard. He successfully headed a host of high profile murder and kidnap investigations, and wrote the national instructions for the latter. He was awarded the Queen's Police Medal for outstanding service in 2000. He retired from the Metropolitan Police in September 2000 to join the ICC and become the Chief Investigator and then General Manager of the ACSU.

Match fixing

Q How do you think the ACSU has been effective in addressing match fixing in international cricket over the last 5 years?

A Back in 2000 international cricket was in crisis, it has recovered and is in much better shape now but I have to emphasise in the strongest terms that there is no room for complacency and that the threat of corruption still exists and indeed increases as the level of betting and the amount of money involved in betting increases.

Q What single specific development has had the most success?

A The long term benefits of the education programme which we have put in place are huge. Every player at international level, even those participating in the ICC U19 Cricket World Cup, will have attended an ACSU presentation and seen the ACSU anti-corruption video. Players are alert to the issues and aware of how would be corrupters operate. The naivety which used to exist amongst players is no longer there.

Q How has the culture that allowed these problems to seemingly develop in the past, amongst international cricketers, been effectively changed?

A. Players are educated about the corruption problem they therefore recognise the issues and respect the tight security protocols put in place. The naivety which used to exist amongst players is no longer there. Players are now constantly observed, a Regional Security Manager attends every international match and that is a constant and visible reminder that anti corruption measures are in place.

Q Are cricketers more likely to report their suspicions of corrupt activities. If yes, what is your evidence and at what frequency does this occur?

A Firstly, I should point out that it is an offence under the Code of Conduct if a player is aware that any other Player or individual has engaged in corrupt conduct, or received approaches and failed to disclose that to his Captain or to his team manager, or to a senior Board official or to us. The reality is that cricket is a team sport and no player wants to report a member of his team. Players also still harbour fears that they will be penalised/ and or ostracised in some way if they do report but the ICC is addressing this through its education programme so that the next generation of international cricketers will have no hesitation in reporting suspicions.

Q How do the political tensions and rivalries between the test-playing countries that the ICC has been confronted by (eg between the sub-continent countries and the old-guard i.e. England and Australia), hinder the activities of the ACSU?

A No the ACSU is unaffected by any such tensions as it operates independently.

Q Do you think international cricket in 2005 is clear of match fixing?

A I am confident that match fixing as we knew it in 2000 no longer occurs but the real danger now is micro fixing and in particular session manipulation which is much harder to detect. Let me explain. Matches are divided into sessions of rolling 20 overs for a five day Test Match and 15 and 20 overs for a one day match. Each session becomes an entity in itself and bets are placed on the outcomes of that session. Many manipulations could be possible in any given session and this may not affect the end result of the match at all. This micro fixing forms a key part of our player education, for instance we have strict dressing room protocols in place which prevent a player from contacting a potential corruptor on a match day.

Q Should the public think international one day matches are completely free from manipulation or are they right to have a continued healthy skepticism? If there is healthy skepticism (also on part of major stakeholders in cricket such as sponsors), what might this mean for the future legitimacy of international cricket?

A At the moment the legitimacy of international

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cricket is intact. What you see on the cricket pitch in international matches is legitimate but the threat is always there and the ACSU will continue to play an active role in investigating alleged corrupt activities and preventing potential corrupters from harming the sport.

The role of the ACSU

Q What are the ACSU powers of investigation?

A The powers and processes for the investigation are contained within the Unit's Terms of Reference which are attached. We have to work within the laws of the country that we are investigating in and we are also very respectful of issues such as data protection and confidentiality.

Q What increased powers would benefit the operations of the ACSU?

A It would greatly benefit the work of the ACSU if more cricket playing nations would introduce tougher legislation firstly to criminalise cheating in sport and secondly to enable prosecution and conviction of the corrupters/fixers as well.

Q What other agencies do the ACSU work with?

A The ACSU has developed good working relationships with a wide range of international authorities and organisations for instance police forces, customs officers, immigration authorities, gambling boards, players associations and other sports governing bodies.

Q Is the ACSU funded sufficiently by the ICC?

A From our inception we were given a budget of US\$4 million to cover the period up to the ICC Cricket World Cup in 2003. We managed to achieve many of our strategic aims within that time and kept to the budget set. We will aim for similar success in our next budget period.

Q What are the wider issues of corruption, if any, that the ACSU should address?

A If the ICC Executive Board decides that the ACSU should become involved in wider corruption related issues such as financial corruption and/or maladministration then we will use our skills and expertise to further that aim but presently the focus is purely on corruption linked to betting on cricket.

Q What form will the ACSU be in existence in 10 years time?

A Due to the increased volume of betting both legal and illegal the ACSU's work is likely to remain highly relevant to the sport. I see the ACSU continuing to lead in the area of responding to corruption in sport. I also see us working much more closely with other sports.

Q Should the ACSU be involved with addressing prohibited performance enhancing drugs on the one hand and social drugs on the other?

A The ICC is currently in the process of introducing an Anti Doping Code which will apply to all its events. I would not rule out our future involvement in the anti doping process. I would also add that if a player is mixed up in drugs he is open to blackmail and it makes him so much more vulnerable.

Q Do international cricketers have confidence in the activities of the ACSU? What is your evidence?

A I believe that the work of the ACSU has won the confidence of international players. The players' association, FICA, has always been very supportive of our activities; it appreciates the threats and the need for proper preventative measures. As I stated previously, we still need to overcome the players' fears about being penalized and/or ostracised for reporting their suspicions.

Gambling

Q Has the ICC/ACSU been effective in engaging with government over changes for e.g. to national gambling laws? Please provide examples.

A. The Unit participated in the Parliamentary consultation which took place before the new Gambling Act in the UK was passed. This Act, which received the Royal Assent in April 2005, criminalises cheating in sport. The penalty is up to two years imprisonment. The ACSU/ICC actually lobbied for a tougher penalty of a maximum of ten years imprisonment. It remains to be seen whether the current penalty of up to two years will be a sufficient deterrent. The Unit would like to see similar legislation in all cricket playing nations.

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Q Should there be more effective laws criminalising those involved in match fixing activities? If so, what?

A. Yes, all those involved; the fixers and would be corrupters should also be prosecuted for their role in the corruption of the sport.

Q What positive advantages are there in the 'Memorandum of Understanding' type agreements between sports bodies such as the ICC and betting exchanges such as Betfair?

A In those countries where the betting industry is regulated we have sought to enter into agreements which allow the Unit access to information which could help identify those involved in corruption. This information sharing obviously furthers the aims of the ACSU but unfortunately it does nothing to assist in the unregulated markets where betting itself is illegal.

Q Is cricket-related gambling supported by organised crime groups for example to facilitate laundering drug related monies?

A The amounts of money involved in the illegal betting industry are so great that it will undoubtedly attract the interest of organised criminal groups. We also know and it has been widely reported that there have been a number of murders linked to cricket related betting.

Q How does cricket liaise with other sporting bodies on sports-related gambling and corruption issues?

A The ICC the first sport to establish a dedicated unit to deal with corruption. We are leaders in this field and we provide guidance and information to other sports who seek our assistance. The ACSU ran an international conference for sporting bodies earlier this year. It was the first of its kind and focused purely on the issue of corruption in international sports. **BASL**

The Authors would like to express special thanks to Jeff Rees, ICC General Manager ACSU and Chief Investigator –for participating in the interview.

- 1 See Raja, N, *Sports Gambling in Malaysia*, *For the Record – the OOfficialao Newsletter of the National Sports Law Institute* (1997) 8(2) pp.3-5
- 2 Lord Condon, *Bounce Corruption out of Cricket* leaflet (2002). Also see ICC Anti Corruption Unit Interim Report April 2001 (The Condon Report) – www.icc-cricket.com
- 3 See <http://news.bbc.co.uk/sport1/hi/football/europe/4445896.stm>
- 4 See Fraser, D, "A Temptation that has been hard to resist and Balls, Bails and Bribes" *The Times* 10th December 1998.
- 5 See Mason, T, *Sports in Britain; A Social History* (Cambridge University Press, 1989).
- 6 See "Stumped but not out for two decades", www.CricInfo.com, 18th April 2000. which gives a chronological history of match fixing/betting allegations
- 7 See ICC Media Release 18th October 2000, www.icc-cricket.com
- 8 See "The ICC Code of Ethics" www.icc-cricket.com
- 9 See *Tampering with Cricket Don Oslear and Jack Bannister and Caught – the full story of cricket's match fixing scandal*, Simon Wilde.
- 10 See ICC Media Release 11th January 1999 www.icc-cricket.com, and – ICC given power to act over match- fixing" *The Times* 12th January 1999
- 11 *Ibid.* ICC Media Release 11th January 1999 and "ICC reveals plan to hunt match-fixers", *The Independent* 12th Jan 1999
- 12 See "Test star Cronje sacked after lying about bribe", www.telegraph.co.uk/, 12 April 2000.
- 13 For more on Cronje scandal, see Gardiner et al, *Sports Law* (2005) 3rd ed. London: Routledge Cavendish pp 325-339. Also see Le Roux, R, *The Cronje Affair* (2002) 2 *The International Sports Law Journal* 11; Gouws, D, "... And Nothing But the Truth?" (2000), Cape Town: Zebra; Alfred, L, *Lifting the Covers: the Inside Story of South African Cricket* (2001), Claremont: Spearhead; Oosthuizen, A and Tinkler, G, *The Banjo Players: Cricket's Match Fixing Scandal* (2001), Hout Bay: Riverside.
- 14 *Eg See Sharjah investigation discussed below.*
- 15 Hyperlink to all these reports can be found at the ICC website www.icc-cricket.com
- 16 Hansie Cronje, Salim Malik, and Mohammed Azharuddin Hyperlink to reports on BBC http://news.bbc.co.uk/sport/hi/english/static/in_depth/cricket/2000/corruption_in_cricket/default.stm
- 17 A full biography for Lord Condon can be found at www.icc-cricket.com
- 18 See Paragraphs 79 to 82 of the Condon Report which describe possible reasons why corruption developed in cricket.
- 19 *Ibid.*, Paras. 106 to 138.
- 20 *Ibid.*, Para. 61.
- 21 See ICC Media Release 11th January 1999 www.icc-cricket.com
- 22 See ICC Media Release 30th April 1999 www.icc-cricket.com
- 23 Conclusion of the ICC Code of Conduct Commission Report of Official Inquiry held 28th and 29th October 1999 can be found at www.icc-cricket.com.
- 24 Recommendations of the ICC Code of Conduct Commission Report of Official Inquiry held 28th and 29th October 1999.
- 25 *The Code of Conduct for Player and Officials* can be found at www.icc-cricket.com. The Code is discussed further below.
- 26 Refer to ICC Media Release 3rd May 2000, www.icc-cricket.com
- 27 The new Terms of Reference for the ACSU can be found at www.icc-cricket.com.
- 28 See *The Guardian* 11th December 2000 Lloyd to lead Sharjah Probe.
- 29 *Op. cit* fn 2, para. 42.
- 30 This is a measure which the Jockey Club has tried to replicate in Horse Racing, see www.thejockeyclub.co.uk
- 31 Lord Condon in ICC Annual Report for 2004-2005, see www.icc-cricket.com
- 32 See <http://timesofindia.indiatimes.com/articleshow/36506343.cms>
- 33 *Op cit.* fn 33
- 34 ICC Code of Ethics paragraph 1.3, see www.icc-cricket.com
- 35 See www.cricInfo.com 15th July 2003
- 36 *The Rules of the Game – Europe's first conference on the Governance of Sport*, see papers at www.governance-in-sport.com. The Conference was jointly organised by the FIA, the European Olympic Committee and lawyers, Herbert Smith. For more information, see Caiger, A and Gardiner, S, 'The rules of the game: Europe's first conference on the governance of sport' (2001) 4(2) *Sports Law Bulletin* 1, and *SportBusiness*, April 2001, p 26.
- 37 Note that there have been many more reports on corporate governance since the Cadbury Report 1992, e.g. OECD – Principles of good practice (2004), see Birkbeck College's Football Governance Research Centre web site for copies of other Reports- www.football-research.org/library.htm.
- 38 The Court of Arbitration for Sport has shown a distinction between issues involving technical decisions, standards or rules that essentially concern rules of the game are beyond arbitral ior judicials scrutiny and should not be reviewed, e.g. M. v Assoc. Internationale de Boxe Amateur (AIBA), CAS Ad Hoc Div. (O.G. Atlanta 1996) reported in Reeb, M, *Digest of Awards of CAS Awards 1986-1998*, (1999), Berne: Staempfli, where case was made to review a referee's decision when Boxer M was disqualified for landing a below-the-belt punch on his opponent. Most recently this has occurred in the Deliége (Case 191/97 [2002] ECR I-4135 and Lehtonen (Case C-176/96) judgement of 13 April 2000.
- 39 *Op cit* fn 2, paras 4-6.
- 40 *Ibid.*, para 135
- 41 A lay bet is a bet that something wont win. This type of bet has grown significantly in popularity over the last few years with the growth of betting exchanges in particular.
- 42 See <http://news.bbc.co.uk/sport1/hi/cricket/3406861.stm>
- 43 See www.1919blacksox.com/
- 44 See Tongue, S, 'Bribery and corruption: English football's biggest ever match fixing scandal', *Total Sport*, March 1997.
- 45 See Gardiner et al, *Sports Law* 2nd ed (2001), pp359-362, for further analysis.
- 46 See *Grobelaar v News Group Newspapers Ltd* (2002) 4 All ER 732- in November 1994 *The Sun* newspaper published a series of very prominent articles charging Grobbelaar with corruption. He promptly issued writs claiming damages for libel. After some delay caused by the intervening criminal prosecution of the appellant and others, these libel proceedings came before Gray J and a jury. The jury found in favour of the appellant and awarded him compensatory damages of £85,000. On the newspaper's appeal against this decision the Court of Appeal (Simon Brown, Thorpe and Jonathan Parker L.J.) set it aside as perverse and November 1994. *The House of Lords* allowed appeal against the Court of appeal discussion but awarded Grobbelaar nominal damages of only £1.
- 47 For further analysis of the internal reforms within the governing bodies of British racing, see *Op cit* fn14 Gardiner et al.
- 48 *The Gambling Act 2005* – can be found at <http://www.opsi.gov.uk>
- 49 *Op cit.* fn 33.
- 50 See "ICC AGREES \$1.15bn DEAL WITH ESPN STAR SPORTS". www.sportbusiness.com/news/160922/icc-agrees-1-15bn-deal-with-espn-star-sports
- 51 *Gambling Review Report* (2001), London: The Stationary Office; it can be found at www.culture.gov.uk/gambling_and_racing.
- 52 *Op cit.* fn 33.
- 53 See <http://www.icc-cricket.com/icc-news/content/story/135251.html>
- 54 See http://news.bbc.co.uk/sport1/hi/cricket/other_international/west_indies/6354441.stm ' See <http://www.icc-cricket.com/icc-news/content/story/207080.html>

Sport Governance and EU legal order: Present and future

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On the future relationship between governance in European sport and in particular professional football and the European Union legal order.

Although sport is part of a healthy lifestyle and is a means of fans devoting themselves to the game and to competition, it has also become a professional business and an economic sector in its own right. To a greater or lesser extent, depending on the discipline, player transfers, infrastructures, media rights, advertising and sponsorship of major national or international events now run into billions of euros or dollars.

At a time when a new European treaty is being drafted, when new questions are being referred to the European Court of Justice (ECJ) for preliminary ruling when there are conflicts between players and their clubs or clubs and their national or European federation, after the publication on 11 July 2007 of the EU Commission's "White Paper on Sport"ⁱ, we felt it opportune to focus, both in terms of 'lege lata' and 'lege ferenda', on European law applicable to professional sport and, more especially, football. We will do so by taking as a starting point the so-called Arnaut report, named after its author José Luis Arnaut, former deputy prime minister of Portugal and minister of sport in charge of Euro 2004, entitled the "Independent European Sport Review" (IESR)ⁱⁱ published in October 2006 as well as the European Parliament resolution on the future of professional football in Europeⁱⁱⁱ adopted in March 2007, for commenting on the findings and proposals contained therein as well as, in turn, offering some thoughts and suggestions for the future of relations between the governance of European sport and, more especially, that of football, on the one hand, and the Community legal system, on the other.

I. Introduction

To date, sport has been organised exclusively by Member States which regulate (often in a specific and rigorous manner) – by means of appropriate legislation – the activities of the various stakeholders in the sporting arena (federations, clubs, players, etc.).

And so, by way of example:

- each Member State applies its national competition law to the centralised sale, by a federation or a league, or the individual sale, of media rights to sporting events;
- each Member State applies its Labour law to the contracts concluded between professional players and sports employers (football clubs, basketball clubs, volleyball clubs, cycling teams etc.);
- in each Member State, it is usual for ordinary courts to decide – on the basis of national law – on conflicts which may arise between the various stakeholders in the sporting arena. This has resulted in a thriving and consolidated jurisprudence.

No claims have ever been made with regard to the fact that this application of national law to the sports sector was going against the "autonomy required" by the federations in order to perform their duties or that this application could be a source of "legal uncertainty". As with all other sectors of society, the sports sector and its protagonists conform – at national level – to the constraints of the rule of law.

The European Union has no jurisdiction when it comes to sport.

Consequently, it only intervenes in this sector by means of the implementation of other powers invested in it, particularly with regard to free competition and free movement for persons, services and capital.

By means of numerous judgments and decisions, the ECJ and the European Commission have gradually developed a jurisprudence:

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- which ensures that the various stakeholders in the sports sector, including international federations, respect fundamental freedoms of movement and competition law;
- which, as for all other sectors, including self-employed professionals, rejects the concept of routine exemption for sports federations but, on the other hand, takes into consideration the specificity of the sport (such as its social role, the need for a certain sporting equilibrium between the participants in a given competition, the need to support training, etc.);
- which, consequently, decides on a case by case basis – in view of all the circumstances of the case in point – on the question of whether restrictions of fundamental freedoms or of free competition created by a rule issued by a federation or by the conduct of a club or a federation are justified by an objective of general interest and are proportionate to the pursuit of this objective. A summary of this jurisprudence can be found in the recent MECA-MEDINA and MAJCEN judgment of 17 July 2006 which we will discuss later.

In short, the EU is limited to having marginal control (namely respect for free competition and fundamental freedoms) over any abuse of power by sports sector stakeholders, including national and international federations.

International federations (mainly UEFA and FIFA) and to a lesser extent the IOC, disputing European jurisprudence, believe that this case by case approach by the ECJ and the Commission generates an intolerable level of “legal uncertainty and confusion” and that in order to remedy the situation it would be necessary to exempt sport from the application of Community law (by virtue of its claimed specificity) and to reaffirm the regulatory autonomy of the federations (particularly international federations) over Community law.

This approach is clearly recommended by the so-called “ARNAUT report” which we must stress, although entitled “independent”, is also clearly marked “commissioned” by UEFA^{iv}. This is no surprise since, although it wishes to focus on sport in general, it mainly concentrates on the world of football.

II. The state of Community law

As stated, we will try to describe the state of Community law by starting from the approaches that we feel are being upheld by the Arnaut report.

A. What would be the rules adopted by the sporting federations which, on the basis of European Court of Justice jurisprudence, are beyond the scope of Community law?

Rules which, according to the Arnaut report, would certainly be beyond the scope of Community law and would, therefore, be up to the “sole discretion of the sports governing bodies” would, in particular, include the rules of the game, rules relating to the structure of competitions, rules making it possible for federations to establish sporting calendars, the “home and away” rule, rules relating to the fight against doping and finally, rules relating to the obligation placed on clubs to make their employees available, free of charge, to national teams, this rule being “motivated by purely sporting considerations” and having, therefore, to be “considered as a prime example of a ‘sporting rule’ which should fall outside the scope of EU law”^v.

The authors of the report could have been able to base their findings on a phrase from an already outdated judgment by the Court of Justice, known as the WALRAVE^{vi} judgment where, for the first time, the Court had applied rules relating to free movement of workers to the field of sport and had stated that sport was only subject to Community law when it constituted an economic activity in the sense of article 2 of the EC Treaty, tempering this approach to rules of purely sporting aspects and (which) as such (have) nothing to do with economic activity (paragraph 4).

Subsequent jurisprudence ought to have already convinced the authors of the Arnaut report of the non-existence of the principle of widespread exemption for “purely sporting rules”. In fact, both in the BOSMAN judgment of 1995 (which decided that the system of fee paying transfers at the end of an employment contract was contrary to Community law and, likewise, the quota rule, fixing the maximum number of players from other Member States able to take part in a match between clubs) (paragraph 76) and in the DELIEGE judgment of 2000 (the only case in jurisprudence where the Court recognised the purely sporting nature of a rule in respect of a regulation not involving the composition of national sports teams but relating to the selection of athletes for high-level international competitions) (paragraph 43), the Court had already specified that any restriction of the scope of Community provisions “must

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remain limited to its proper objective” and henceforth, cannot “be relied upon to exclude the whole of a sporting activity” from the scope of the Treaty^{vii}.

Even on this now outmoded basis, it certainly does not appear reasonable to believe that arranging sporting calendars, which in fact consists of distributing all the production capabilities of the “football product” between clubs and federations, or the obligation to make players available, which makes it possible, for example, for FIFA to organise a World Cup with a commercial value running into billions of Euro (this event being, by its very nature, in direct competition with products offered by the clubs) should, a priori, escape investigation by Community judges.

It is, however, above all, highly surprising that no major reference is made in the Arnaut report to the MECA-MEDINA and MAJZEN judgment, even though this was given prior to publication of the report in question and which, in relation to anti-doping rules, very clearly moved the boundary between sporting regulations which escape the application of Community law and those falling within its scope^{viii}. The moment that any sporting rule has an economic effect, even if this is an ancillary economic effect, it will fall within the scope of the major freedoms of movement and competition law. The Court, in effect, states that “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule of the body which has laid it down” (paragraph 27) and that “if the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty” (paragraph 28)^{ix}.

Let us remember that, in this case the Court quashed a judgment of the Court of first instance which, basing its judgment on the premise that “the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration” (paragraph 47) had concluded that anti-doping rules, and more particularly, the disputed anti-doping regulation, did not fall within the scope of treaty provisions on economic freedoms and free competition, did not pursue any discriminatory purpose and, therefore, constituted a purely sporting rule, even though it did have economic repercussions (paragraph 49 and paragraph 52). In contrast, the Court of Justice applies the so-called Wouters jurisprudence^x to anti-doping regulations, mindful of the fact that compatibility of a regulation with Community law cannot be applied in an abstract manner, that it is necessary to take into

consideration the global context in which the rule has been enacted or in which it deploys its effects prior to investigating whether or not the resulting restrictive effects on competition are inherent to the pursuit of the legitimate objectives sought by it and are in proportion to said objectives.

Let us remember that the fact that a regulation falls within the scope of Community law does not mean that it is necessarily incompatible with said law. The Court did, in fact, state in the same judgment that an anti-doping regulation does not “necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC Treaty, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes” (paragraph 45).

That said, once a legitimate objective has been defined, it is once again necessary to determine whether the regulation is proportionate, i.e. limited to what is required in order to achieve the objective in question, in this case, the correct conclusion of sporting competitions.

In the case in point, in the Court’s opinion, examination of the proportionality of an anti-doping rule must relate both to the level at which the margin of tolerance over which doping is punishable is set and the severity of the sanctions laid down.

In this regard, let us take two other examples.

In quoting the decision given by the Belgian Competition Council (on the licensing system put in place by the Royal Belgian Football Association), the authors of the Arnaut report believe that rules relating to “club licensing” – intended to encourage strong governance and financial stability and transparency within clubs – should “also fall within the legitimate autonomy of the sports authorities” (p.45).

The Belgian Competition Council, in its decision No. 2004-E/A-25 of 4 March 2004^{xi}, did not confirm “the autonomy” of the Royal Belgian Football Association in terms of the “club licensing system”.

In effect, the Competition council judged that: “The two provisions are necessary for the organisation of sporting events. They aim to ensure the equilibrium of sporting events, uncertainty in respect of results and to provide the sector with sound financial management. Although

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they may impose constraints, the Council notes that these are inherent to the pursuit of the legitimate objective sought and are proportionate to this objective.

In this sense, the Royal Belgian Football Association has perfectly fulfilled its role as regulator.

Consequently, it is necessary to decide that the provisions are beyond the scope of article 2, paragraph 1, of the law^{xii}.

It is, therefore, in application of the “inherent” test, as formulated by the ECJ in the WOUTERS judgment^{xiii} and – more specifically for sport – in its recent MECA-MEDINA and MAJCEN judgment, mentioned above, and, therefore, on the basis of a concrete examination of the disputed provisions that the Competition Council has concluded that there was no breach, in the case in point, of Belgian competition law.

By basing its findings on the judgment given by the Court of Arbitration for Sport in the ENIC case and on the positions taken by the European Commission on this same case, the authors of the report believe, with regard to rules aiming to prevent multi-ownership or the influencing of clubs by third parties, that “the discretion of the football authorities to take the necessary steps to safeguard the integrity of the competitions that they organised should also be respected as matters falling within their natural sphere of competence».

Once again, the authors of the Arnaut report seem to confuse compatibility with Community law of the UEFA rule prohibiting – to a certain extent – multi-ownership, and non-application of Community law.

In fact, in its decision to dismiss the complaint filed on 27 June 2002 (in the case COMP/37806: ENIC/UEFA)^{xiv}, the Commission in no way believed that the UEFA rule was beyond the scope of Community law (and, so, would come under the sole “discretion” and the UEFA’s “natural sphere of competence”).

On the contrary, by invoking the WOUTERS judgment, mentioned above, the Commission decided that said rule falls within the scope of article 81 of the EC Treaty but that its restrictive effects on competition are inherent “in the pursuit of the very existence of credible pan European football competitions^{xv}” and that “the limitation of the freedom of action of clubs and investors which the rule entails does not go beyond what is necessary to ensure its legitimate aim: i.e. to protect the uncertainty of the results in the interest of the public.”^{xvi}

Once again therefore, it is after a concrete examination of the rule’s objective and its effects, within the field of application of Community law, that a compatibility report can be drawn up, with no means of deducing, a priori, compatibility with Community law of any rule on multi-ownership (and even less so the non-application of this law to such rules).

In other words, in the light of the MECA-MEDINA and MAJCEN judgment, even the fact that a rule is adopted and implemented by a federation or the IOC in its capacity as regulator (anti-doping rules certainly being one example of this) and not as an economic agent, under no circumstances results in this rule being exempted from the scope of Community law in general and articles 81 and 82 of the EC Treaty in particular, the moment that it has economic consequences and affects one or more freedoms drawn by third parties from the EC Treaty.

B. What criteria have to be fulfilled for rules issued by sporting federations and falling within the scope of Community law to be declared acceptable?

Here again, we believe the Arnaut report’s analysis to be disputable in so far as it systematically neglects the fact that a declaration of compatibility with Community law is only ever made after analysis, in each individual case, of the suitability of the rule as regards the general interest objective sought and its proportionality.

Let us take some examples:

1. Organisation of competitions

The rules under which federations may impose total acceptance of competitions forming part of the European pyramid on clubs would be compatible with Community law.

And so, both at national and European level “the football authorities may legitimately require their members to commit to participation in the pyramid or co-operative structure as a whole and not merely in one or other part of it”^{xvii}.

To this end, the authors of the report invoke ECJ jurisprudence under which it is lawful for a cooperative’s articles of association to prohibit its members from participating in other organisations in direct competition with said cooperative.

Upon reading the GØTTRUP-KLIM judgment invoked^{xviii}, it is hard to see how this jurisprudence could be used to prove the essential nature of the pyramidal organisation. In fact, paragraphs 32, 34 and 35 of this

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judgment lay down that:

32. In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

34. It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85 (1) of the Treaty and may even have beneficial effects on competition.

35. Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in Article 85 (1) of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

We have, therefore, noted that the ECJ did not authorise, in abstracto, the prohibition of dual membership but that upon completion of a concrete examination of the objective sought and the necessity of the means employed, decided – in the case in point – that this type of ban does not breach Community competition law.

In addition, in the GØTTRUP-KLIM case, the ban on dual membership aimed to make it possible to place a “counterweight to the contractual power of large producers” and make way for “more effective competition”. In professional sport, a ban on existing, in part, outside the pyramid would appear both in its aims and effects to prevent the appearance of competing producers. Here we have two very different situations.

In any event, it is clear that it would be wrong to try to prevent (a priori and on the grounds of the allegedly lawful nature of the pyramidal organisation) the players or clubs involved from raising the question, by means of appropriate recourse, of the legality under Community law of certain rules involved in the construction of the pyramidal model.

2. Player transfers

The same reasoning can be applied to rules on player transfers.

In fact, in both the BOSMAN^{xxx} and the LEHTONEN^{xx} judgments, the ECJ judged that the transfer rules would restrict the free movement of players and would, therefore, constitute an obstacle on this fundamental right invested by the EC Treaty. It was only in the second instance that the Court verified “whether that obstacle may be objectively justified”^{xxi}, which may be the case – for example – if the deadlines set for player transfers were required in order to ensure “the regularity of sporting competitions”^{xxii}.

Both in the BOSMAN and the LEHTONEN judgments, the Court judged that the regulations in question went “beyond what is necessary for achieving the aim pursued”.

It is, therefore, really by means of a case by case, rather than a general examination, that certain rules relating to a transfer system may possibly be declared to conform to Community law. A fortiori, it is out of the question that some of these rules fall beyond the scope of Community law, as is, however, maintained by the Arnaut report.^{xxiii}

3. The activity of players’ agents

Claiming a greater role for UEFA in this respect (at the present time essentially managed by FIFA), the Arnaut report believes that these rules are inherent “to the proper regulation of sport and therefore compatible with European Community law”^{xxiv}.

In referring to inherence criteria, the authors of the Arnaut report fall neatly within the framework traced by WOUTERS and MECA jurisprudence.

It cannot, however, be claimed, as they seem to do, that all rules relating to the activity of players’ agents are inherent to the smooth operation of the football market and, therefore, compatible with Community law.

Once again, the Community judge will assess whether the restraints on the freedom of action of players’ agents that the rule creates are inherent to the achievement of the legitimate objective sought, on a case by case basis.

Finally, in its PIAU judgment^{xxv}, encouraged to make a decision on the compatibility of the FIFA judgment on the activity of players’ agents with articles 81 and 82 of the EC Treaty, the Court of first instance judged that:

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“On the one hand, the Players’ Agents Regulations were adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (see, by analogy, Case C-309/99 *Wouters and others* [2002] ECR I-1577, paragraphs 68 and 69). Those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either (*Bosman*, paragraph 81, and *Deliège*, paragraph 47).

On the other hand, since they are binding on national associations that are members of FIFA, which are required to draw up similar rules that are subsequently approved by FIFA, and on clubs, players and players’ agents, those regulations are the reflection of FIFA’s resolve to coordinate the conduct of its members with regard to the activity of players’ agents. They therefore constitute a decision by an association of undertakings within the meaning article 81 (1) EC (Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraphs 29 to 32, and *Wouters and others*, paragraph 71), which must comply with the Community rules on competition, where such a decision has effects in the Community.

With regard to FIFA’s legitimacy, contested by the applicant, to enact such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football (see paragraph 2 above), is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded.

The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.

In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. Nevertheless, in the present dispute, the rule-making power exercised by FIFA, in the almost complete absence of national rules, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested

decision must be assessed, while considerations relating to the legal basis that allows FIFA to carry on regulatory activity, however important they may be, are not the subject of judicial review in this case.”

These are the most relevant Court findings and they continue to be topical.

4. UEFA rules on “homegrown players”

Here again, the Arnaut report believes that the rules requiring each club to have a certain number of players under contract who have been trained either at the club or within the national federation to which this club belongs^{xxvi} are necessarily compatible with Community law.

Again, it would seem risky to uphold this principle, even acknowledging that, to a certain extent, these rules may be justified by an objective of general interest and are proportionate^{xxvii}.

In paragraph 106 of the *BOSMAN* judgment, the ECJ judged that: “In view of the considerable social importance of sporting activities, and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results, and of encouraging the recruitment and training of young players must be accepted as legitimate” (our underlining).

UEFA invokes these two justifications but also maintains that this system provides “a large reservoir of talent for national teams as a consequence”.

Likewise, UEFA acknowledges that its rule favours the recruitment of “homegrown” nationals rather than nationals from other Member States, thereby creating an indirectly discriminatory obstacle.

Furthermore, it is doubtful that this rule contributes to competitive equilibrium on a transnational level. In effect, nothing will prevent – in a given Member State – the richest club from acquiring the best “homegrown players” prior to training. This was, in addition, explicitly judged by the ECJ in point 135 of the *BOSMAN* judgment, in respect of nationality clauses (the “homegrown players” clause, as only constituting, in our opinion, a positivised and “restyled” version of the nationality clause) ; “although it has been argued that the nationality clauses prevent the richest clubs from engaging the best foreign players, those clauses are not sufficient to achieve the aim of maintaining a competitive balance since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent”.

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What is more, this rule will penalise clubs in small Member States, which will be disadvantaged by the narrowness of their national labour market.

5. *The centralised marketing of media rights*

Here again, the authors of the Arnaut report believe that the concept of the sale or individual ownership of television rights cannot be accepted from an intellectual point of view.

Referring to the findings of Mr Advocate General LENZ in the BOSMAN case ("certain restrictions may be necessary to ensure the proper functioning of the sector") and the decision of the European Commission in the UEFA Champions League Media rights case, the authors of the report conclude that "It is both acceptable and necessary for the football authorities to require clubs to commit to a central marketing model as a condition of their participation in a sporting competition and compatible with European law"^{xxviii}.

Firstly, when we are talking about media rights, we must avoid any confusion between the question of ownership of rights, entitlement to said rights, and their mode of marketing.

Contrary to what is maintained by the authors of the Arnaut report, the principle of individual ownership of these media rights is not only intellectually conceivable but is part of substantive law.

There is no unified or harmonised system of ownership within the European Union, the organisation of these systems coming under the jurisdiction of each Member State. The question of a property ownership system (and, therefore, in particular, that of knowing if said right belongs individually to a club or is jointly owned by several clubs) is governed by national law in each Member State. This was noted by the European Commission in its decision of 23 July 2003 relating to the joint selling of the commercial rights of the UEFA Champions League^{xxix}. In a certain number of Member States, the individual ownership formula was upheld^{xxx}.

It should then be analysed whether the joint sale of these rights, grouped together by an agreement between the individual owners or the co-owners, is compatible with article 81 (1) of the EC Treaty, as the Commission states in paragraphs 122 to 124 of its decision as referred to above:

122. (...) on the basis of the information submitted by UEFA, UEFA can at best be considered as a co-owner of the rights, but never the sole owner. The question of

ownership is for national law and the Commission's appreciation of the issue in this case is without prejudice to any determination by national courts.

123. The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament. It is not considered necessary for the purpose of this case to quantify the respective ownership shares.

124. It suffices to note that there are multiple owners of the media rights to the UEFA Champions League. An agreement between the three owners (the two football clubs and UEFA) which are indispensable to produce one unit of output (the license to broadcast one match) would not be caught by Article 81 (1) of the Treaty and Article 53 (1) of the EEA Agreement. However, since the agreement regarding UEFA's joint selling arrangement extends beyond that, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply to the arrangement.

After a detailed investigation, the Commission considered that this joint sales agreement would generate restraints on competition in the sense of article 81 (1) of the EC Treaty but could, to a certain extent, benefit from the exemption provided for in 81 (3) of the EC Treaty, by virtue of improvements in production and distribution brought about by these restraints and by virtue of the fact that an adequate share of the resulting profits would return to consumers.

The Commission decided, however, that: "Exemption should (...) be subject to the condition that football clubs must not be prevented from selling their live TV rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster".

In conclusion, once again, it was after concrete analysis that, to a certain extent, some joint sales agreements were declared to conform to Community law.

Furthermore, it should be noted that the Commission based its analysis on the premise that this joint sale resulted from the free consent of the clubs involved. It is, therefore, wrong for the Arnaut report to deduce from this decision that it would permit federations to impose a "central marketing model" on clubs as a condition of their participation in a sporting competition.

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It is, on the contrary, the free consent of the clubs involved which makes it possible for this model to be conceived and, to a certain extent, to benefit from the exemption laid down by article 81 (3) of the EC Treaty.

III. The specificity of sport

Apart from the fact that they have never been taken into consideration or accepted by the Court of Justice, certain arguments presented in the Arnaut report attempt to demonstrate that sport should merit different treatment from that reserved for other sectors of economic life.

We admit that on the basis of this type of reasoning, numerous sectors of socio-economic activity could claim a right to exemption from the application of Community law on the grounds of their exceptionality. Do the aeronautics, forestry, health, energy, waste and telecommunications industries not have their own specificity? In any event, both Court of Justice and Commission jurisprudence upholds, by way of justification of restraints on fundamental freedoms or on free competition, objectives of legitimate interest which may differ according to sector and the sports sector has, furthermore, benefited from this.

Blanket exemption from Community law of sporting regulations cannot, of course, be justified, as in the Arnaut report, due to the need to give the relevant bodies a guarantee of being able to act "without fear of their decisions being undermined by the application of European Community law" (page 31 of the Arnaut report). Legal disputes are created and legal decisions are given in all sectors of social and economic life. There is no more legal uncertainty in the field of sport than in other sectors, both with regard to fundamental freedoms and competition regulations and only legislation and jurisprudence can reduce this uncertainty which also results from the changing behaviour of the stakeholders in a given sector. In any event, the solution to legal uncertainty is never to adopt "soft law" or to leave the law to private stakeholders, even if UEFA and the national federations could be considered to be pure regulators, which they are not. They are also leading economic agents in a market that they are also called upon to regulate. With very few exceptions, they are called upon to adopt regulations and decisions of a mixed nature which contribute both to the regulation of the professional football market and to the promotion of their own economic and commercial interests. And so, when UEFA fixes the dates of the final phase of the European Championship which is held in June, it reserves this period of production for itself and makes it unavailable for clubs, with the positive or negative

economic consequences that this may bring for either party.

There is, therefore, no reason why, in the name of the specificity of the sports sector, sports federations should be exempted from the application of a law which is applied, for example, to certain associations of professionals, as in the WOUTERS judgment, which relates to a national Bar Association.

The Arnaut report also refers, at great length, to the "European sporting model", the principles of which would be respected, in full, by UEFA. This model would be based on democratic operation, the separation of powers, the representation of the various stakeholders (players, supporters, clubs, federations) within consultative bodies, the principle of promotion/relegation (with the resultant pyramidal structure), financial solidarity guaranteeing a certain degree of equilibrium in respect of the sporting powers-that-be and recourse to arbitration.

Prior to commenting on some of these points, even if we suppose that these points have all been made, we do not see why said points would justify the exemption of sport from Community law, and more specifically, from provisions relating to the freedom of movement and competition.

Although the impression given by sports federations is sometimes that of public authorities, they are still no more than private entities involved in economic and commercial activities and are, moreover, generally constituted under Swiss law.

In the aforementioned PIAU judgment, the Court of First Instance demonstrated the purely private nature of an international federation, acting "on its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity...". Even though a Bar Association receives this type of mission from the national legislator, its decisions are still subject to competition law^{xxxii}. Even more so for sports federations.

Consequently, it would seem to be inappropriate to compare the division of tasks put in place within UEFA, a purely private entity, with a separation of powers, as practised by democratic States governed by the rule of law and falling within public law.

In addition, it is public knowledge that some clubs, particularly those in the G-14 group^{xxxiii}, do not share the

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analysis made by the authors of the Arnaut report, that clubs within UEFA are fully satisfied, particularly with regard to democratic requirements and mechanisms of “representation” .

In this respect, the authors of the Arnaut report believe that a purely consultative representation is sufficient. In our opinion, this is not the case since the degree of participation of clubs in decision making has necessarily to vary according to the issues in question.

And so, simply by way of example, the proven status of the clubs participating in the UEFA Champions League as co-owners, necessarily requires co-management of the commercial rights on which this co-ownership is based. In effect, in view of general legal principles on the subject of managing ‘res communis’, UEFA’s claim for exemption from said management for all the other co-owners is not reasonably justifiable and, consequently, abusive^{xxxiii} .

Even if the principle of promotion/relegation, which means that the clubs at the top of the sporting pyramid never have a legal guarantee that this situation will continue, can be accepted, there can be no question of requiring clubs to waive any right of criticism of these procedures, if necessary, by legal means, whether these criticisms relate to the format of the different competitions or the sporting calendar and of requiring application of the principle of proportionality to be monitored.

Although financial solidarity and revenue sharing are certainly one means of serving an objective deemed worthy of protection, i.e. maintaining a degree of equilibrium of the sporting powers-that-be, there is no question that any income sharing would necessarily be acceptable under Community law. It suffices to remember that in paragraph 228 of the opinion in the BOSMAN case, Mr Advocate General LENZ prudently expressed himself as follows: “Mr BOSMAN submitted a number of economic studies which show that distribution of income represents a suitable means of promoting the desired balance. The concrete form given to such a system will of course depend on the circumstances of the league in question and on other considerations. In particular it is surely clear that such a redistribution can be sensible and appropriate only if it is restricted to a fairly small part of income: if half the receipts, for instance, or even more was distributed to other clubs, the incentive for the club in question to perform well would probably be reduced too much” .

In addition, there is a certain degree of contradiction, indeed incompatibility, between the principles of “promotion/relegation” and “competitive balance” (used for revenue sharing).

In effect, revenue sharing is a concept deriving from American professional sports, which are characterised by closed leagues (NBA, NFL, etc.). In the United States, although revenue sharing exists, it is only between members of the same elite, guaranteed not to be relegated to a lower category.

In other words, it is the absence of “promotion/relegation” which makes the widespread practice of “revenue sharing” acceptable.

Furthermore, the reticence of the major clubs in each league to support revenue sharing is accentuated by their desire to be competitive in Europe.

Finally, if arbitration is an acceptable method of conflict resolution, it is not acceptable for the various stakeholders within professional sport to have to waive the right to take action through the ordinary courts, in particular, in order to contest the legality of certain federation decisions in respect of Community law.

This obligation to permit the ‘ordinary man in the eyes of the law’ to appear before ordinary courts was one of the conditions imposed by the European Commission on FIFA to put an end to the infringement proceedings relating to transfer rules that it had instituted against FIFA^{xxxiv} .

The lack of restrictive and exclusive recourse to arbitration does not in any way harm its efficacy, as illustrated by the FIFA Regulations “for the Status and Transfer of Players”, as modified following the intervention of the European Commission which, in its article 22, lays down that recourse to arbitration is optional, any player or club retaining the right to “seek redress before a (...) court” .

What’s more, in practice, it seems that just a small percentage of disputes relating to this ruling are referred to civil courts, most disputes ending up in the Court of Arbitration for Sport.

Without doubt, the fact that this rule was subject to amendments required by the European Commission, prior to its entry into force, and that its Community legality was thereby guaranteed, is not unconnected with this state of facts.

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In its judgment of 15 May 2006, ruling in the first instance on the dispute between Sporting de Charleroi, backed by G-14, and FIFA and UEFA, the Charleroi Commercial Court judged that: "... it is clear that the ban issued by the second paragraph of article 51 (FIFA statutes) on recourse to ordinary courts, only applies under the hypothesis that an arbitration agreement in proper and due form would keep the dispute out of these courts.

Any provision that would lay down a general ban on going before the ordinary courts would, in fact, be contrary to public order and, consequently, ought to be put aside by our court"^{xxxv}.

We may question UEFA and FIFA's true motives, relayed via the Arnaut report, for wishing so ardently that arbitration should be the sole means of recourse against their decisions.

Does the answer not lie, once again, in the alleged desire of these organisations to escape the application of Community law?

And from this perspective, it is not so much arbitration that has garnered the favour of FIFA and UEFA but rather the fact – not by chance – that the place of arbitration is Switzerland.

In fact, the Court of Arbitration for Sport, set up in Lausanne, is an international court of arbitration in the sense of the federal Swiss law on private international law of 18 December 1987.

Consequently, rulings given by the Court of Arbitration for Sport are only open to appeal before the Swiss Federal Court, which mainly limits itself, when it comes to reviewing legality, to serious violations of international procedural public order.

This concept does not, however, include Community law, in particular, on competition, as explicitly judged by the Swiss Federal Court, in a ruling of 8 March 2006"^{xxxvi}.

And so arbitration, provided that it is implemented, on an exclusive basis, by a court of arbitration in Switzerland, incidentally makes it possible to escape Community legal order.

According to article 1704 of the Belgian Judicial Code, sentences given by a court of arbitration sitting in Belgium can only be subject to appeal before the territorially competent Court of first instance, whose judicial review will mainly focus on conformity to public order.

Belgian public order does, of course, include Community public order (in particular, therefore, articles 81 and 82 of the EC Treaty). Where necessary, the Belgian judge may reverse the arbitration ruling given in violation of Community law, i.e. refer to the ECJ any preliminary issue that it may deem necessary.

The Court of Arbitration for Sport already has local chambers in Sydney, in Australia, and in New York, in the United States. The establishment of a headquarters within the European Union, for example, in Brussels, would make it possible to reconcile arbitration and Community legal order.

This would also mean that we would no longer be obliged to question the sincerity of the attraction that arbitration holds for FIFA and UEFA.

In conclusion, although certain measures may be envisaged on the basis of current law (for example, certain practices mentioned by the Arnaut report could be liable for exemption by category in the sense of competition regulations) there is no argument to say that Community law should be applied to the sports sector rather than to other sectors, apart from under the specific circumstances already acknowledged in some Commission decisions or Court of Justice rulings^{xxxvii}.

IV. Towards a change in Community Law?

As we have seen, the relationship between Community law and professional sport is at the level of the EC Treaty itself. If, however, it were to be necessary to amend the law in this matter, particularly to institutionalise or consolidate the powers of the sporting federations, new regulations or directives would not be enough, and it would mean radical change in primary Community law, namely of the Treaty itself, in some of its most fundamental principles.

There is currently no legal or political factor likely to lead to such radical change. Let us look at the texts currently in circulation.

Declaration of the European Council of Nice, 7-10 December 2000.

The authors of the Arnaut report make much of this declaration "on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing Common policies".

The authors admit that this declaration is not enforceable at law because they claim that it should be transformed into positive law^{xxxviii} but it should also be

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stressed that it is not even joined with the Treaty of Nice, it contains no proposal to amend the Treaty agreed by the Member States, even if, on certain points, the text echoes the viewpoints of the sporting federations.

European Parliament resolution of 29 March 2007 on the future of professional football in Europe

This resolution clearly originates from the Arnaut Report, since it contains similar findings and suggests similar solutions.

This said, the resolution contains no formal proposal to change the Treaty; it expresses a wish that the application of Community law to professional football “does not compromise its social and cultural purposes, by developing an appropriate legal framework, which fully respects the fundamental principles of specificity of professional football, autonomy of its bodies and subsidiarity”. This overlooks the fact that the jurisprudence of the Court of Justice and the Commission take this specificity into account since their decisions analyse the objective of general interest which, provided that it is in proportion, can inspire the rules of sporting federations and justify the restriction of the fundamental freedoms or freedom of competition.

It overlooks that this same jurisprudence in no way undermines the autonomy of professional sporting authorities acting as regulators, but it is to be expected that, as an economic agent in a market representing billions of euros, the rules of the internal market and competition should apply to them.

The Parliament also takes up the problem of legal uncertainty resulting from an approach based solely on treating cases individually. We have already answered this argument, which applies to all economic sectors and it is furthermore interesting to note that, according to the European Parliament, it is not at all clear whether “the Union of European Football Associations (UEFA) rule stipulating that teams must contain a minimum number of home-grown players (...) would, if it were reviewed by the Court of Justice, prove to be consistent with Article 12 of the EC Treaty”. We feel that it is today in no way impossible to make rules compliant with Community law.

We should also add that the European Parliament is careful not to propose any automatic derogation of the competition rules and has proved stricter with regard to UEFA and, above all, to FIFA, with regard to the need to reinforce their internal democracy.

Last but not least, a resolution of the European Parliament obviously has no legally binding effect and the European Parliament has no powers of decision or co-decision to change the founding treaties.

Article III-282 of the Treaty establishing a Constitution for Europe

The Treaty establishing a Constitution for Europe (which we now know will never be ratified as such by the 27 Member States) includes an article III-282 with specific reference to sport.

It is no exaggeration to say that this article does not propose any change to Community law in the sense of the conclusions of the Arnaut Report.

If the article provides that action of the European Union in matters of sport should take into account “the specific nature of sport, its structures based on voluntary activity and its social and educational function”, this phrase gives no particular jurisdiction to the European Union and, furthermore, concerns both amateur and professional sport.

When that same article states that the intention of the European Union to develop “the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen”, it in no way means that this action could derogate the direct provisions of the Treaty as to freedom of movement and competition.

Finally at the level of legislation which could be used to implement article III-282, its paragraph (3) only allows the European Union to adopt recommendations (which are not legally binding) or European laws or framework laws to establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States. This obviously implies that no exception can be made to the provisions as to freedom of movement and competition.

We know that, since the signature of this Treaty establishing a Constitution for Europe in 2004, it transpired that, despite eighteen ratifications out of 27 Member States, the text of the Treaty had no chance of being agreed by all Member States, which was indispensable to its entry into force. After a period of reflection, at the instigation of a very dynamic German presidency, the European Council of June 2007 agreed on the text of a so-called “simplified” treaty, which

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would include those parts of the Treaty establishing a Constitution for Europe on which the 27 Member States could agree. The general idea adopted in June 2007 was that, except for specific exceptions, the proposals in the Treaty establishing a Constitution for Europe should be incorporated into the new treaty.

It is therefore not surprising to find in the first draft of the amended treaty, prepared by the Portuguese presidency on the basis of the mandate from the European Council of June 2007, the practically unchanged text of article III-282 of the Constitutional Treaty, which was to become article 176 B of the EC Treaty. Nothing else on sport, despite the publication of both the Arnaut report and the Resolution of the European Parliament between the signature in 2004 and the European Council of June 2007.

The “White Paper on Sport” of the European Commission published on 11 July 2007

Far from the proposals in the Arnaut Report, the European Commission recalled the relevance of existing jurisprudence, stressing that the MECA-MEDINA and MAJZEN judgment made an important legal point by rejecting the theory of the existence of “purely sporting rules”, falling a priori outside the EC Treaty (and therefore its articles 81 and 82) and affirming to the contrary that each sporting rule should be studied case by case in the light of the provisions of articles 81 and 82 EC.

In this context, quoting the principle of subsidiarity, the European Commission refused to take an interventionist approach and – in the main – intends to restrict itself to ensuring the respect of the basic freedoms when necessary. It is appropriate here to quote the passage which the Commission devotes to the “specificity of sport”:

“ Sport activity is subject to the application of EU law. (...) Competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding citizenship of the Union and equality between men and women in employment.

At the same time, sport has certain specific characteristics, which are often referred to as the “specificity of sport”. The specificity of European sport can be approached through two prisms:

The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve the competitive balance between clubs taking part in the same competitions;

The specificity of the sport structure, including notably the autonomy and diversity of the sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport;

The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law.

As is explained in detail in the Staff Working Document and its annexes, there are organisational rules that – based on their legitimate objectives – are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued. Examples of such rules would be “rules of the game” (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, “at home or away from home” rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods.

However, in respect of the regulatory aspects of sport, the assessment whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis, as recently confirmed by the European Court of Justice in its Meca-Medina ruling. The Court provided a clarification regarding the impact of EU law on sporting rules. It dismissed the notion of “purely sporting rules” as irrelevant for the question of the applicability of EU competition rules to the sport sector.

The Court recognised that the specificity of sport has to be taken into consideration in the sense that restrictive effects on competition that are inherent in the organisation and proper conduct of competitive sport

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are not in breach of EU competition rules, provided that these effects are proportionate to the legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector".^{xxxix}

The Commission does not therefore propose any change to the Treaty to meet the general central aim of the Arnaut Report, namely the institutionalisation and consolidation of the authority of the sporting federations.

Finally, the Commission:

- strongly supports the development of the "European Social Dialogue", and finds that "in the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes" and that "a European social dialogue in the sport sector, or in its sub-sectors (e.g. football) is an instrument which would allow social partners to contribute to the shaping of employment relations and working conditions in an active and participative way. In this area, such a social dialogue could also lead to the establishment of commonly agreed codes of conduct or charters, which could address issues related to training, working conditions or the protection of young people". Therefore, "the Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector", recalling that authentic representatives of employees and employers must take part in them.^{xi}
- states that "the White Paper has taken full advantage of the possibilities offered by the current Treaties. A mandate has been given by the European Council of June 2007 for the Intergovernmental Conference, which foresees a Treaty provision on sport. If necessary, the Commission may return to this issue and indicate further steps in the context of a new Treaty provision."^{xii}

Conclusion

Since UEFA, an association under Swiss law, is not purely a regulator, but also clearly an economic agent in the professional football market, its basic claim is to be given the monopoly in the management of European football and not just its regulation, and to carry out this management without any control of a Community judge.

UEFA's and FIFA's resistance to any form of organised competition, even embryonic, was recently made clear by their Presidents' open call at their last respective congresses to the eighteen member clubs of the G-14 to disband their EEIG and withdraw any litigation, in return for which FIFA and UEFA promised to open dialogue with them^{xiii}.

In passing, we would stress the paradox of suggesting the disbanding of a EEIG of clubs as a precondition for dialogue with them. In effect, because of the complexity and diversity of the subjects to be tackled, a structured negotiating partner would be required, sufficiently representative of the interests it defends, and with a legal personality.

This is what is done with regard to the dialogue between on the one hand, FIFA and UEFA and on the other FIFPro, which represents the players. The difficulty which these international federations experience in reproducing this model in their relationship with the clubs is – in our minds – a reflection of the commercial reality mentioned above, namely that the clubs active in the transnational sphere are perceived by FIFA and UEFA as competitors on the international football market, which is not so with the players, although they are internationally organised within FIFPro.

Furthermore, we would recall that the international federations, without waiting to obtain the privileged status claimed by the Arnaut Report, are trying to achieve a similar result procedurally by making recourse to CAS arbitration compulsory with the intention, or at least the effect of suppressing any litigation between stakeholders in the football sector (of which they are themselves members) and the community rule of law.

However, respect by these international federations of Community law as it stands and the smooth performance of their regulatory role within the current legal framework of the Community are in no way utopian.

Furthermore, the "European sports model" as postulated in the Arnaut Report, is not a common heritage shared by all sports.

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For example:

- in cycling, the role of the International Cycling Union (UCI) is close to that of a pure regulator, the organisers (who are private organisations) and the teams share management and operation of commercial activities generated by the sport;
- in basketball, after a brief breakaway period, the main professional leagues, reunited within the Euroleague Basketball^{xliii}, have succeeded in maintaining the International Basketball Federation (FIBA) as regulator and have won management of the organisation and implementation of European inter-club competition.

Finally, the vision of football promoted by UEFA and FIFA (and reflected in the Arnaut Report) is intrinsically national. It is organised on a national basis (one federation in each state), with management arising out of that structure, and FIFA and UEFA wish to perpetuate this organisational model, not only for competitions between national teams (which is legitimate) but also for club football.

In other words the not only hierarchical but compartmented "European sports model" promoted by these federations is in fact a "national model of European sport"^{xliiv}. This model, if adapted to the needs of competitions between national teams, also has the effect – with regard to club football – of rendering the economic fate of clubs dependent to a large extent on the size of their respective national markets, leading specifically to the relative pauperisation of clubs in the "small States".

This said, our analysis of current Community law and our opinion that primary Community law should not be changed in the sense required by the Arnaut Report, does not preclude modernisation of the current model of the governance of professional sport. Although it is appropriate to reaffirm the legitimacy under Community law of the preponderant role of national and international federations with regard to the organisation and management of competition between national teams, this should not mean that the federations should have absolute freedom because these competitions affect the rights and interests of third parties, namely the clubs, who see themselves deprived of their employees, whom they continue to pay, and therefore of the ability to play matches whenever there is a competition between national teams.

Questions of sporting calendar and player availability are the two points of contact which produce the most important friction between "club football" and the "national football team".

In effect, the international calendar is neither more nor less than the production timetable for the "football product". In other words, in compiling the calendar and rendering organisation of football matches by anyone else subject to prior authorisation, FIFA is setting the production periods reserved for itself and its members and those left for the clubs.

As to availability of players, this is the means by which FIFA and its members assume authority over the "raw materials" (services of players) so that matches between national teams can be arranged within those parts of the calendar which FIFA reserves for the purpose, and this appropriation has the effect of depriving the clubs of the "raw material" whose services they have, however, acquired under contracts of employment.

Further dialogue with the clubs would in no way prevent the national and international federations from maintaining their role as guardians of the sporting ethic, responsibility for all matters connected with refereeing of matches and the discipline guaranteeing the respect of the different rules of the game and the sporting ethic on and off the pitch.

Community law in no way prevents the organisation of a real European social dialogue, which should go further than pure consultation and have a bearing on all participants who could, together, tackle the matters which are important for the future of professional football.

As we see it, the future of professional sport should not be outside Community law which, as interpreted by the European Court and the European Commission, is probably the best guarantee of maintaining flourishing competition between national teams on the one hand and the spirit of truly European club football on the other.

When the need really arises, as is the case with regard to questions of the international match schedule and player availability for national teams, there can be no doubt that the scope of the application of

d. clarify the rights and obligations of the sector's various parties under EU Law. ^{BASL}

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- i Available at this address: http://ec.europa.eu/sport/whitepaper/wp_on_sport_en.pdf
- ii Available at this address: http://www.independentfootballreview.com/doc/Full_Report_EN.pdf (only in English).
- iii Available at this address: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0100+0+DOC+XML+V0//EN>
- iv In its 2006 annual report, the "Independent Football Commission", created in 2001 at the behest of the British government and various British football stakeholders, with a view to monitoring the world of football, also examines this idea of "independence": "Arnaud promotes the desire for UEFA to control all national leagues and FAs. It would be interesting to discover how much input and influence UEFA had over the compilation of the Arnaud report" (p. 18). In its White Paper on Sport, the European Commission indicates that the Arnaud report was financed by UEFA (Commission Staff Working Document – The EU and Sport: Background and Context; page 7). Page 42.
- v Judgment of the Court of 12 December 1974, B.N.O. Walrave and L.J.N. Koch v. Association Union Cycliste Internationale, Case C-36/74, European Court reports 1974, page 1405.
- vii Judgment of 15 December 1995, Bosman, Case C-415/93, European Court reports, page I-4921 and Judgment of 11 April 2000, Deliège, Case C-51/96, European Court reports, page I-2549.
- viii Judgment of 10 July 2006, Case C-519/04, not yet published. This lack of reference is even more surprising since the judgment did not fail to draw the attention of UEFA. In fact, UEFA's Director of Legal Affairs, Gianni Infantino, talked about it as "a step backwards for the European Sports model and the Specificity of Sport", as "a strange twist" and as a judgment that is "unsatisfactory from a legal point of view" [article available at this address, <http://www.uefa.com/uefa/keytopics/kind=2048/newsid=574246.html#> under the heading "Sport specificity – UEFA analysis"].
- ix See in the Jurisprudence Liège Mons Bruxelles, 2006, page 1792, "L'arrêt MECA-MEDINA et MAJGEN: plus qu'un coup dans l'eau", by Melchior Wathelet.
- x Judgment of 19 February 2002, Case C-309/99, European Court reports, page I-1577.
- xi Competition Council, Decision No. 2004-E/A-25 of 4 March 2004, case CONC-E/A-01/0039, published in the "Revue trimestrielle de jurisprudence du Conseil de la Concurrence" 2004/01, page 128.
- xii Unofficial translation from the French original.
- xiii See above.
- xiv Available in English at the following address: <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37806/en.pdf>
- xv Points 31 and 32 of the decision.
- xvi EC Press release of 27 June 2002, ref. IP/02/942.
- xvii Arnaud report, page 36.
- xviii Judgment of 15 December 1994, Case C-250/92, European Court reports. page. I-5641.
- xix ECJ, 15 December 1995, Bosman, Case C-415/93, European Court reports, page I-4921, pts 99, 100 and 120.
- xx ECJ, 13 April 2000, Lehtonen, Case C-176/96, European Court reports, page I-2681, pts 49 and 50.
- xxi ECJ, 13 April 2000, Lehtonen, Case C-176/96, European Court reports, page I-2681, pt 51.
- xxii ECJ, 13 April 2000, Lehtonen, Case C-176/96, European Court reports, page I-2681, pt 53.
- xxiii Arnaud report, page 105
- xxiv Arnaud report, p.47.
- xxv Judgment of the Court of first instance judgment of 26 January 2005, Case T-193/02, European Court reports, page. II-209 (paragraphs 74 to 78).
- xxvi Arnaud report, p. 49 and 50.
- xxvii On page 7 of the "White Paper on Sport" of July 2007, to which we will return later, the Commission does not state otherwise. "Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players. The ongoing study on the training of young sportsmen and sportswomen in Europe will provide valuable input for this analysis."
- xxviii Arnaud report, p. 52.
- xxix COMP/C.2-37.398, Official Journal of the European Union L291/25, 8.11.2003.
- xxx See points 121 and subsequent points of the decision and, in particular, footnote 59.
- xxxi See the Wouters judgment.
- xxxii For further information, see www.g14.com
- xxxiii In this respect, see Stephen Weatherill, "Is the pyramid compatible with EC Law?", The International Sports Law Journal, 2005/3-4, p. 3 et s.; also in: Stephen Weatherill, "European Sports Law: Collected Papers", ASSER International Sports Law Centre/T.M.C. Asser Press, The Hague 2007, p. 259 et s.
- xxxiv EC press release IP/01/314, available at this address: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/314>, in which the Commission reiterates that: "arbitration is voluntary and does not prevent recourse to national courts".
- xxxv Unofficial translation. This ruling is available on the Charleroi Commercial court website: www.tcch.be
- xxxvi Case 4P278/2005. See, in particular, this link: http://www.semainejudiciaire.ch/DAT/DATI JUR/2006/06_31.htm
- xxxvii In our opinion, there is no question of allowing sports federations to benefit from the exemption provided for by article 86 (2) of the EC Treaty which stipulates that undertaking entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Apart from the fact that this type of tasks is generally entrusted to public companies, we cannot really see that a "service of general economic interest" would be entrusted to sports federations. Furthermore, let us remember that article 86 (2) only results in the companies in question being protected from the application of Community law whilst still being subject to administrative and civil and, of course, Community courts.
- xxxviii See Arnaud Report p. 21: "In plain terms, the aim of the current project is to support and give practical effect to the principles set out in the Nice Declaration, in other words, to implement the Declaration in sport and more particularly in the specific case of football".
- xxxix See pp 14 and 15. Underlining is ours.
- xl P. 21 of the "white paper on sport"
- xli P. 21. of the "white paper on sport"
- xlii See Le Monde of 2 June 2007, p. 15 and in particular where it states that "Michel Platini, new president of UEFA, thus, on Monday 28 May rated G14 an association which incorporates the 18 most powerful clubs in Europe, which it described as an 'elitist group'. It demanded 'officially' that it should be dissolved and asked its members to 'engage in a fruitful dialogue with other members of European football'. 'I agree with Platini' said Sepp Blatter, Thursday 31 May, on his re-election to the head of the International Football Federation (FIFA), and I say to the clubs 'Come back into the family and withdraw your complaints'. (unofficial translation from the French original)
- xliii Website: <www.deloitte.com>.
- xliv Note that UEFA in implementation of its own commercial activities, does not restrict itself to respecting the territorial logic. For example, on 21 May 2007, on the launch of the Chinese version of the UEFA website (<<http://cn.uefa.com>> – the CEO of UEFA Media Technologies SA said: "This is a major step forward in our efforts to bring the passion of European football to the football fans around the world. With SINA, we have found a partner to help us bring our vision of the world's biggest game to the world's biggest audience".

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Sports Law Foreign Update

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Conferences, meetings, lectures, courses, etc.

Symposium celebrating sports law association anniversary (Netherlands)

This year marks the 15th anniversary of the founding of the Netherlands Association of Sport and the Law (Vereniging voor Sport en Recht). To mark this event, a symposium was held in June 2007, in which various speakers deliberated on the various developments which this aspect of the law has undergone during the period of the Association's existence. These topics included the commercialisation of sport, sport and the law of torts, developments in the way in which disciplinary decisions are made, as well as the influence exerted by the European Union (EU). The event took place in Biddinghuizen ([2007] 4/5 *Nederlands Juristenblad* p. 1149).

Obituaries

Percy Sonn

The world of cricket administration suffered a grievous loss with the untimely death of Percy Sonn at the age of 57. Not only was he the first African to preside over the body which controls the game worldwide, i.e. the International Cricket Council, but he also gave his role a new dimension through his administrative skills and deep commitment to the sport.

Trained as a lawyer, Mr. Sonn (who was a Cape Coloured) made his name as an administrator in South Africa once the apartheid system had ended, serving as head of the United Cricket Board of South Africa between 2000 and 2003. Prior to this, he had worked as an attorney and advocate, serving as Deputy Director of Public Prosecutions and legal adviser to the South African Police Service. In the 1990s he established, then headed, the Directorate of Special Operations, being a unit set up in order to tackle organised crime, including drug trafficking.

His tenure as a cricket administrator in his country was not free from controversy. Thus he caused a disagreement when he used his veto to overrule the selection of Jacques Rudolph for a Test against Australia, opting instead for a black player, Justin Ontong. This ethnically inspired selection provoked a strong reaction from various members of the selection panel, as well as from certain players and former players, who accused the administrator of instigating racial tensions (*Daily Telegraph* of 29/5/2007, p. 25). His

most notorious escapade occurred in the course of the 2003 World Cup in Western province, when he unleashed a torrent of abuse against the English cricketing authorities over their refusal to play in Zimbabwe. It was generally thought that excessive consumption of alcohol had fuelled this outburst.

In spite of these controversies and peccadilloes, he was elected President of the ICC in 2006, in succession to Ehsan Mani. The first major issue with which he was required to deal was the controversy surrounding umpire Darrell Hair's handling of the final test between England and Pakistan at the Oval last year, extensively documented in these columns and elsewhere ([2006] 3 *Sport and the Law Journal* p. 64). Somewhat bizarrely, he did not seem to appreciate the seriousness of that particular incident and its implications, and attempted to defuse the situation by means of a few light-hearted comments (*The Times* of 28 May 2007, p. 47). Nevertheless, he was offered a further year in March next year – which he failed to complete because of his death.

Chris Benoit

The sorry details of the violent demise of the Canadian wrestler are recorded elsewhere in this volume (see below, p. 65).

It is thought that the consumption of steroids contributed to the state of mind which ultimately drove him to kill his family as well as himself (*The Guardian* of 9/7/2007, p. 24).

Shiggy Konno

Although the national side has yet to make a definitive breakthrough at the very top of the game, rugby is now a well-established sport in Japan, thanks mainly to the efforts of Mr. Konno, who died recently at the age of 84. He expanded his knowledge of and enthusiasm for the sport whilst studying banking in Britain just after World War II, and became determined to turn the Japanese side into a team of contenders. His first steps in rugby administration were taken in 1952, when he acted as liaison officer for the first tour of his country by Oxford University. In 1996, he managed the Doshisha University tour of New Zealand, and two years later was instrumental in establishing the Asian Rugby Football Union (ARFU). He later became the chairman of the Japanese Rugby Football union, in which capacity he served for 22 years. When Japan was granted full council status on the world governing body, he became the country's representative on the International Rugby Board between 1991 and 2000 (*The Independent* of 28/4/2007, p. 47).

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Diego Corrales

The US super-featherweight champion died in a motoring accident at the age of 29. He had some serious brushes with the law, including an arrest or assault on his first wife, Maria, in 2000 (*The Independent of 9/5/2007, p. 33*).

Tom Cartwright

Mr. Cartwright, who died in April 2007 aged 71, was a successful bowler in English country cricket during the 1960s and 1970s. He was involved in international controversy when, having been selected to tour South Africa during the winter of 1968-9, he withdrew, to be replaced by Basil d'Oliveira. The latter being a Cape Coloured South African, he was refused entry into his native land. This led to the subsequent cancellation of the tour (*The Daily Telegraph of 1/5/2007, p. 25*).

majority of rules issued by sporting federations only apply to clubs organised as legal associations or limited companies (GmbHs). Where such a community achieves promotion to a higher division, such promotion can, in the author's opinion, merely be enforced by transferring this right to the parent association or by means of a merger. Another major contribution is made by the author Gianni Infantino, who takes a critical look at the recent Medina/Majcen decision, reported in an earlier issue of this Journal (*[2006] 1 Sport and the Law Journal p. 77*), which he regards as a back ward step for the European sporting model and for the specific nature of sport. More particularly he criticises the application of rules issued by national and international sports federations to the EC Treaty, and advocates total autonomy for sporting activity in this regard.

Digest of other sports law journals

Latest issue of Zeitschrift für Sport und Recht

In the first issue for 2007, the authors Stephan Schmidt and Friedrich Curtius deal with a subject which has raised its head in previous issues of this Journal (*e.g. [2006] Sport and the Law Journal p. 54*), to wit the difficulties encountered with the marketing and distribution of match tickets for the football World Cup held in Germany last year. ("Rechtliche Fragen der Fußball-WM 2006 – Beispiel Ticketing: Erkenntnisse für zukünftige sportliche Großveranstaltungen"). The authors explain the organisational structure of the ticketing arrangements for the World Cup and the resulting conflicts which involved the organising body, i.e. FIFA, as well as the legal issues to which this gave rise. These concerned questions such as the applicability of German or European law, as well as the novel issues governing the distribution and sale of match tickets, such as the issue of credit card exclusivity and the transferable nature of match tickets. On the basis of these findings, the authors develop a new model for the organisation of major sporting events in the future.

Also in this issue, the author Ingo Strauss examines the extent to which the reporting of sporting events by means of "live ticker" can be allowed, taking into account the legal nature of various rights involved, on the basis of which the organisers of such sporting events could prevent, at least in part, this kind of sports reporting. The author Bernard Pfister analyses the right to promotion of sporting communities, given that the

Sport and international relations

Zimbabwe cricket continues to produce turmoil at the international level

Australian government cancels intended tour...

This Journal has already provided extensive coverage of the various ethical problems which have been raised by the question whether the international cricketing community should continue or abandon its relations with Zimbabwe, particularly under its current political régime under the leadership of Robert Mugabe. This dilemma has led to, inter alia, England refusing to play the Zimbabwean team during the 2003 World Cup, with dire consequences in financial and diplomatic terms. It looks as though these problems will continue to fester, judging by recent developments in this field.

In the autumn of 2007, Australia were due to perform a very brief tour of Zimbabwe. This once again aroused opposition from various quarters other than the world of cricket, more particularly the Australian government, which, in early May of this year, called upon its national team to abandon this venture. More particularly the nation's Foreign Minister, Alexander Downer, announced his intention of meeting officials from Cricket Australia, the game's national authority, in the hope of persuading them to cancel the tour. Not to do so, said Mr. Dowber, would be to hand a "propaganda victory" to Mr. Mugabe – whose regime he described as "horrific" – especially in view of the latter's position as patron of the Zimbabwe Cricket Association (ZCA) (*The Independent of 8/5/2007, p. 48*). The government even indicated its willingness to pay the potential \$2 million fine which the International Cricket Council (ICC)

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was bound to impose on it if the tour were to be abandoned (*Ibid*). It will be recalled from a previous issue ([2004] 2 *Sport and the Law Journal* p. 76) that, three years ago, the leg-spinner Stuart McGill had refused to take part in the Australian tour of Zimbabwe because he could not do so and at the same time retain a clear conscience.

The discussions between Mr. Dowber and Cricket Australia having proved inconclusive, the Australian Prime Minister, John Howard, took the matter out of the latter's hands on the grounds that it was unfair to leave such an important foreign policy decision with sporting performers. He added that, if necessary, he would enforce the ban by cancelling the passports of any players who attempted to defy the ban and travel to Zimbabwe. A great cricket lover himself, Mr. Howard commented that the decision "pained" him, but that the odious nature of the Harare regime left him no alternative (*The Daily Telegraph* of 14/5/2007, p. 17). This decision also had the effect of enabling Cricket Australia to evade the \$2 million fine referred to earlier, since the decision had not been taken by the cricketing authorities but by their government on "political" grounds (*The Guardian* of 14/5/2007, p. 15).

The reaction by the Australian cricketing community was mixed. The team captain, Ricky Ponting, pronounced himself "happy" with the ban and with the fact that the Government had taken the responsibility for taking decisions related to international affairs on behalf of the country. However, James Sutherland, the Cricket Australia chief, whilst accepting the ban, stated that he would examine the possibility of playing the three one-day internationals planned during the tour at a neutral venue – which was most likely to be South Africa. Prime Minister Howard expressed reservations about this idea (*Ibid*).

The ICC, for its part, took the news of the cancellation pragmatically. Malcolm Speed, its Chief Executive, interviewed by a leading British newspaper (*The Times* of 24/5/2007, p. 88) a few days after the decision was announced, commented:

"The ICC has adopted a consistent policy in relation to Zimbabwe and all of its 97 member countries. The ten full members (of the ICC) have entered into a binding agreement to play each other home and away over a six-year cycle, with a minimum of two test matches and three one-day internationals (ODIs) in each series. If it is unsafe to undertake such a tour, or if a country's government imposes a prohibition on the team, then a tour will not take place. Otherwise the teams are obviously expected to fulfil this commitment. We have said consistently that

governments should make political decisions rather than cricket boards and if a Government refuses its team permission to tour another country, we respect that" (*Ibid*).

However, Mr. Speed was clearly not entirely happy with the cancellation, since he went to great lengths to state that, where sanctions were applied, they should apply to all sports. He pointed out that Zimbabwe's leading sporting performer at the time of writing is swimmer Kirsty Coventry, who gained three medals at the 2004 Olympics, and two more at the subsequent World Championships (*Ibid*). The obvious implications of Mr. Speed's remarks were that to single out Zimbabwe's cricket team smacked of inconsistency, if not worse.

....but West Indies decide to go

Nevertheless, not all cricketing nations seem to share the desire to boycott Zimbabwe. In late June 2007, the West Indies Cricket Board announced their intention to proceed with the planned tour of the "A" team, due to leave the following week. This was in spite of the fact that Dinath Ramnarine, the President of the West Indies Players Association (WIPA), had indicated that the players themselves were "uncomfortable" with the security situation in that country. However, Tony Deyal, the Board's head of communications, responded that the tour would proceed unless WIPA could show "overwhelming reasons" why it should not (*The Daily Telegraph* of 23/6/2007, p. S22).

Zimbabwe gets ICC World Cup money in spite of corruption accusations

The controversy surrounding this cancellation was exacerbated by the questions being asked about the money which Zimbabwe was officially due to be paid from the proceeds of the 2007 World Cup. All full members of the Council were in principle entitled to the sum of \$11 million for their participation in the tournament. However, there were major question marks over the ultimate destination of Zimbabwe's share, particular since it was widely believed that this money would not find its way to the Zimbabwean cricketers, but to the country's government – whose policies had been the cause of the cancellation in the first place. This came on top of rumours that the Zimbabwe cricketing authorities themselves had engaged in questionable financial practices. Certainly there have, for some years now, been suspicions of corruption and financial irregularities at the top of Zimbabwean cricket. This related not only to rumours of overseas assets held by members of Zimbabwe Cricket, the game's national regulatory board in addition, the proceeds from recent home series against India and New Zealand, amounting to several millions of dollars,

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were believed to be missing, and the relevant accounts were never presented for scrutiny (*The Daily Telegraph of 26/6/2007, p. S15*).

Initially, it seemed as though Zimbabwe would receive its share without undue difficulty. However, it soon transpired that the accusations surrounding Zimbabwe's cricket finances were founded on more than just malicious rumours, when the ICC dispatched a team of independent auditors from the global accountancy firm KPMG in order to examine accounts which increasingly looked to have been manipulated. In fact, a leading British newspaper received a leaked report in which ICC Chief Executive Malcolm Speed had claimed that the accounts had been "deliberately falsified" to hide various illegal transactions from the auditors and from the Zimbabwean government. Particular concern had been aroused by two transactions amounting in total to \$1.5 million (*The Sunday Independent of 1/7/2007, p. 88*).

The auditors in question became so concerned about this state of affairs that the ICC decided to withhold a tranche of \$4.5 million from the World Cup proceeds referred to above until more light was shed on the affair. However, this proved to be something of a charade when Mr. Speed announced that this final tranche would be paid as soon as the auditors commenced their investigations into the Zimbabwean board's finances – regardless of any irregularities which they uncovered! (*The Sunday Telegraph of 1/7/2007, p. S6*) He explained that the ICC had "no power" to withhold the money, in which case the question could legitimately be asked why the ICC had threatened to withhold the final tranche in the first place. Another inconsistency appeared to reside in the fact that the ICC released the final instalment when they received an assurance from the Zimbabwe Cricket President, Peter Chingoka, that their players had finally been paid, two months after the World Cup had ended (*Ibid*). If the ICC truly had no power to withhold the payment, why was it made conditional on the players being remunerated? In addition, it is understood that the cricketers received the basic sum of \$2,000 each, with a bonus of \$500 for individual performances such as scoring a fifty. Zimbabwe's World Cup campaign did not feature many such performances. Where the remaining millions ended is the subject of the auditors' investigation, the final outcome of which was not yet known at the time of writing. However, Mr. Speed has indicated that future ICC payments to Zimbabwe could be made subject to the discretion of cricket's governing body (*Ibid*).

Zimbabwe's Test-playing future again in doubt

When Zimbabwe was admitted to the ranks of Test-playing nations in the 1990s, this was not seen as a fanciful or exaggerated move, reflecting as it did the hope and expectation that, as had been the case with Sri Lanka previously, regular competition with the major test-playing nations would enable a country with, initially, modest cricketing resources gradually to climb up the international rankings. Indeed, such faith seemed amply justified initially when the African nation succeeded in drawing a home series against England and notched up several other creditable results. However, standards of play started to decline sharply during the past decade, to the point where, as was reported in these columns (*[2003] Sport and the Law Journal p. 34*), a six-month crisis, triggered off by the dismissal of Heath Streak as captain, led to calls for Zimbabwe to be stripped of their Test status. Although an uneasy truce followed, the side was left woefully weak, and Test and ODI defeats by Bangladesh confirmed that Zimbabwe were bottom of the world league. A self-imposed one-year suspension from Test cricket followed, but when Zimbabwe came back they were, if anything, even weaker, whilst the disarray of its domestic game showed no signs of abating.

The reasons for this steep decline are not only to be found in the rampant politicisation of the Zimbabwean cricket, but also in some of the issues touched upon above, i.e. financial mismanagement. Quite apart from any issues of corruption, it is a fact that, for some time now, there has been little or no money available for grassroots development (*The Daily Telegraph of 26/6/2007, loc. cit.*). This is in spite of the sums which are still paid to Zimbabwe as a result of its – largely inflated – status in world cricket. These include not only the World Cup payment referred to above, but also the 75 per cent share in the profits from ICC events which are guaranteed to Test-playing nations – not to mention a full vote in key decisions affecting the game internationally. This has naturally once again prompted calls for Zimbabwe to be removed from the top echelons of the game. During the interview given by ICC chief Malcolm Speed, referred to above, the latter pledged that this matter was on the agenda for the next ICC meeting (*The Times of 24/5/2007, loc. cit.*).

1. General

Tillman death continues to cause ructions (US/Afghanistan)

It will be recalled from a previous issue of this Journal ([2004] 2 *Sport and the Law Journal* p. 50) that Pat Tillman a former American footballer, was killed in action in the course of the allied forces' campaign in Afghanistan which followed the 11 September attacks. At the time, Mr. Tillman's death was reported to be the result of an enemy ambush, and therefore the outcome of heroism in battle. He was posthumously awarded the Silver Star for valour. President Bush described him as a "national inspiration". Mr. Tillman had also given rise to a great deal of admiration on account of the fact that, although an established star with the Arizona Cardinals of the National Football League (NFL), he spurned a \$3.6 million contract in 2002 in order to enlist with the elite Army Rangers and thus participate in the Afghan campaign. However, in the interim further details of this dramatic episode have come to light – and they show up the relevant authorities in a very poor light indeed.

Although the events which led to Corporal Tillman's death were chaotic in the extreme, it has now been established beyond any doubt that he was killed by bullets from his own side – making him a victim of the grotesquely misnamed "friendly fire". This fact was known to members of his unit, but was instantly suppressed. It took well over a month for his family to be informed of the corporal's death, by which time the US Army had distorted the facts to make it appear that he died under enemy fire. The army also concocted the citation for the Silver Star award – being the military's third highest decoration for valour in combat (*The Independent of 26/4/2007, p. 30*). One of the Army Rangers who was with Tillman when he died told a House of Representatives Committee that he realised at once that the fire came from his own side, and wanted to inform the corporal's brother, who was serving in the same unit. However, he was ordered to desist from doing so by his battalion commander. The testimony given by the brother in question, Kevin Tillman, was even more bitter. He accused the military of "deliberate and calculated lies" which were intended to divert attention away from the Abu Ghraib prison scandal, which broke only days later, as well as mounting US casualties in Iraq.

At the time of writing, Henry Waxman, who chairs the US House (of Representatives) Committee on Oversight and Government Reform, now wishes to establish how high the cover-up over this affair extended. As Mary Tillman, the ex-footballer's mother, has noted, Mr. Tillman's decision to forfeit his lucrative NFL career attracted so much attention that Donald Rumsfeld, the

former US Defence Secretary, had sent him a personal letter of thanks. She argues that it was therefore inconceivable that the latter was not informed when her son died (*Ibid*).

Muslim/Jewish tennis pairing holds firm and draws the crowds

The age-old political crisis in the Middle East has polarised feelings and opinions in the religious communities involved, and more especially those of the Muslim and Jewish faith. This has almost inevitably spilled over into the sporting arena, and affected contacts between athletes professing these faiths. However, this has not deterred two courageous women tennis players from forming such an unlikely alliance. Sania Mirza (India) and Shahar Peer (Israel) had formed a doubles some years ago, but in October 2005 they had agreed to split because of pressure exerted by certain religious authorities. Ms. Mirza, a devout Muslim, was excoriated by clerics from the Sunni Ulema Board for entering into this partnership. The precedents for such a pairing certainly did not bode well – in 2002, Pakistani Aisam-ul-Haq Qureshi had been threatened with suspension by his national tennis federation when he entered the Wimbledon's men's doubles event with Israeli Amir Hadad (*The Guardian of 2/7/2007, p. 35*).

Nevertheless, the two women decided to resume their partnership during the 2007 Wimbledon tournament, and certainly proved a tremendous crowd-puller, with women in saris, men in turbans and scores of spectators of South Asian and Israeli origin cramming into the unfashionable Court Three in order to witness the rebirth of this partnership. The pairing had an extra dimension in that, in the course of the tournament, Ms. Peer was completing her mandatory two-year national service (*Ibid*). Alas, this brave partnership did not make a lasting impression on the record book, since it did not last beyond the third round. However, they can claim to have done more for international understanding than many of their more talented, but less imaginative, colleagues.

Blocked football fixture halts peace talks (Cyprus)

Ever since the Mediterranean island was partitioned in the early 1960s, relations between the two communities have been at best formal, at worst downright inimical. This has produced sporting side effects, in that there is currently in place a sports embargo against teams from the Turkish Cypriot community. When a friendly football match between

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Turkish Cypriot side Cetinkaya and English league side Luton Town was organised and scheduled to take place in mid-July, officials from the Greek Cypriot side complained to the international football authority FIFA, on the grounds that such a fixture would violate this embargo. This had wider political consequences, since it caused Turkish Cypriot leaders to suspend plans for a meeting with leaders from the Greek community (*The Guardian of 13/7/2007, p. 23*).

Olive branch extended by US Olympic body to Iran

Another focal point for strife in the Middle East is Iran, named by US President Bush as a fully paid-up member of the "axis of evil". Here, however, sporting relations seem to be set for a vast improvement following an initiative by the US Olympic Committee (USOC), which has recently negotiated a ground-breaking exchange of coaching, training and technological facilities with its Iranian counterpart. Robert Fasulo, the head of USOC's international relations department, had met Iranian officials at the General Assembly of the Asian Olympic Council in Kuwait, held in mid-April 2007. He had recognised that the USA's international relations had fallen to such a low point that it was necessary to do something in order to restore some semblance of harmony (*The Daily Telegraph of 25/4/2007, p. S20*).

The breakthrough was cemented when the Iranian Olympic Committee confirmed that two teams, representing weightlifting and water polo, were to visit the US in August and September of this year. It is understood that this exchange has the approval of Karen Hughes, head of Diplomacy at the State Department for International Affairs (*Ibid*).

Olympic torch route sours Sino-Taiwanese relations

The relationship between China and its "breakaway" state Taiwan may have improved slightly in recent years, but remains fraught with all manner of difficulties. This has intruded on the world of sport, as was in evidence when Taiwan turned down an invitation to feature on the route taken by the traditional torch on its way to opening the 2008 Beijing Olympics. The island is seeking recognition as an independent state, and objected because, according to the announced route, the torch would leave its shores directly to China – more specifically to Hong Kong (*The Guardian of 27/4/2007, p. S2*).

Other issues

Recently published German works on sports law

Introduction to international European and German sports law (Sport und Recht – Ein lehrbuch zum internationalen, europäischen und deutschen Sportrecht) This is a work by Martin Nolte, which has appeared as part of the series Beiträge zur Lehre und Forschung im Sport. Its structure is unusual, in that it starts with a chapter on international sports law, which itself commences with a section on international sports arbitration. This is a highly appropriate scheme, since all national sporting federations, as well as the individual sporting performers themselves, are bound by the rules and decisions of the international sporting bodies. The author contributes considerably towards enabling comprehension of the entire work by ensuring that practical examples are provided in relation to important issues.

This chapter is followed by one which is devoted to European sports law, in which the fundamental freedoms of the EC Treaty, as well as the competition law of the EU, are featured prominently. The following section, on national sports law, does not confine itself to the traditional law on associations and clubs, but covers all legal areas. One of the more interesting features in this connection is the constitutional status enjoyed by sport, including school sport. Equally interesting is the chapter dealing with special administrative law relating to sport, more particularly in the fields of safety, protection of the environment and nature, planning permission and noise abatement (*reviewed in [1-2/2007] Neue Juristische Wochenschrift p. 40*).

In the Sporting Model Contracts Handbook (Formularbuch für Sportverträge) the author Andrea Partikel has sought to produce a compilation of model contracts, formal documents and official rules for all aspects of sport, and has entirely succeeded in this attempt. The work contains a full complement of such instruments which provide the reader with a full picture of the requirements set by various forms of sporting activity in this field. Thus it features a model constitution for a sporting club, various government regulations on planning, contracts for players and coaches, advertising and sponsoring agreements, marketing and licence contracts, etc. However, the work contains little by way of directions and advice on how to use and complete these instruments, which might be a suggestion for any further editions (*Reviewed in [3:2007] Neue Juristische Wochenschrift p. 2096*).

1. General

In *Manual for the Practice of Sports Law* (Praxishandbuch Sportrecht), the authors, Jochen Fritzweiler, Bernhard Pfister and Thomas Summerer, cast their net very widely, covering as it does not only areas which are self-evidently part of this field, such as the law relating to clubs and federations, but also issues such as European law and rules on marketing, even as far as the traditional “law on neighbourliness” – which can cover anything from a ball which lands in a neighbour’s garden to the abatement of noise emanating from a sports stadium. Although the authors sometimes give the impression that the various topics covered were selected rather arbitrarily, there is a consistent thread running through the work, in that they are all extremely relevant to the world of legal practice (*Ibid*).

The 1936 Olympics – a triumph of organisation, dissimulation and hypocrisy

Although the political dimension of the 1936 Olympics is by now well-documented, a recently-published work entitled *Berlin Games – How Hitler Stole the Olympic Dream*, by Guy Walters, constitutes a valuable addition to this well-trodden path. He points out the sheer perfection of the organisation at this event, as was evidenced by such innovations as giant television screens relaying the action from the stadium to the rest of the city, the quality of the stadium itself, and such novelties as the carrying of the Olympic flame from Greece and the relative luxury in which the athletes were housed.

He also highlights the lengths to which the Nazi regime went to demonstrate to the world what a great country Germany was. All traces of anti-semitism were well concealed, even though no German of Jewish descent was allowed to compete. He also pinpoints some fascinating ironies, such as the fact that the runner Jessie Owens, who was victimised in his own country because of his ethnic origin, was lionised by the public of Berlin – perhaps the area of the country where Nazism was the least popular – because of the dent he made in Hitler’s dream of an Aryan “master race” by winning four gold medals. Another tragic irony was the fact that, during the closing speech, the International Olympic Committee president invited the youth of the world to reassemble in Tokyo in four years’ time. In fact, the majority of young people at whom this address was aimed were to assemble four years later, but to lay down their lives against Nazi imperialism (*The Daily Telegraph of 9/7/2007, p. S3*).

Imams give mixed football the red card (Norway)

In early May 2007, a number of Norwegian Imams refused to play a friendly football match with Protestant pastors in Oslo because the latter had women players, raising the possibility of bodily contact between male and female clerics. The fixture had been arranged to conclude a meeting aimed at building closer links between Islam and Christianity (*The Daily Telegraph of 7/5/2007, p. 12*).

2. Criminal Law

Corruption in sport

German Supreme Court rejects Hoyzer application for review – but refuses to award civil damages

The German refereeing scandal, in which several match officials accepted cash in return for decisions on the field of play which would influence betting outcomes, has been well documented in these pages. It will be recalled ([2006] 2 *Sport and the Law Journal*) that Robert Hoyzer, the chief culprit in this unsavoury affair, had been sentenced to a two-year term of imprisonment by the Berlin Court of Appeal (Landesgericht) for his part in the scandal. He subsequently applied to the Supreme Court (Bundesgerichtshof) for a review of this decision. However, in mid-December 2006 the Supreme Court dismissed this application, and confirmed Hoyzer's sentence. The BGH was also required to give a ruling on the civil aspects of the case, in terms of any compensation which might be due to the victims of this malpractice. The BGH ruled (Case 5 StR 181/06) that where an offer was made to interested parties to conclude betting agreements staked on results of football matches, the offer tacitly included the pledge that the matches in question would not be manipulated by the offering party to his own advantage. Any such manipulation represented fraud, as regulated by Article 263 of the Criminal Code (StGB). This conclusion could clearly be drawn from the facts and circumstances which constituted the substance of the contracts in question, in particular the uncertainty of the outcome of these fixtures.

In addition, the uneven distribution of risks and duties involved during the time covered by the betting contracts suggested that the party offering to conclude betting contracts intended to include the pledge of a fair distribution of chances, untarnished by any manipulation on its part. Where, at the moment of concluding the contract, the party offering the wager had already decided to manipulate the outcome, all the factual conditions for fraud by deception had been fulfilled and the fraud committed. When assessing the amount due by way of damages to a bettor who had fraudulently been deprived of the opportunity of winning, the Court had to proceed from the odds involved and the change in these odds made by the manipulations. Odds invariably constituted part of the financial risk and chance involved in betting, and had an effect on winnings. The manipulation engaged in had an effect on the difference between the sums bet and the amounts won. Even where, as was the case here, the effect produced on the winning chances by any manipulation to the advantage of the betting firm were low, the

fraudulent intervention resulted in the bettor's capital being theoretically endangered. However, since it was a fact of life that the end result of a group of football matches could have an unforeseen outcome, and there had not been any widespread manipulation, in the case under review there had been no actual or calculable losses by way of lost winnings, although an act of fraud had been committed which was punishable. ([2007] 6 *European Current Law p. 153*).

Italian football corruption scandal – an update

Background

Not only the reader of this Journal, but also anyone following, even from afar, developments in European football will recall the football corruption scandal which erupted in Italy last year, and saw several clubs penalised with varying degrees of rigour. It was always unlikely that these rulings would constitute the final chapter in this saga, and the intervening period has produced a number of further developments.

National coach's son to stand trial

It will be recalled that one of the main protagonists in this affair was the sports management agency GEA World. Even as the Italian national team were proceeding on their victorious march towards the world title in July 2006, Davide Lippi, son of team coach Marcello, was already under investigation for his involvement with this group. Nearly a year later, the news broke that Lippi Jr. was sent for trial, accused of "unfair competition through the use of threats and violence". Those who will be implicated in the trial will include Luciano Moggi, who was banned from football for five years for his part in the match-fixing scandal, and his son Alessandro, who manages the GEA company (*The Independent of 12/5/2007, p. 72*).

No further details are available at the time of writing.

AC Milan win European Cup – but should they have been allowed to?

The final of last season's European Champions League featured an intriguing rematch between the two teams which had made the 2005 final such a memorable occasion, i.e. Liverpool and AC Milan. The latter duly gained revenge for their shock defeat two years ago by beating the Merseysiders 1-0. Disappointment on the English side was mixed with a certain measure of resentment that a team which had been involved in the Italian football scandal should have been allowed to compete at all in last season's tournament. Even if one

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discounts something for the proverbial rancid fruit, it is hard not to have some sympathy with this claim. Although it is generally agreed that Milan were the lesser offenders in the scandal – the principal culprit being their arch-rivals Juventus Turin – their sins seemed to many observers to be sufficiently serious to warrant exclusion from the top European competition – at least for the subsequent season. There are several factors which give some weight to their opponents' protestations.

The first is that there was something rather too neat about the final outcome of the Italian footballing authorities' sequence of rulings on the subject. It will be recalled from the previous issue ([2007] 1 *Sport and the Law Journal*, p. 55) that, initially, the prosecutor had requested that Milan be expelled from the First Division (Serie A). However, the relevant Italian Federation tribunal contented itself with inflicting a penalty of 44 points for the 2005-6 season and of 15 for 2006-7. This was reduced to 30 points for 2005-6, which pushed the Milan club into third place and qualified it for a Champions League place. There is at least a suspicion that the political clout carried by Milan owner Silvio Berlusconi, the former Italian Prime Minister, may have played a part in this.

The second consideration is that the European governing body, UEFA, appears to be unreasonably shackled in what it can do about such developments. Many within the controlling body were distinctly uncomfortable about the impending presence of AC Milan in last season's top European competition, but soon found that the organ's own rules did not allow it to override the decisions of a national association. If the Italian body in question, the FIGC, deemed Milan fit to represent them, there was nothing that could be done. Its head of communications, William Galliard, explained:

"It was very simple. Our executive committee could only take up the matter after the Italian sentences were confirmed, because there were many appeals. The Italian association sent us their list of clubs, which included Milan. Some of the committee had misgivings about the situation, but when we examined our statutes and regulations we saw that we could not do anything about it because, in matters such as this, the national association was sovereign" (*The Guardian* of 21/5/2007, p. S6).

This is clearly an area which will need to be looked at in the future, in view of the potential dangers it represents – as is evidenced by this case.

Thirdly, this is not the first occasion on which Italian clubs in general, and AC Milan in particular, have come under strong suspicion of corrupt practices. In the previous issue ([2007] 1 *Sport and the Law Journal*, *loc. cit.*) we highlighted the cases of the 1973 European Cup-winners Cup final between Leeds United and AC Milan, and the European Cup semi-final between Derby County and Juventus, for which strong evidence of bribery and corruption was uncovered by prominent sports journalist Brian Glanville, but which the European football authorities did not see fit to pursue. Many believe that that Italian football has been allowed off the hook too frequently in this regard, and that a stand needs to be taken against this.

Academic articles on scandal

As this furore was always likely attracted the attention of academia, several articles have appeared recently on this topic. In "Match-Fixing: lessons from the appeals process" ([2006] 4 *WSLR* 13-16) the authors, Quirino Mancini, David Roberts and Michael Short, examine developments in the appeals lodged by the accused Italian football clubs referred to above. It analyses the tactics used by Juventus to challenge relegation, where it appealed to the Court of Arbitration and the Regional Administrative Court (TAR). The authors further discuss the sporting and financial implications for both the clubs and the Italian football league of the penalties imposed. They highlight the need for governing bodies to examine their powers to impose penalties, and for commercial partners to incorporate appropriate protective clauses in sponsorship agreements (*reviewed in* [2006] 12 *European Current Law* 184).

In "Football corruption judgments update" ([2006] 4 *WSLR* 6-7), the authors, Luca Ferrari and Matteo Castioni, report on the decisions and penalties imposed by the Italian Federal Committee of Appeals (CAF) on those clubs which were found guilty in this affair. They include a list of all clubs and individuals charged, the infringements of Italian Code of Sporting Justice of which they were accused, the penalties imposed by the FIGC and those handed down by the CAF (*reviewed in* [2006] 7 *European Current Law*, *loc. cit.*).

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FC Porto in match-fixing probe (Portugal)

In late July 2007, it was learned that the Portuguese public authorities have opened an investigation into a number of football matches in which it is alleged that the result was influenced by corruption. The games in question were played during the 2003-4 season, when Porto – under the leadership of current Chelsea manager José Mourinho – won the national title. This investigation, called Operation Golden Whistle, started following a tip-off, and centres around payments allegedly made to referees in order to distort match results. Six other clubs, including top team Benfica, were involved in the suspect games. Mr. Mourinho himself is not under investigation (*Daily Mail of 26/7/2007, p. 87*). No further details are available at the time of writing.

Corruption rears its head in tennis

Officially at least, tennis has remained relatively immune from match-influencing corruption. However, the increase in tennis betting – both online and offline – has given rise to concern among the relevant sporting authorities that the practices of certain players could bring this image into serious disrepute. More particularly, concern has been mounting about the increasing incidence of players betting on the outcome of their own matches. Four years ago, a leading British newspaper, the Sunday Telegraph, had already expressed some reservations about this practice, but the top players' governing body, the Association of Tennis Professionals (ATP), had categorically denied that anything untoward was afoot.

However, subsequent developments have compelled the ATP to abandon such complacency. It tightened its rules following a match between Yevgeny Kafelnikov and Fernando Vicente at the 2003 Lyon Grand Prix, which was suspended amid accusations concerning the amounts gambled. Three years later, the online betting firm, Betfair, launched an investigation into a shock victory for British player Richard Bloomfield against Carlos Berlocq at Wimbledon. More than £300,000 had been placed on Bloomfield to win, even though he was ranked 170 places below Berlocq (*The Daily Telegraph of 4/8/2007, p. S7*). So concerned did the ATP become at these developments that, in the course of this year's Wimbledon tournament, they issued a memorandum to all their members warning them of the perils inherent in match-fixing. Under the heading "ATP Monitoring Gambling and Corruption in the Tennis Industry", the memo read as follows:

"Gambling is an increasing problem among athletes – 25 per cent of this population (sic) gamble on a frequent basis. Athletes' competitive nature and the excitement of having something on the line are some of the main reasons they are attracted to gambling. You could be the target of organised crime and/or professional gamblers – you are an easier target if you continuously gamble at casinos, online, etc. Gambling on your own sport and/or match fixing will corrupt the sport and ruin your career. ATP is closely monitoring the tennis gambling industry and will take action when needed. DO NOT – under any circumstances – get involved in any kind of tennis gambling or match fixing" (*The Sunday Telegraph of 1/7/2007, p. S4*).

These warnings could not have been issued at a more appropriate time, since it was only a few weeks afterwards that Betfair, the online betting forum, refused to settle its wagers after the top seed in the Polish Open, Nikolai Davydenko, retired following irregular betting patterns on his match. After winning the first set against Argentinian Vassallo Arguello by 6-2, the Russian player lost the second before withdrawing from the match with his opponent leading 2-1 in the third set. These developments in the match, coupled with apparently unusual betting patterns, led Betfair's market-integrity inspectors to commence an investigation into the fixture (*The Guardian of 3/8/2007, p. S1*).

The development which had apparently given rise to this concern was the fact that, despite Mr. Davydenko being the tournament favourite and the then No. 4 in the ATP Tour rankings, his pre-match odds drifted to 2.3 – which is equivalent to 11-8 against, even though he was about to face an opponent standing 87th in the world rankings. So despite Davydenko winning the first set, the lesser player remained favourite to win on the in-play Betfair market. When the match was suspended, Betfair indicated that bets worth £3,590,595 had been placed and accepted on its site. This compared with approximately £1.5 million which was wagered during another second-round fixture, between Steve Darcis and Tommy Robredo (*The Daily Telegraph of 4/8/2007, p. S7*). The online betting operator informed the ATP Tour of its concerns about this match, under the terms of its memorandum of understanding with the tennis pros' organisation, which has been in place since 2003. The ATP holds similar information-exchange agreements with other prominent bookmakers (*The Guardian of 3/8/2007, loc. cit.*).

To indicate how seriously the tennis authorities were taking this affair, ATP officials flew to London a few days later in order to make contact with specialist betting investigators from the British Horseracing

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Authority (HRA). The specific expertise being sought was that of the HRA Integrity Unit, led by the former senior police officer, Paul Scotney. This unit has betting experts with extensive experience of monitoring betting patterns. It was the analysis of such market movements which led Betfair to contact the ATP. The ATP was, at the time of writing, also about to appoint an independent "hearing officer" to oversee the investigations into the match. It is felt that minor tournaments, where prize money is relatively low and few ranking points are at stake, represent prime targets for the fixers – which is something the ATP will also need to look into (*The Guardian of 8/8/2007, p. S1*).

This column will naturally continue to follow developments in this saga for the benefit of its readers.

Hooliganism and related issues

Troubles involving English clubs' fans in Europe continues...

In the previous issue, a sizable part of the corresponding section was taken up by the now-familiar story of trouble involving English fans supporting their teams in European competitions – even though in some cases it was far from clear who sinned and who was sinned against. One such tie was that which pitched AS Rome against Manchester United, and which, as was reported in the previous issue, matters got out of hand. Some of the away fans became involved in clashes with the notorious Italian Ultras, a well-known hooligan fringe, which left three English fans stabbed. Further provocation and baiting from both sets of fans caused the Italian police to advance upon the away fans, 18 of whom were left bloodied and battered in the resulting fracas.

Naturally, this did not bode well for the return tie at old Trafford two weeks later. The authorities on both sides did their utmost to prevent trouble. On the eve of the fixture, the Independent Manchester United Supporters' Association urged their fans not to attempt any "revenge" attacks on visiting Italian supporters (*The Guardian of 10/4/2007, p. S9*). Italy's Foreign Ministry, on the other hand, warned travelling Roma fans of the possibility of clashes, and urged "correct and prudent behaviour" on their part (*Ibid, p. S1*). With approximately 2,500 Roma supporters flying in, and a further 1,500 making their way to Manchester independently, there was certainly the potential for further trouble.

Unfortunately, these precautions did not prevent a number of unsavoury incidents. Eighteen arrests were made outside the stadium prior to kick-off as fights broke out along Sir Matt Busby Way. Later, Roma fans threw a firework into a crowd of United supporters as police tried to form a cordon between the sets of supporters (*The Independent of 11/4/2007, p. 58*). In addition, fans from both clubs hurled bottles and other objects at police lines outside Old Trafford, and taunted each other with chants. The violence, which had started about three hours before kick-off, continued as the match started. The police had little success separating rival fans and struggled to quell the trouble. Some fans had cuts and other injuries, but no-one was, in the event, seriously injured (*Ibid*).

In the event, the disciplinary hand of the footballing authorities came down relatively mildly on both sides. In late April, the European football-governing body UEFA fined Roma £31,000 and Manchester United £14,500 for their fans' part in the trouble in Italy. It will be recalled that the Italian police had been heavily criticised for their reaction to the incidents, with some United fans accusing them of administering "indiscriminate beatings". UEFA did not, however, make any mention of the police (*The Daily Telegraph of 26/4/2007, p. S4*). Nor did they take any action over the trouble which occurred during the return leg, on the grounds that they had no jurisdiction over what occurred outside the stadium (*Daily Mail of 11/4/2007, p. 79*).

(On the possible impact which the actions of the Italian police may have produced on their country's chances of hosting the 2012 European Championships, see below, p.104).

The troubles that occurred over both legs of the fixture scarcely failed to dampen Manchester United's elation at achieving one of their best-ever results in European football, beating Rome 7-1 in the return leg. With Liverpool going equally strong in the competition, the prospect of an all-English European final in Athens began to loom large. Well before the identity of the finalists' team was known, therefore, UEFA sought talks with the British police in dealing with the possibility of the logistical nightmare which a clash between two English Premiership sides would bring – particularly if, as at one stage seemed likely, the fixture in question would be between arch-rivals Liverpool and Manchester United (*The Daily Telegraph of 13/4/2007, p. S3*). In the event, United bowed out of the competition, succumbing to AC Milan in the semi-finals, so that this particular scenario was averted – at least for this year.

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However, the eventual Final between Liverpool and AC Milan turned out to be far from trouble-free. Naturally, the security apparatus was there in plentiful numbers, with Greece's entire 20,000 strong police force being deployed in order to prevent violence at the European final in Athens. Police squads from across the country were bussed in to form a security cordon around the city centre during the hours leading up to the game. Officers, including riot police, were stationed outside hotels, cafés and bars which the British supporters were expected to frequent (*The Guardian of 21/4/2007, p. S5*). In addition, the Greek authorities moved to avoid potential trouble by instructing charter companies not to bring contingents of ticketless fans. With the finalist clubs having been allocated only 34,000 of the 63,800 seats available, the great fear was that the city would be swamped by fans attempting to buy tickets on the black market (*The Daily Telegraph of 3/5/2007, p. B21*).

The allegedly meagre ticket allocations prompted protests from both clubs, most of all from Liverpool, whose supporters held a demonstration at their home ground protesting against this development. Whilst the club's dismay at the size of the allocation was understandable, particularly given that UEFA's restrictions had generated a black market thought to be around £5 million, this could not dissimulate the fact that Champions League clubs had known for several months beforehand what the allocations for the final would be (*The Times of 11/5/2007, p. 63*). It is true that both the European governing body UEFA and the British police warned ticket "touts" that they might take action to prevent tickets for the match being sold on for high profits; however, exactly what form such action would take was not specified (*The Independent of 9/5/2007, p. 52*).

Increasingly, it looked as though the ticketing arrangements would end in comprehensive chaos, particularly after it was being reported that up to 5,000 fake tickets could flood the black market, thus adding to the security concerns surrounding the match (*The Daily Telegraph of 23/5/2007, p. S3*). UEFA stated that there was little it could do to stem this tide, and had to restrict themselves to hoping that matters would not get out of hand as a result. In the event, admission to the ground proved to be a complete shambles, if certain eyewitnesses were to be believed. It would appear that inspection procedures were entirely inconsistent between various parts of the stadium. Many tickets were dutifully checked using an ultra-violet scanner in order to detect any fakes; however, at other checkpoints the checks amounted to no more than fans being asked to hold their tickets aloft as they passed the barrier. This apparently enabled some people to hold

up blue cigarette boxes and pamphlets bearing the UEFA logo, and still be waved through. As a result, many fans occupied seats not allocated to them, and genuine ticket holders found themselves locked out (*The Independent of 25/5/2007, p. 77*).

If these reports are true, they could explain – if not excuse – some of the violent incidents which occurred just before and during the match. Trouble erupted when, half an hour before kick-off, police lost control of the outer security cordon established in order to weed out those fans without genuine tickets. This was followed by a large build-up of Liverpool fans, which forced the officers to allow them into the complex without ticket inspections. This in turn led to massive pressure on police and stewards at the entry points to the stadium. As kick-off approached, police set up barriers and the decision was taken to close the turnstiles. When Liverpool fans attempted to rush the gates, police responded with tear gas (*The Daily Telegraph of 25/5/2007, p. S3*).

Once the match had finished, and the two sets of supporters had left Athens, it emerged that the trouble could have been a good deal worse, given that there were no serious injuries and not even any arrests. Nevertheless, it was obvious that matters had gone badly wrong organisationally, and UEFA naturally lost no time in pledging an investigation. However, the European governing body displayed a certain degree of ineptitude by the manner on which some of its leading lights started issuing damning judgments before the inquest had even begun. On the very day when the announcement of the investigation was made, William Gaillard, the organ's Director of Communications, placed the blame for the incidents squarely on the Liverpool fans, stating that the Milan fans did not face the same problems because they "didn't behave in the same way". In addition, Mr. Gaillard blithely praised the Greek police for containing a potential flashpoint, saying that it was "to their credit" that no dangerous incidents had occurred (*The Guardian of 25/5/2007, p. S4*).

Two weeks later, the same Mr. Gaillard announced that a detailed dossier compiled by undercover police officers blamed the Merseyside fans for the chaos which had prevailed in Athens. He even went so far as to accuse them of removing match tickets from the grasp of children, adding:

"The incidents involving Liverpool fans have been well known to us before the trouble at the Champions League final. This was just the latest example. What other set of fans steal tickets from their fellow-supporters or out of the hands of children? We know who caused most of the

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trouble in Athens. There have been 25 incidents involving Liverpool fans away from home since 2003 and those are in the report – most teams’ supporters do not cause any trouble at all (*The Guardian of 4/6/2007, p. S7*)

The Liverpool club, for its part, pointed out that it had sent UEFA a report criticising the organisation and security arrangements five days before the match, and claimed their warnings had gone unheeded (*ibid.*). Two days later, UEFA were compelled to stage an embarrassing climbdown when Michel Platini, its new President, distanced himself from Mr. Gaillard’s accusations, and appeared to absolve the Merseyside supporters from all blame. Mr. Platini blamed the trouble on the fact that supporters had travelled without tickets, which he described as an “old story”, and attributable merely to the fact that more English fans followed their clubs than those from other countries (*The Times of 6/6/2007, p. 89*).

These conciliatory words may have defused the war of words, which has threatened to spiral out of control. However, they are unlikely to diminish calls for the dismissal of Mr. Gaillard, whose intemperate remarks caused him to be described as a “clown” by Liverpool owner Tom Hicks (*ibid.*). Nor are they likely to deter the legal action threatened by an enraged Liverpool fan against UEFA for their handling of the event. Paul Gregory, an architect, had, together with two friends, spent £2,370 on flights, accommodation and tickets. In a letter to Mr. Platini setting out his case, the Liverpool supporter stated:

“As a former shareholder in Liverpool FC, I am the recipient of three ?140 tickets for the Champions’ League final. All are still unused as we were refused entry into the stadium. I was herded, tear-gassed, kicked and baton-charged by riot police outside the stadium for the hour leading up to kick-off, and way beyond. As the organising body, UEFA has a duty of care towards its legitimate ticket holders in just the same way as any corporate body has towards its customers. This duty of care extends to having systems in place to deny entry to the stadium to non-ticket holders. Demonstrably these systems were not in place” (*The Daily Telegraph of 30/5/2007, p. S6*).

Mr. Gregory concluded by asking the UEFA chief three questions: (a) at what time was the stadium declared closed; (b) what security arrangements did UFA have in place, particularly as regards forged tickets about which the organisation had been warned several weeks in advance, and (c) why were corporate “partners” allowed to sell tickets at vastly inflated prices to fans (*ibid.*). It is not yet known, however, whether Mr. Gregory has initiated court proceedings.

Almost inevitably, the day after Mr. Platini’s climbdown on behalf of his organisation, the latter announced the establishment of a working party aimed at reviewing ways of tightening security and crowd control, ahead of next year’s final. The new guidelines are likely to be focused on grounds having capacities of over 80,000. One particular critical point will probably be the need for stadiums to have turnstiles capable of reading barcode tickets (*The Daily Telegraph of 6/6/2007, p. 57*). Earlier – i.e. well before the final in question – UEFA had already convened a meeting of law enforcement agencies from across Europe to discuss crowd disorder and other criminal threats to football (*The Guardian of 12/4/2007, p. S2*).

Scandinavian football derby abandoned after fan attack (Denmark)

The European Championship qualifying fixture between regional rivals Denmark and Sweden at the Parken stadium in Copenhagen took a dramatic and unprecedented turn when the referee abandoned the game following an assault by a “fan”. The home side had climbed back from a seemingly impossible position to level the scores, when, in the 89th minute, there occurred an off-the-ball incident in which Denmark’s Christian Poulsen punched Swedish international Markus Rosenberg. This was brought to the referee’s attention by the linesman, and as a result the away side were awarded a penalty and Mr. Poulsen was shown the red card. This so incensed one of the home supporters that he ran onto the pitch and, despite attempts by the players to impede him, succeeded in reaching referee Herbert Fandel and striking him. The offender having been arrested, the German referee took the players off the field for 15 minutes in order to consider what action to take. Eventually, he abandoned the game. At least two more spectators succeeded in forcing their way onto the pitch shortly after the incident (*The Observer of 3/6/2007, p. S10*).

The fate of the match result naturally hung in the balance, and European governing body UEFA immediately announced that a disciplinary committee would carry out an investigation into the incident. Christian Poulsen himself was full of remorse for having sparked off this chain of events, and apologised “to my teammates and to the general public” (*The Independent of 4/6/2007, p. 66*). On June 8, 2007 the hearing was held, awarding Sweden the match by 3-0, fining Denmark CHF 100,000 (€66,000) as well as decreeing that Denmark should play their next four home qualification matches (effectively the rest of the competition) at least 250m (making it practically

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impossible to hold the event in Denmark), with the next match against Liechtenstein having to be played behind closed doors. Poulsen was banned for three competitive matches.

The Danish Football Association, however, appealed the decision. The appeal saw the original restrictions considerably eased. The fine was halved to CHF 50,000. The closed-doors ban for Liechtenstein was lifted, the team would only have to play two matches away from Parken instead of four, and the restricted radius was reduced to 140 km (87 m) from Copenhagen, making several smaller stadiums within Denmark viable venues during the Parken ban (www.en.wikipedia).

Anti-hooliganism Law adopted in France

In July 2007, the French Parliament adopted Law No. 2006-784 on the Prevention of Violence during Sporting Events ([2006] JORF 10113). This legislation is aimed at preventing and penalising violence during sporting events, for which purpose it establishes as Consultative National Commission for the Prevention of Violence during sporting events.

With the benefits of the opinions emanating from the Commission, it will be possible for the Government to dissolve by decree any association or group of persons which has engaged in violent behaviour during previous sporting events. Penalties can amount to a maximum of five years' imprisonment and a €75,000 fine for those found guilty of offences relating to racial, religious or gender discrimination. Also, in buildings where video surveillance systems have been installed, managers of sporting events are obliged to ensure that the system is activated. The Law lays down a €15,000 fine for managers who fail to do this (*reviewed in [2007] 7 European Current Law p. 112*).

Academic articles on football hooliganism

In "Euro 2000 and football hooliganism", the author, Hans Mojet, ([2006] 1/2 ISLJ p. 88) discusses the legal framework for the manner in which hooliganism was countered in the Netherlands during the Euro 2000 tournament. It describes the co-operation agreement between the Netherlands and Belgium, the involvement of Dutch government members in the preparations and in the establishment of a Euro 2000 Centre. The author further considers the use of the Schengen agreement on the abolition of controls within the EU in order to reintroduce border checks, as well as the conclusion of the Bergen-op-Zoom Treaty on cross-border police intervention during the tournament, and the issuing of

Joint Statements with non-member states. He further reviews the visa policy applied by the Netherlands authorities, the use of stadium bans, the collection of information about football supporters, stewarding arrangements and the detention of football hooligans (*reviewed in [2007] 2 European Current Law p. 102*).

In "Football sans frontières: harmonising violence prevention standards for sporting events in the European union" ([2007] 4 SLA&P12), the author, Irish sports law specialist Jack Anderson, reviews the way in which police forces in the European Union are developing a co-ordinated approach towards the prevention of violence at football grounds, in view of the Euro 2004 tournament (Portugal) and the 2006 World Cup (Germany). He considers the issue of joint police operations, the exchange of information, the Council of Europe Convention on Spectator Violence and Misbehaviour at Sports Events of 1985, initiatives introduced by Member States such as national football information points, subsequently adopted as a Council Decision of April 2002, as well as the use of personal data. (*reviewed in [2007] 7 European Current Law p. 43*).

Rural France hit by le bouliganisme

Pétanque, or boules, is a French national sport sometimes described as "croquet without the frenetic action", and conjures up images of beret-clad old peasants poring over metallic spherical objects in between hearty draughts of le pastis. It would seem that this bucolic idyll is being brutally shattered with the increasing prevalence of violence and acts of vandalism during such games. In mid-June 2007, it emerged that one particular boules federation, in Nièvre, western Burgundy, had been compelled to suspend competitive matches after several such incidents. These have featured assaults using the heavy metal boules themselves, and vicious exchanges of words, after one team has attempted to *chambrier* (i.e. wind up) the other (*The Independent of 11/6/2007, p. 18*).

Some players have put the blame on travelling people, or Gypsies, who are known for their fondness for the game. Others maintain that the problem has a much wider dimension, and has been fuelled by alcohol and betting. Nor has this been an isolated case. Incidents have been reported in the Normandy and Languedoc areas, as well as in the South-West. However, it is in Nièvre that the most serious incidents have taken place, and in one particularly extreme incident a club president was backed against the wall and a small shearing knife pointed at his throat. In another clash, there were scuffles following accusations that set of boules had

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been stolen. As a result, the senior government official (Préfet) ordered the indefinite suspension of all competitive matches in the area.

As has been mentioned earlier, it appears that a lethal combination of betting and alcohol may also play a part in these disturbances. Although the prizes on offer are relatively small, large side-bets are sometimes made. To raise money for the prizes, boules clubs rely on the profits from drink. However, thus far they have dismissed any suggestions that the boules tracks should “go dry” (*Ibid*).

“On-field” crime

The “Ferrigate” affair

The rivalry between the Ferrari and McLaren teams has assumed almost legendary proportions in the world of Formula 1 motor racing. Hitherto, however, any competitiveness has been restricted to the racing tracks and, as far as anyone can tell, has remained within the bounds of legality. Recent developments, however, suggest that something more sinister may have been at work, the full implications of which have as yet to become fully apparent.

By the middle of the 2007 season, McLaren were ahead of Ferrari in the drivers’ and constructors’ championship, thanks largely to a run of three successive wins early in the summer. The first of these victories was achieved in Monaco on 27 May. This development did not raise any particular eyebrows, until a month later, when Nigel Stepney, a leading British mechanic with the Ferrari team, was under a criminal investigation for allegedly having sabotaged his own team during the Monaco event. These sensational accusations centred on a mystery powder found in and around the fuel tanks belonging to racing aces Kimi Raikkonen and Felipe Massa six days before the race. The contaminated parts were replaced and the powder sent for scientific examination by Italian police in Parma. Following an internal investigation at the firm’s Maranello headquarters, Mr. Stanley was sent on “gardening leave” by the company (*Daily Mail of 23/6/2007, p. 111*).

It is generally believed that suspicion fell on Mr. Stanley because he was known to be disenchanted with the way in which his career at Ferrari was developing. He had apparently nurtured a desire to step into the shoes of Ross Brawn, originally from Manchester, who played a pivotal part in the success earned by Michael Schumacher

over the years. Instead, the Italian firm turned to two of their compatriots. This was a bitter blow for the Warwickshire-born Stepney, and he voiced his frustration earlier this year, complaining publicly that he no longer felt fulfilled with the company, and was agitating for a move. Such criticism did not apparently play very well with the Ferrari hierarchy. Shortly afterwards, he was redeployed to a more mundane factory-based post, in what was seen as retribution for his outburst.

It should also be pointed out that this saga came soon after two former Ferrari engineers were found guilty of industrial espionage following a 12-month court case. In April that year, Angelo Santini and Mauro Iacone were sentenced to nine and 16 months’ imprisonment respectively, pending appeal, for having revealed company secrets to their new employers, Toyota (*Ibid*). As a result of a formal complaint, accompanied by supporting documents, which was sent by Ferrari to the Modena public prosecutor, the latter launched a criminal investigation, and a public defence lawyer appointed to represent Mr. Stepney, who at the time was on holiday in Asia (*The Guardian of 23/6/2007, p. S10*). When asked to comment, the accused engineer expressed his confidence that he would be cleared of any wrongdoing, and blamed the accusations on a “dirty tricks campaign” (*The Guardian of 25/6/2007, p. S9*).

The entire episode took a new twist several days later, when several leading technical lights attached to the leading teams were relieved of their duties. First came the not unexpected news that Mr. Stepney had been formally dismissed by his Italian employer. However, the plot thickened when McLaren announced that they had suspended an unspecified member of their team for receiving technical information from a Ferrari employee at the end of April. The full significance of this was revealed by the following statement issued by the firm:

“McLaren became aware on July 3, 2007 that a senior member of its technical organisation was the subject of a Ferrari investigation regarding the receipt of technical information. The team has learnt that this individual had allegedly received a package of technical information from a Ferrari employee at the end of April. While McLaren has no involvement in the matter, it will fully co-operate with any investigation. The individual has, in the meanwhile, been suspended by the company pending a full and proper investigation of the matter” (*The Independent of 4/7/2007, p. 53*).

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It transpired that the individual in question was Mike Coughlan, the firm's chief designer, and that his house had been searched as a result of an application for a search warrant made to the British authorities by Ferrari, in a process running parallel to their investigation of Mr. Stepney. The search had been triggered off when Ferrari were contacted by a photocopying shop in Surrey advising them that a customer (i.e. Coughlan's wife, Trudy) had brought in documents bearing Ferrari identification. As a result of the search, documents belonging to Ferrari were discovered, leading directly to the British-based firm's decision to suspend him. The Italian firm itself stated that it reserved the right to take further legal action, claiming that they had proof that Mr. Stepney had been supplying technical information to a McLaren employee (*The Guardian of 4/7/2007, p. S1*). It also transpired that Coughlan and Stepney had worked together at Benetton in the early 1990s, and later at Ferrari's UK design studio, which was based in Surrey until 1996 (*Ibid*).

Several days later yet another dimension was added to the saga when the Honda F1 team confirmed that their team principal, Nick Fry, had been visited at a Heathrow hotel by Messrs. Stepney and Coughlan. The firm claimed that the two engineers had visited Mr. Fry in order to offer the latter's firm a deal whereby a group of engineers from their two teams would move to Honda, in order to help the struggling Japanese team to improve its disappointing form. Honda, however, stressed that at no point during this meeting had any confidential information been offered or received. Spokesman Ron Dennis also insisted that there were "no other team's intellectual property rights" on his firm's car. He did, however, concede that there would always and inevitably be a degree of overlap between various teams as engineers and technicians changed jobs on a regular basis (*The Guardian of 7/7/2007, p. 39*).

The next day, Nigel Stepney added to the furore by making explosive allegations about his former employer. He claimed in effect that Ferrari had framed him in the espionage affair, and had carried out a campaign of harassment after he had announced his decision to quit the team in March that year. He went on:

"I have been followed and so have my fiancée and daughter. There have been high-speed chases. There was tracking gear on my car. When we cornered some guys last Thursday evening they refused to speak. Ferrari are terrified that what I have in my mind is valuable. I know where the bodies have been buried for the past 10 years, there were a lot of controversies" (*The Independent of 8/7/2007, p. 24*).

Matters reached a formal judicial stage the following week, with a preliminary hearing before the English High Court relating to the intellectual property dimension of the dispute, which centred round two computer discs containing 780 pages of material. Nigel Tozzi, the lawyer representing Ferrari, informed Briggs J that Mr. Coughlan and his wife should not have been in possession of the documents which were found during the search of their home, and that the pair had "behaved disgracefully" in the entire affair. The Coughlan's defender, however, argued that his clients had behaved "responsibly". Furthermore, it was learned that the hearing also included a second McLaren employee, Jonathan Neale, who knew Coughlan had received the confidential information in question. Mr. Neale himself was not under investigation, although Ferrari were keen to determine the precise point at which he learned that Coughlan was in possession of the dossier in question. (*The Daily Telegraph of 11/7/2007, p. S7*).

Mr. Coughlan had appeared at the hearing but did not speak. He was ordered to disclose the details of his involvement in the case in an affidavit, and Ferrari decided to call off the hearing scheduled for the next day when the McLaren engineer and his wife Trudy agreed to provide a sworn statement on the affair. Ferrari also withdrew their request to the High Court to make the affidavit available to the Modena public prosecutor, who was still in charge of the criminal investigation into Mr. Stepney's involvement in the affair (*Daily Mail of 12/7/2007, p. 91*). Nevertheless the Italian firm insisted that they would continue the civil case arising from the affair in England, and requested Coughlan to explain the alleged conversation with Jonathan Neale referred to earlier (*The Independent of 12/7/2007, p. 56*).

The pressure on Mr. Stepney increased when it was learned that Italian police had been trawling through his bank statements, checking accounts at Italian banks and requesting the checking of several records in Britain. In so doing they were seeking evidence of payments which the former Ferrari engineer may have received in return for his alleged passing of information to McLaren. Details of the new investigation emerged as Mr. Stepney's Italian lawyer, Sonia Bartolini, revealed that her team would be pressing for an inquiry into the allegation that Ferrari had been harassing Mr. Stepney, as referred to earlier (*Daily Mail of 17/7/2007, p. 71*). That same weekend, various reports in the Italian press held that Coughlan had admitted confiding in several McLaren staff members that he had the incriminating documents. He allegedly made these allegations in a

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confidential affidavit, copies of which were in possession of Ferrari and the motor racing authorities. McLaren responded by once again firmly denying that the confidential documents found at the Coughlans' home were handled by any other member of its staff (*The Guardian of 17/7/2007, p. S10*).

The accused engineer's troubles continued when greater detail emerged concerning the contents of the indicted documents. According to a nine-page submission made to the High Court by Ferrari's lawyers on 20 July, which was obtained by a leading Italian (*Corriere della Sera*) and British (*The Guardian*) newspaper, the documents which Stepney was alleged to have passed to Coughlan contained details of four aspects of the Italian car's design. More particularly, it was being claimed by Ferrari that, in March 2007, Stepney sent three emails to Coughlan concerning an unspecified "floor device", a rear wing-flap separator (aimed at enhancing aerodynamic down force) and a "subtle engineering technique to lower the floor of the Ferrari car". In addition, the document claimed that, more than a month later, Stepney gave Coughlan a "diagram of a brake balance assembly used by Ferrari" and discussed how the rear brake disc on the Ferrari Formula One car worked. The fact that the McLaren chief designer had these documents in his possession was alleged to have given his team an "unfair advantage over Ferrari" during the 2007 season, since it enabled Coughlan to identify Ferrari's strengths and weaknesses, as well as gauging McLaren's philosophies against those of Ferrari (*The Guardian of 26/7/2007, p. S5*).

Naturally, all this activity had not eluded the attentions of the world governing body for this sport, to wit the FIA. This body accordingly summoned the McLaren team to appear before an extraordinary meeting of its Sport Council in Paris. It refused to rule out the possibility that two of its top drivers, Lewis Hamilton and Fernando Alonso, could lose World Championship points as a result of the inquiry (*The Independent of 13/7/2007, p. 60*). The hearing was duly held at the FIA headquarters in Paris.

Mr. Coughlan's testimony was always going to be a crucial element in the entire procedure, and the latter had in fact delivered a sworn affidavit to the FIA detailing the sequence of events from his perspective. In formal terms, McLaren were charged with infringing Article 151c of the International Sporting Code as a result of a member of their F1 team possessing unauthorised and confidential information belonging to Ferrari. It is important to note here that the mere possession of such documents is punishable, so the arguments which

hitherto had been raised by McLaren in their defence, i.e. that they did not use the information for use on their own cars or to gain an unfair advantage over Ferrari, would not in principle exculpate them (*The Daily Telegraph of 26/7/2007, p. S10*).

In the event, the FIA's World Motor Sport Council did find that McLaren were in breach of the said regulations, but decided that no action should be taken. The reasons for this were set out by Max Mosley, the FIA President, in the following words:

"The WMSC is satisfied that Vodafone McLaren-Mercedes was in possession of confidential information. However, there is insufficient evidence that the information was used in such a way as to interfere improperly with the FIA Formula One world championship. We therefore impose no penalty. But if it is found in the future that the Ferrari information has been used in such a way as to interfere improperly with the FIA Formula One world championship, we reserve the right to invite Vodafone McLaren-Mercedes back in front of (sic) the WMSC where it will face the possibility of exclusion from not only the 2007 championship but also the 2008 championship. The WMSC will also invite Mr. Stepney and Mr. Coughlan to show reason why they should not be banned from international motor sport for a lengthy period" (*The Guardian of 27/7/2007, p. S1*).

It would seem that the FIA, by thus ruling, were inclined to believe the alternative scenario hinted at earlier – i.e. that Stepney and Coughlan colluded in order to combine expertise from Ferrari and McLaren and make it available to a third team, which may have been Honda. Although the latter's team principal, Nick Fry, admitted meeting the two engineers with a view to filling technical posts in Japan, he stressed that neither of the two had been successful in their application (*The Daily Telegraph of 27/7/2007, p. S20*). From this ruling, it also appeared that Stepney and Coughlan would face further grillings from the supreme motor sport authority. At the time of writing, these had not been conducted.

Not unexpectedly, Ferrari responded furiously to this news, describing as "incomprehensible" the fact that violating what they regarded as a fundamental principle of sporting honesty did not have, as a logical and inevitable consequence, the application of a penalty. They accused the FIA of "legitimising dishonest behaviour" through their decision, and of acting in a way which was prejudicial to the credibility of the sport. They vowed to continue the legal action under way before the Italian and English courts, as described earlier (*The Independent of 27/7/2007, p. 64*). The decision was obviously going to have far-reaching

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consequences for both teams, since it lifted the threat to the predominance of McLaren drivers Lewis Hamilton and Fernando Alonso, the former leading the World Championship series and the latter being in second place.

Indeed, there was a suggestion that the FIA decision had been motivated precisely by a reluctance on the FIA's part to upset a gripping season in which the young and charismatic Lewis Hamilton had created a resurgence of interest in the sport, rather than by any considerations of sporting probity. Particularly the Italian media highlighted this aspect, describing the FIA decision as a "political sentence" (*The Independent of 28/7/2007, p. 73*). Ferrari immediately signalled their intention to appeal against the ruling, claiming that the main point at issue was not whether McLaren possessed the relevant information, but when they came into its possession. McLaren had always claimed that they were unaware of Coughlan's possession of the relevant documents until they were informed by Ferrari on 3 July. However, Ferrari Executive Director Jean Todt claimed that McLaren possessed these data before the season had started. He stated on Ferrari's website:

"During yesterday's meeting, the McLaren bosses, with no exceptions, admitted that their chief designer had obtained since back in March, prior to the Australian GP, documents from Nigel Stepney. Some of this data was used to prepare a clarification request submitted to the FIA, aimed clearly at us" (*The Guardian of 28/7/2007, p. S4*).

In the "clarification request" concerned, McLaren had pointed out to the FIA that some teams were running a "flexible floor" on their cars, being a design strategy aimed at enhancing performance. McLaren requested a rule clarification in March, and the FIA subsequently revised the floor regulations after the Australian Grand Prix, which opened the season. Ferrari were one of the teams affected. Todt claims that the information contained in the indicted documents were thus used in order to obtain an advantage over Ferrari, not through an improvement in their performance, but by restricting Ferrari's. He also speculated as to what would have happened if 780 confidential documents of another team had been found in the house of a Ferrari designer – hinting strongly that there may have been some form of discrimination at work (*Ibid*).

However, it emerged that the Formula One rules do not allow an appeal against a decision by the World Motor Sports Council. Nevertheless, Ferrari indicated that they would not let the matter die, stating that they were examining "all possible options" – thus hinting strongly at court action, even though the civil courts are loath to

rule in such disputes and have a habit of referring such disputes back to the governing body (*The Guardian of 31/7/2007, p. S10*). However, matters took a favourable turn for the Italians when Max Mosley, the FIA president, intervened in order to enable Ferrari to offer their interpretation of events before the governing body's court of appeal (*Ibid*). This development came about as a result of a challenge made by the Automobile Club of Italy (ACI) on behalf of their licence holder Ferrari. This appeal was to be heard by an elite panel of international judges. Unlike the World Council hearing, this appeal will give Ferrari's lawyers the opportunity to cross-examine McLaren and present new evidence to the court (*The Daily Telegraph of 1/8/2007, p. S18*).

The very next day, McLaren launched an attack of their own, accusing Ferrari of using an illegal car to win the opening race of the season. This relates to the floor attachment mechanism which, as has been mentioned before, featured in the Stepney/Coughlan discussions which led to this dispute. Coughlan had informed McLaren that Ferrari's mechanism breached the relevant technical regulations, and the FIA subsequently banned it (see above). This has momentous consequences, according to a letter written by McLaren chief Ron Dennis to the Italian national sporting authority in response to a statement issued by the latter challenging the FIA decision:

"You will appreciate the significance of this. As far as we were aware, Ferrari ran their cars with the illegal device at the Australian GP, which they won. In the interests of the sport, McLaren chose not to protest the result even though it seems clear that Ferrari had an illegal competitive advantage. Ferrari only withdrew the floor device after it was confirmed to be illegal by the FIA. Were it not for Mr. Stepney drawing this illegal device to the attention of McLaren, and McLaren drawing it to the attention of the FIA, there is every reason to suppose that Ferrari would have continued to race with an illegal car. Mr. Stepney acted in the interests of the sport by "blowing the whistle" (*The Independent of 2/8/2007, p. 56*).

Mr. Dennis also accused Ferrari of having submitted a lengthy and "grossly misleading" memorandum to the WMSC on 16 July, which McLaren did not see until 22 July – four days before the Paris hearing referred to above (*Ibid*). Kimi Raikkonen, the Finnish driver who had won the disputed race for Ferrari, dryly – and somewhat disingenuously – responded that if he had been driving an illegal car, he would have been disqualified. Ferrari themselves at first refused to be drawn into the debate, other than stating that they were awaiting the verdict of

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the appeal hearing (*The Guardian of 3/8/2007, p. S10*). However, a few days later the firm decided to issue a firm rebuttal of the charges brought against them. It asserted that the two F2007 cars used in the Australian GP were deemed by the stewards to be entirely in conformity with the relevant technical regulations, before, during and after the event. The fact that the FIA subsequently made the contentious floor mechanism illegal was, according to Ferrari, standard procedure:

“The FIA took the opportunity to issue a clarification on the interpretation of the regulation and then asked the teams concerned to make the necessary modifications. There are actually numerous examples of this in both the recent and distant past which have also involved other teams. At the next sitting of the FIA International Court of Appeal Ferrari will fully explain its position on the entire matter” (*The Guardian of 4/8/2007, p. S11*).

Mr. Stepney, for his part, released a statement through his Italian lawyer denying that he had informed McLaren about the Ferrari floor at the Australian GP, claiming that one only needed to “take a look at the car” to realise what was wrong, and that this was obvious to people who work in the Formula One field. In other words, McLaren must have known about it without requiring any “whistle-blowing” (*Ibid*).

It was later announced that the FIA International Court of Appeal would hear the case on 13 September (*The Daily Telegraph of 8/8/2007, p. S7*). The present author will, as usual, cover the outcome of this hearing, as well as any other developments in this saga, with the keenest of interest.

Suicide bombers dampen Iraqi Asian Cup celebrations

Even before its invasion by certain Western countries, Iraq was already riven by sectarian strife, mainly between its Shiite, Sunni and Kurd communities. Since the overthrow of the Saddam Hussain régime, these divisions have only deepened, as witness the daily litany of routine killings and revenge killings which have arisen from these violent divides. Even one of the few causes which have been capable of arousing some sense of national unity, i.e. the fate of the country’s football team, has fallen victim to this strife. As Iraqis celebrated the success earned by the national team in reaching the final of the Asian Cup tournament, suicide bombers struck in the capital Baghdad, killing at least 50 people and injuring a further 135.

In the first attack, a bomber detonated a car rigged with explosives near a celebrating crowd in Mansour, killing at

least 30 civilians. A second device struck at an army checkpoint in Maisalon Square, East Baghdad, killing at least 20, including five soldiers (*The Daily Telegraph of 26/7/2007, p. 20*). The national squad itself has been marked by the violence which has engulfed the country in recent years. Thus the assistant manager had to flee Baghdad after receiving threats that his son would be kidnapped, and the goalkeeper lost his brother-in-law in a murderous incident (*The Independent of 28/7/2007, p. 32*).

Brennan penalty reduced on appeal (France/Ireland)

It will be recalled from a previous issue (*[2006] 3 Sport and the Law Journal p. 56*) that Trevor Brennan, the Irish international rugby player, had been involved in an incident in which he punched a number of supporters during a Heineken Cup fixture in Toulouse, France. He claimed to have been provoked by derogatory comments from visiting supporters, but a panel subsequently served him with a lifetime ban, as well as being fined and instructed to pay compensation to an Ulster supporter hurt in the incident (*The Daily Telegraph of 2/6/2007, p. S16*).

Later, however, an independent Appeal Committee reduced the penalty imposed on Brennan. It upheld the original decision of the independent Disciplinary Committee, which found Mr Brennan guilty of misconduct in that Mr Brennan had entered one of the seating areas in the stadium and repeatedly struck an Ulster spectator, namely Mr Patrick Bamford. However, having heard from Mr Brennan, several character witnesses and from ERC’s Disciplinary Officer during the appeal hearing, the Appeal Committee found that although the incident was of a very serious nature, in their view the original suspension, which was the maximum available, was disproportionate and should be reduced.

The Appeal Committee therefore suspended Mr Brennan from playing Rugby Union for five years (commencing, 1 June 2007) and furthermore imposed a five year suspension on Mr Brennan from participating in ERC tournaments in any capacity (commencing 1 June 2007). The Committee also upheld the original fine of 25,000 euro imposed on Mr Brennan and the order to pay 5,000 euro compensation to Mr Bamford and the costs of convening the disciplinary hearing (www.ercrugby.com/eng of 11/6/2007).

The independent Appeal Committee chaired by Wyn Williams QC (Wales) and also comprising Robert Horner (England) and Sheriff Bill Dunlop (Scotland) convened in Dublin on Friday, 1 June and communicated its decision to both parties (*Ibid*).

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Car rally driver not guilty of manslaughter – Belgian criminal court decision

During a car rally in Ichtegem, Belgium, there occurred a serious accident in which two spectators died. At a certain point, one of the competing cars careered across the course of the event, zigzagging from left to right, and in the process hit two spectators who later died of their injuries. The rally driver was charged with manslaughter by the prosecuting authorities. The District Criminal Court (Politie rechtbank) of Bruges held the driver to be not guilty. However, the prosecuting authorities appealed against this decision to the Criminal Court of First Instance (Correctionele Rechtbank).

The latter Court confirmed the original decision. It confirmed that taking part in a car race on a closed circuit does not dispense the pilot from his duty to take care in driving the car in question. In assessing whether the driver had observed the necessary standards of care, it needs to be established what would have been the conduct of a reasonably prudent, attentive and experienced driver. In making this assessment, the court needs to restrict itself to the facts as they arose in the case, disregarding for the purposes of the case the subsequent developments which occurred.

However, the Court also conceded that, in motor sports such as rallying, speed and the consequences which flow from this factor, such as the possibility that the driver may lose control over his steering wheel, constitute one of the spectator attractions, which means that the ordinary rules of the road traffic code relating to speed cannot apply here, and definitely not on a closed circuit. In racing events, the fact that a car may deviate from a bend or slip is a normal risk which is inherent in the competition, and does not in itself suffice to hold the driver liable. The first court was therefore justified in finding the accused not guilty (*Decision of 24/6/2005, [2006-7] Rechtskundig Weekblad p. 1132*).

Supreme Court fraud decision confirms awarding monopoly of judo federation (France)

In this case, a judo teacher, who held the Fifth Dan award, had, in several publications and on the Internet, presented himself as the holder of the Sixth Dan. The French Judo Federation thereupon brought charges against him before the District Criminal Court (tribunal correctionnel) on counts of fraudulent use of awards and misleading advertising. The Court issued the decision against the teacher, who appealed to the Rennes Court of Appeal. The latter set aside the

previous judgment. It held that the teacher had in fact been awarded the Sixth Dan by a committee constituted by the national association of Judo Teachers before the entry into effect of a 1999 Law which had attributed the power to award Dans solely to a specialist commission of the national judo federation. In addition, a Decree of 1993 which laid down the conditions for issuing certain titles in the martial arts, as well as several other executive instruments, had been annulled by the Supreme Administrative Court (Conseil d'Etat). The accused was not, therefore, guilty of fraudulent use and misleading advertising.

However, the Supreme Court (Cour de Cassation) disagreed. It held that the teacher in question had engaged in the disputed advertising after the entry into effect of the 1999 law, Article 2 of which expressly restricts the award of such martial arts titles to the specialist Judo Federation commission referred to earlier. This Law was an amendment to Article 17-2 of the 1984 Law on Sporting Activity. Therefore the Court of Appeal had misapplied this rule, which meant that the teacher had in fact been guilty of fraudulent use of titles and of misleading advertising. The Court accordingly set aside the Court of Appeal decision and ordered a retrial before a different Court of Appeal (*Decision of 10/10/2006, JCP-La Semaine Juridique of 14/3/2007, p. 45*).

"Off-field" crime

Woolmer death fiasco – murder case collapses (Jamaica)

Not only the reader of this journal, but anyone who has taken more than a token interest in the sport of cricket, will recall the stunning news that, the day after Pakistan had been knocked out of the 2007 World Cup, their coach, former England and Kent batsman Bob Woolmer, had been found dead in his Jamaica hotel. It will be recalled from the previous issue (*[2007] 1 Sport and the Law Journal p. 118*) that the coroner assigned to the case had arrived at the conclusion that Mr. Woolmer had met his death as a result of strangulation. Various theories had been put forward, from betting ring mafias to disgruntled supporters, and even religious fanatics. Indeed, at a certain point the police considered that they had a suspect, identified from security camera footage taken at Woolmer's hotel on the night the latter died. This was hailed as one of the two major breakthroughs in the case, the other being the long-awaited toxicology report showing that the victim was poisoned, with the intention of either knocking him out or killing him (*The Independent on Sunday of 22/4/2007, p. 52*).

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Nothing further was reported for a few weeks – indeed, the slow pace at which the inquiry was proceeding attracted much criticism and cast doubts on the competence of the investigators. However, during the second week of May, the Pakistan government stated that it expected to have a “conclusive” statement on the Woolmer death in around two weeks’ time (*The Guardian of 9/5/2007, p. S2*). News was indeed forthcoming within that period – but not of the kind anyone expected. Reports began to appear in the newspapers that the police would conclude that Mr. Woolmer was not in fact murdered but died from natural causes (*The Independent of 5/6/2007, p. 35*). Further reports to that effect appeared, but no official statement was forthcoming. Finally, however, Jamaican police confirmed that Woolmer, did die of natural cause. At a news conference in Kingston Jamaica, the commissioner of police, Lucius Thomas, said a review of the pathology by experts from Britain and elsewhere concurred that Woolmer had not been strangled (<http://edition.cnn.com of 12/6/2007>).

Naturally, the entire affair was bound to have several repercussions – including legal ones. In the first instance, amidst accusations of gross incompetence, the hunt started for the person or persons responsible for the entire fiasco. The finger was increasingly being pointed at Dr. Seshaiyah, the pathologist in charge of the post-mortem findings. His first assessment was inconclusive and did not support the theory that Mr. Woolmer had been strangled. Why, then, did he change his mind? Another figure who came in for heavy criticism was the leader of the investigation, former Scotland Yard detective Mark Shields, who appeared to be convinced of the murder theory at a very early stage in the investigation (*The Independent of 5/6/2007, loc. cit.*) This gave substance to the suspicion that Mr. Shields was sometimes a little too fond of the media limelight, and allowed this to influence the manner in which he discharged his responsibilities.

The news that no murder was involved aroused particularly strong feelings in Pakistan – and not only because the affair concerned their national coach. In the wake of Mr. Woolmer’s death, suspicion had fallen on members of the Pakistan team and their entourage, and both players and backroom staff were fingerprinted, swabbed for DNA and interviewed by police after the news broke (*The Daily Telegraph of 4/6/2007, p. S14*). Former Pakistan captain, turned politician, Imran Khan was particularly voluble in his criticism, which was directed not only against the public authorities but also against Sarfraz Nawaz, the former Pakistan fast bowler, who was one of the first to make allegations about the

Pakistan team’s involvement with the gambling industry, and had even gone so far as to suggest that the Pakistan World Cup matches were fixed. He accordingly suggested that the Pakistan cricket board should sue both the Jamaican police and Mr. Nawaz (*The Guardian of 6/6/2007, p. S9*). The Pakistan team spokesman, Pervez Jamil Mir, echoed these sentiments, and hinted strongly at legal action against the Jamaican police (*The Guardian of 9/6/2007, p. S12*).

Manchester City owner passes “fit and proper person” test – but faces criminal charges in Thailand

The past few years have seen a massive increase in the number of English premiership clubs under foreign ownership. Starting with the acquisition of Chelsea FC by Russian oil magnate Roman Abramovich, the list of clubs now owned by foreign nationals has grown considerably. However, doubts have sometimes arisen over the question whether these new owners’ background and activity made them suitable for such ownership. This is why the premier league has recently instituted a “fit and proper person” test, which bars any prospective owner if the latter have been convicted of a number of offences, including such “white-collar” crimes as fraud, false disclosure and tax evasion.

One of the clubs involved to have been thus acquired is Manchester City, which was recently taken over by the former Thai Prime Minister, Thaksin Shinawatra. Dr. Thaksin, who was ousted as a result of a coup in September 2006, also owned a telecom company called Shin Corp. Various doubts about his suitability began to arise even as his name was only being tentatively suggested as a potential buyer of the Eastlands club. It was learned in mid-June that Dr. Thaksin had assets worth £811 million frozen by the Thai Government (*The Daily Telegraph of 15/6/2007, B2*). This not only cast doubt on his ability to fund a potential £90 million take-over of the club, but also raised questions about his financial probity. These suspicions were strengthened a few weeks later, when it was learned that Thaksin had been ordered to return to Thailand in order to answer charges of failing to declare profits from the sale of his telecom company. It also emerged that he was facing allegations of tax evasion over a land sale in which he and his wife were involved in 2003. The Head of the Department of Special Investigation in Thailand even announced that he was considering making a request to the British government if Dr. Thaksin failed to return to Bangkok to face the charges (*The Daily Telegraph of 27/6/2007, p. S9*).

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It also emerged that Dr. Thaksin's reign as Prime Minister had been marred by accusations of human rights abuses. More particularly, it was being claimed that, when he declared war on the drug methamphetamine (crystal meth), some 3,000 people died during the "zero tolerance" three-month clean-up operation. Many claimed that death squads were in operation, and also pointed to 84 Muslim deaths at a mosque in the South of the country when the army quelled an uprising (*Daily Mail of 22/6/2007, p. 103*). In fact, the organisation Human Rights Watch called him a "human rights abuser of the worst kind" in a letter to the Premier League which challenged the former Thai ruler's ability to pass the "fit and proper person" test (*The Daily Telegraph of 1/8/2007, p. S7*). Manchester City, however, vigorously defended Dr. Thaksin, whom they described as the victim of a smear campaign by Thailand's new rulers, pointing out that he had been legitimately elected twice and had been ousted by a military putsch (*Ibid*).

The premier League have in the meantime announced that Dr. Thaksin does meet the "fit and proper person" test, pointing out that this criterion goes well beyond any requirement made by UK company law (*The Guardian of 1/8/2007, p. S5*). At the time of writing, it was not yet known whether Dr. Thaksin had in fact returned to Thailand to face the criminal charges referred to earlier.

Wrestler Benoit and family die in murder/suicide (US)

Chris Benoit was one of wrestling's best-known former champions, being known as the "Rabid Wolverine". It came as a massive shock to learn that, in late June 2007, he and his family were found dead in their Atlanta (Georgia) home, in what was subsequently confirmed as a murder/suicide bid (*The Guardian of 27/6/2007, p. 26*). That in itself was sufficiently shocking a development. However, one of the many questions surrounding this tragedy was whether body-building steroids may have played a part in it. This suspicion was fuelled by the revelation that detectives had found legally prescribed steroids in the house, with experts pointing to the recorded side-effects of body-building drugs, including depression, paranoia and bouts of unexplained violence called "roid rage".

Certainly Mr. Benoit's actions and behaviour during the previous few days were, to say the least, somewhat strange – to the point where the World Wrestling Entertainment corporation alerted police in Fayetteville, Georgia, to look into the former champion's welfare, when workers and friends received strange text

messages from him over that weekend, after he had cancelled two scheduled appearances because of what he described as a "family emergency". The messages included details of his home address and, bizarrely, where his guard dogs could be found. When the police did finally enter the house the following Monday, they found Mr. Benoit's body dangling from the wire and pulley of an exercise machine in his home gym. In another room, his wife Nancy and his seven-year-old son Daniel were also found dead, both victims being found with closed bibles beside them (*The Independent of 28/6/2007, p. 39*).

The suspicions that drugs were at least partially to blame seemed to harden into certainty when, several weeks later, the wrestler's regular doctor, Phil Astin, was charged with prescribing 10 months' worth of anabolic steroids to Mr. Benoit every three to four weeks between May 2006 and May 2007 (*The Observer of 8/7/2007, p. S11*). The outcome of these charges was not yet known at the time of publication.

Case against lacrosse players collapses (US)

It will be recalled from a previous issue of this Journal (*(2006) 1 Sport and the Law Journal p. 67*) that three students from the elite Duke University of Durham, North Carolina, had been accused of raping and kidnapping a black stripper hired to dance at a student lacrosse party, in what subsequently became a cause célèbre across the States, particularly in the Southern part of the country. The University in question is located in an area which has strong racial sensitivities. The fact that the lacrosse team is overwhelmingly white in an ethnically mixed University, and the alleged victim was black, sparked a crisis at the university and caused considerable division throughout the US.

This highly controversial cases came to a conclusion in mid-April 2007, when the three players were cleared of all charges. Delivering himself of the opinion that the case was the result of a "tragic rush to accuse", the North Carolina Attorney General, Roy Cooper, also issued a scathing condemnation of the District Attorney who had led the prosecution of the three students, saying that a 12-week investigation by his office had shown that there was insufficient evidence to proceed. Thus ended a 13-month saga which encapsulated many of the issues dividing present-day society in the US – race, sex, class and sport. Mr. Cooper went so far as to claim that the three accused – David Evans, Reade Seligman and Colin Finnerty – had been victims of what he described as a "rogue prosecutor" who had ignored numerous inconsistencies in the accuser's story, as well

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as a failure to find any DNA evidence or witnesses to support her account (*The Guardian of 12/4/2007, p. 19*).

The District Attorney in question, Mike Nifong, has in fact been charged with ethics violation for his handling of the case. He was also charged with withholding evidence from the three players' defence team, and lying to State Bar investigators. It also emerged that the accused DA had departed from official procedure in conducting a police line-up consisting only of the members of the team. This saga caused intense debate about the privileged status afforded to some student athletes, and highlighted the divisions between the elite and largely white Duke University and the city's poorer, largely black, North Carolina Central University at the which the accuser was a part-time student (*The Independent of 12/4/2007, p. 31*).

Kasparov arrested and fined for "public order offences" (Russia)

The former Grand Master, Garry Kasparov, followed up his glittering chess career by entering the political arena – more particularly as leader of the United Civil Front, which is part of the opposition coalition in the Russian parliament. In mid-April, Mr. Kasparov was arrested as police appeared to use excessive violence in breaking up a banned rally in the centre of Moscow. Many demonstrators were detained, and many more were beaten and kicked by riot police who had flooded into the nation's capital in order to crush the pro-democracy protest. Various journalists were also arrested. Yevgeny Gildeyev, a police spokesman, later stated that Mr. Kasparov had been detained on "suspicion of incitement". Since his retirement from professional chess in 2005, the former Grand Master has fiercely opposed the régime of Vladimir Putin for centralizing power in Russia, and destroying virtually all opposition voices. Fearful for his family's safety, he has moved the latter abroad (*The Sunday Times of 15/4/2007, p. 28*).

Several days later, the Kremlin issued a statement conceding that the police had "overreacted" at the rallies, but nevertheless summoned Kasparov for questioning over allegations of "extremism". In the meantime, the latter had been fined for public order offences. More particularly, the FSB (successor to the notorious KGB) was investigating whether he made calls for extremist action in a radio interview given before the rally, and in a newspaper (*The Guardian of 18/4/2007, p. 18*). The following month, an anti-Government demonstration had been scheduled to take place in Samara, on the borders of the river Volga. Although the demonstration was a lawful one, Mr.

Kasparov was prevented from travelling there, his passport and travel documents having been confiscated at Moscow airport. Various other opposition politicians shared this fate (*Le Figaro of 19/5/2007, p. 3*). This has not prevented the former chess champion from appearing at other rallies, including one in St Petersburg, for which he was joined by another prominent Putin critic, Eduard Limonov (*The Independent on Sunday of 10/6/2007, p. 22*).

American football star charged with staging dogfights

In mid-July 2007, it was learned that the career of Michael Vick, one of the major stars in the National Football League, was in the balance after he had been charged with operating an unlawful dog ring. According to an 18-page grand Jury indictment, Mr. Vick, assisted by three associates, ran their operation, known as the "Bad News Kennelz" from a house in South-eastern Virginia. Investigators found live fighting dogs, equipment used for dog fighting, a blood-stained carpet, as well as the remains of several animals. Apart from organizing the fights, which constitutes a crime in all but two of the States – Vick is said to have taken part in the killing of approximately eight dogs in April 2007 after they had performed badly in test fights. If found guilty, Mr. Vick could face up to six years in jail (*The Independent of 19/7/2007, p. 51*).

At the time of writing, the trial had yet to take place.

Boxer Camacho convicted for burglary (US)

In mid-June 2007, it was reported that eight-times world champion boxer Hector "Macho" Camacho had been sentenced to the maximum term of imprisonment, i.e. seven years, for burglary. However, the circuit judge in Biloxi, Mississippi, suspended six years of the sentence and ruled that Mr. Camacho could serve one year under house arrest if the authorities in Puerto Rico agreed to monitor him. This would be followed by two years' probation. In addition, the judge declined to hear a motion to dismiss a drugs charge brought in January 2005. Authorities maintained that they had found 10 pills of Ecstasy in a casino hotel room. Trial for this charge was set for a later date (*The Guardian of 13/6/2007, p. S2*).

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Mutual accusations of assault between John Daly and wife (US)

John Daly is a golfer whose turbulent private life has often given rise to adverse comment. More particularly his married life has never been of the most harmonious, and yet another example of this strife was in evidence in mid-June 2007, when he and his wife engaged in a bout of mutual allegations of perpetrating violence. When the former US Open winner appeared for the second round of the St Jude Championship in Memphis, he had red marks on his cheeks, which he alleged had been caused by his wife attacking him with a steak knife. He lodged a complaint arising from this incident with the Shelby County Sheriff's Office, although no criminal charges were filed. However, he has revived an earlier petition for divorce (*The Daily Telegraph of 13/6/2007, p. S14*).

However, his wife Sherrie hotly disputes this accusation, maintaining that Mr. Daly had in fact scratched his own face in an attempt to cover up a sexual assault on her, and sought a restraining order against her husband as well as temporary custody of their son. She claimed that she had been woken early one Friday morning by her drunken husband, who sexually assaulted her and caused unspecified injuries. She claims that she then called the police and took her children to a neighbour's house. These allegations have been denied by Daly (*Ibid*).

No further details are available at the time of writing.

Montgomery pleads guilty to fraud (US)

Tim Montgomery has hitherto figured in this Journal mainly in connection with his involvement in the BALCO doping scandal (Journals passim). However, his troubles with the authorities took on a new, and potentially even more serious, form in mid-April 2007. The former 100m world record holder pleaded guilty in connection with a multi-million bank fraud and money laundering scheme. He had been charged the previous year, together with 12 others, in an alleged conspiracy to deposit \$5 million in stolen, altered or counterfeit cheques over three years at several banks. Admittedly, the plea deal offered by Mr. Montgomery was said to reflect his minor role on the alleged conspiracy, and does not require him to testify at the trial of his former coach, Steven Riddick, and his co-defendants. However, he could still face a jail sentence as a result (*The Guardian of 10/4/2007, p. S14*). The trial had not yet been held at the time of writing.

Back to school for Nelson Piquet (Brazil)

Imagine Lennox Lewis being sent to self defence classes, and you get a measure of the weird situation in which the three-times Formula One champion Nelson Piquet found himself recently in his native Brazil. In early August 2007, he began a driving education course after having had his licence revoked for accumulating too many traffic infringements. Mr. Piquet lost his licence after having received a slew of speeding and parking tickets. His wife, Viviane, also had her licence removed for bad driving, and joined her husband in the compulsory driver awareness course. Mr. Piquet admitted that the coupe "had to pay" for their mistakes (*The Independent of 2/8/2007, p. 26*).

Antipodean Rugby league stars fall foul of the law (Australia/New Zealand)

The Australian National Rugby League has recently had its problems with some of the more wayward of its stars. Thus Sonny Bill Williams, the New Zealand loose forward who plays for the Sydney Bulldogs and is one of the best-known players in Australia, admitted to an alcohol problem after having been spotted urinating in the street by police shortly after leaving a Sydney nightclub, this being the third drink-related incident to involve him in the past 12 months. In 2006, he was banned from driving for five months (*The Guardian of 19/6/2007, p. 34*).

In a separate incident during the same period, Ben Roberts, another New Zealand international who also plays for the Bulldogs, was also charged with drink-driving, two weeks after he had been dropped from the side after breaking a team curfew after a game in Auckland, New Zealand. The Canberra raiders have also had their problems in this respect, in that their stand-off, Todd Carney, was sentenced to 200 hours' community service and banned from driving for 18 months after being found guilty of a series of offences in a high-speed police chase (*Ibid*).

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Harrison arrested in Spain (Mark II)

The former World Boxing Organisation featherweight champion Scott Harrison has a history of brushes with the forces of law and order, particularly in Spain. It will be recalled from a previous issue of this Journal (*[2007] 1 Sport and the Law Journal p. 89*) that the boxer, following his somewhat turbulent past in his home city of Glasgow, had been training in the south of Spain in preparation for the defence of his title in December 2006. Here too, however, his troubles continued, since he was arrested for having attacked a police officer. He spent 40 days in custody in Spain on that charge, before being conditionally released. However, in mid-May 2007 he was once again in trouble, having been held in custody for his alleged involvement in a fight which took place in a brothel. Three people were apparently injured in the fight (*The Guardian of 22/5/2007, p. S10*). No further details are available at the time of writing.

Football club president found murdered (Bulgaria)

In mid-May 2007, it was learned that a gunman had shot dead the president of a popular football club in the Bulgarian capital, Sofia. Alexander Tasev was the third president of Lokomotiv Plovdiv, who play in the Premier Division, to be murdered. He was shot twice whilst sitting in his car. His predecessor, Georgi Iliev, was murdered by a sniper two years previously, just months after another president, Nikolai Popov, was killed in the capital (*The Independent of 15/5/2007, p. 19*).

Miami Heat basketball player victim of aggravated burglary (US)

In mid-July 2007, the Miami Heat forward Antoine Walker was badly shaken after an armed robbery which took place at his home in Chicago. Both he and a relative were bound at gunpoint, whilst robbers took a car, cash and jewellery (*The Guardian of 13/7/2007, p. S2*).

Security issues

Australian hockey team withdraw from Lahore trophy

In late July 2007, it was learned that Olympic hockey champions Australia withdrew from the Champions Trophy because of "security fears" (*The Daily Telegraph of 26/7/2007, p. S17*). No further details are available at the time of writing.

Football fans die in stampede (Zambia)

In early June 2007, a stampede killed 12 football fans and injured a further 46 in Northern Zambia after an African Cup qualifying match. Spectators trampled each other as they rushed to leave the stadium in Chililabombwe, where Zambia defeated Congo Brazzaville 3-0. The cause for the stampede was not known, but one witness was reported as saying that members of the crowd, which was larger than the ground capacity, were running in order to catch the free buses (*The Independent of 4/6/2007, p. 31*). This has once again brought into sharp focus the issue of security at sporting grounds in certain countries.

Seven killed as drag racer hits crowd (US)

Concerns about the safety of "drag-racing" increased in mid-June 2007, as a result of an incident which saw seven people killed after a drag-racing car lost control and spun into spectators during a parade in Selmer, Tennessee. The crash happened during an "exhibition burnout", in which a driver spins a car's tyres to make them heat up and smoke. A video of the crash showed the car skidding off the road, with bodies flying into the air (*The Independent of 18/6/2007.p. 23*).

Other issues

Betonsports pleads guilty to infringing US racketeering laws

It will be recalled from a previous issue of this Journal (*[2006] 2 Sport and the Law Journal p. 91*) that the US authorities had commenced a crackdown on internet sports gambling, and in this endeavour had arrested executives from certain British-based companies. One of these firms to be most seriously affected was Betonsports, and in late May came the news that it had in fact pleaded guilty to federal racketeering in a deal aimed at settling a criminal prosecution for flouting the relevant US legislation. In an agreement announced by the US Department of Justice, Betonsports admitted a slew of felonies, including repeated mail and wire fraud,

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money laundering and illegal gaming. The company accordingly faces a fine of around £250,000. In addition, in a potentially controversial clause of the agreement, they have pledged to provide witnesses and information in order to assist the prosecution by the US Government of its former Chief Executive, David Carruthers (*The Guardian of 25/5/2007, p. 28*).

This plea by the British company has obviously been claimed as a massive victory by US opponents of online gambling. Leading republicans, including the President, regard this activity as immoral, as well as being an untaxed outflow of money from North America. At its peak, Betonsports took wagers from over 100,000 regular players, generating an annual revenue of over £800 million. However, its fortunes went into sharp decline after the arrest of its Chief Executive in Dallas. Betonsports is now in liquidation which, as its lawyer claimed, means that it is uncertain whether the company could in fact assist in Mr. Carruthers' prosecution. The company's settlement will enable its directors, including Lord Glentoran, a Conservative spokesman on Northern Ireland, to travel to the US without fear of arrest. In January of this year, the founders of the online payments firm Neteller were charged with money laundering (*Ibid*).

The outcome of this case will be reported in a future edition of this Journal.

Polish prisoners may build Euro 2012 stadiums

As is reported elsewhere in this issue (see below, p. 104), the decision by the European governing body in football, UEFA, to award the Euro 2012 tournament to Poland came as a major surprise, in view of the weight carried by some of the other contenders. In late June 2007, it emerged that the country's authorities are seriously considering the use of prisoners in order to build the stadiums which will be required for this event. This is in response to a nationwide labour shortage – approximately 200,000 construction workers have left the country since it joined the EU in 2004 (*The Daily Telegraph of 23/6/2007, p. 18*).

Illegal horse racing makes millions for Mafia (Italy)

Many regions in Italy have a tradition of holding horse races in city centres, such as the famous – or infamous, depending on one's viewpoint – annual Palio event in Siena. However, this type of racing is subject to various safeguards laid down in legislation, and it has emerged

that many races are now being organised which flatly infringe these rules. Worse still, it is estimated that the notorious mafia have involved themselves in this activity, and are earning more than £500 million per year from such illegal racing, which takes place in the streets of Sicily. These contests, in which the horses are frequently injured, are run over hard asphalt or slippery cobbles in cities such as Palermo, Catania and Siracuse (*The Daily Telegraph of 5/7/2007, p. 17*).

The police have attempted to put a stop to this activity, and last year a hippodrome full of horses, as well as 10,000 crates of performance-enhancing drugs, were seized by them. Nevertheless, they only succeeded in halting seven out of an estimated 300 races. In fact, experts have predicted that this number is set to rise. One particular jockey, who was suspected of being one of the Mafia's senior jockeys, described the races in the following terms:

"They start at dawn. Or sometimes at night, by the light of car headlights. The streets are closed. No-one can get through. Residents are warned by mobsters not to step outside with threats of violence. The course is about 400 metres long, sometimes 500. They look for streets on an incline so that the horses don't slip. But it's asphalt, and every once in a while a mess happens. Asphalt isn't good for horses. It damages their tendons. And in order to ease the pain [the organisers] drug them. But sometimes a horse has a bad fall and breaks some bones. Then the horse is shot" (*Ibid*).

The cruelty to the horses does not apparently end there, since angry punters sometimes stone the losing horse to death. One such dead horse was recently found on a beach near Catania. Profits from a single race can sometimes be as high as £35,000. Italy's Anti-Vivisection league recently released a report on such races, stating that the industry was "truly based on violence and exploitation" (*Ibid*).

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Media rights agreements

Academic articles on media rights agreements

In "The sale of rights to broadcast sporting events under EC law" ([2006] ISLJ 3/4 3-15), the author, EU law specialist Stephen Weatherill, considers EC law relating to the sale of rights to broadcast sporting events. Her reviews the constitutional background to this question, and examines the application of EC competition law, including the law on cartels, restrictive practices, the abuse of dominant position as well as private and public enforcement. He further discusses the economic background of sport and broadcasting, and comments on the prohibition of exclusive selling. He also assesses the collective sale of rights and collective purchasing (reviewed in [2007] 1 *European Current Law* p. 38).

In "Changes to TV contract and transfer rules" ([2007] 5 WSLR 12-13), the authors, David Monterossi and Alessia Bellomo, examine the recommendations made by the Italian Competition Authority report on the organisation and management of the Italian Football Association, the Football League and its clubs, as well as the efforts made by the Italian Government to make the Italian football industry more competitive. They focus on television broadcasting rights, including potential changes to law 78/1999 on Television Broadcasting Rights, which affirms the co-ownership of sports media rights by all clubs, and guarantees that new operators can enter the market. They also note changes made to the January transfer window (reviewed in [2006] 9 *European Current Law* p. 45).

In "The right to information and short reporting/short extracts with regard to sports" ([2006] 3/4 ISLJ 87) the author, Robert Siekmann, considers whether the NOS, being a Dutch joint national public broadcaster, had an enforceable preferential right in relation to the short reporting of Dutch premier League games under Article 7 of the Law on the Media. He considers the scope of the proposed Article 3b in the Draft EU Directive amending Council Directive 89/552 on the co-ordination of certain provisions concerning the pursuit of television broadcasting activities, and reproduces the text thereof (reviewed in [2007] 4 *European Current Law* p. 67).

Legal issues arising from transfer deals

[None]

Employment law

Toulouse to sue Thomas for touring with Wales (France)

The Welsh national rugby union side has had rather mixed fortunes ever since its sensational "grand slam" victory in the 2005 Six Nations tournament, and its preparations for the 2007 World Cup were not exactly given a boost by a comprehensive 31-0 defeat by the Wallabies in Brisbane in early June 2007. The side was captained by Gareth Thomas, who in recent years has been turning out for French club Toulouse. Although the Welshman was set to join Cardiff Blues later that summer, he was supposed to be assisting the French side in the final rounds of their national championship. This greatly offended the Toulouse management, who have threatened to sue Mr. Thomas for breach of contract. [The club's president, René Bouscatel, was particularly vituperative about Mr. Thomas, describing him as "ungrateful" (*The Independent* of 4/6/2007, p. 64).

At the time of writing, it was not yet clear whether or not the French side intended to carry out its threat.

"Child labour" controversy over Olympic goods

(See below, under heading "Sports policy, legislation and organisation" p.79)

Employment contract for sporting professionals extended to coaches (Belgium)

In late December 2006, a Royal Decree extended the scope of the Law of 1978 on contracts of employment for sporting professionals to football coaches whose remuneration exceeds the minimum prescribed in Article 2 of this Law ([2006-7] *Rechtskundig Weekblad* p. 1691).

Concern grows at alleged exploitation of young African footballers

There can be no doubt that the clubs of Western Europe have benefited greatly from the contribution made towards their fortunes by players from Africa.

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However, there appears to be an unhealthy side to this influx of African players, particularly those from the poorest countries of that continent. A recent investigation by a leading British newspaper (*The Observer of 10/6/2007, p. 39*) in the Ivory Coast found that Lebanese businessmen in Abidjan (Ivory Coast), an entrepreneurial community once preoccupied with diamond and timber smuggling, are turning their attention to football, establishing illegal training schools across the country in an attempt to farm the best talent out to some of the largest clubs of the Middle East and Europe. The children's parents and the youngsters themselves dream of success; however, it is a process of exploitation which is increasingly causing alarm amongst West African-based NGOs such as Save the Children and Caritas (*The Observer of 10/6/2007 p. 39*).

The desire to escape the poverty-stricken nations of this region is, of course, perfectly understandable. At the present time, 90 per cent of all child deaths in the world take place in 42 countries, 39 of which are in sub-Saharan Africa. The Ivory Coast, being the world's largest exporter of cocoa, and once a symbol of African economic triumph, is now one of the world's most unstable and violent nations. This and other dire conditions have made the country a breeding ground for exploitation and, with the success of their national team – notably during the 2006 World Cup – the centre of Africa's football trade. Each year, thousands of young players leave the Ivory Coast for teams abroad, some as young as 13. In an interview with a leading British newspaper (*The Observer, loc. cit.*), Mon Emmanuel, one of the first African footballers to play in Europe, alleged that at least 90 per cent of West African players leaving the region are doing so unlawfully, and most will end up on football's growing scrapheap.

Recently, Sepp Blatter, the head of football's world governing body FIFA, accused European clubs of "despicable" behaviour, in that they were increasingly conducting themselves as "neo-colonialists" who do not care about heritage and culture, but are instead engaging in "social and economic rape" of Africa (*Ibid*). It is to be hoped that Mr. Blatter will not restrict his campaigning on this issue to mere words.

One example of how this problem can be tackled came in the shape of a recent academic article on this subject ("Player trafficking in Belgium: analysis" [2006] 4 WSLR 6). The author, Dimitri Dedecker, examines the high levels of human trafficking of Third World footballers in Belgium before this abuse was, mostly, eliminated through political, judicial and public pressure. He explains how ineffective work permit requirements, as

well as the inadequate rules of the Belgian Football Association, which place no limit on the number of non-EU players in a team, made the Belgian football market highly attractive for the agents of such players. He highlights the abuse suffered by under-age players, particularly those from Africa, by their agents (*reviewed in [2007] 2 European Current Law p. 162*).

Academic articles on sporting employment law

In "Labour law, the provision of services, transfer rights and social dialogue in professional football in Europe" ([2006] 4 *E&SLJ*), the author, Robert Siekmann, criticises the use of contracts for services to supplement or replace contracts of employment between football clubs and players in Bulgaria. He considers whether the players' freedom of movement is being unduly restricted by the system of players' passes. He further examines the implications of contracts of service for industrial relations (*reviewed in [2006] 8 European Current Law p. 76*).

In "Unilateral option clauses in footballers' contracts of employment. An assessment from the perspective of international law arbitration" ([2007] 2 *ISLR 6-16*), the author, Wolfgang Portmann, discusses key features of unilateral option clauses in contracts of employment between footballers and their clubs, which give the employer the right to extend the contract by fixed periods, and explains the circumstances in which a player may be allowed to conclude an improved contract with another club on the grounds that the option is invalid. He also comments on the international aspects of such situations, the sports arbitration body having jurisdiction to hear cases involving international transfer certificates, the applicable law, and the role played by public policy considerations, with particular emphasis on Swiss law. He further considers the extent to which the relevant rules have mandatory international application (*reviewed in [2007] 3 European Current Law, p. 149*).

Trainee footballer legislation ruled contrary to EU law (France)

Article 23 of the Professional Football Charter (*charte du football professionnel*) in France imposes on any player, whenever his "young trainee" contract with a club expires, the obligation to conclude a professional footballer contract of employment with the club which provided his training, and prohibits him from making such a contract with any other club, regardless of whether it is affiliated to the French Football league or not. The Court of Appeal at Lyon (*Decision of 26/2/2007*,

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JCP-La Semaine Juridique of 18/7/2007, p. 50 ruled that this absolute prohibition is contrary to the principle of the free movement of workers within the EU as laid down in Article 39 of the EC treaty, as well as being contrary to not only the fundamental principle of the freedom to exercise one's professional activity, but also Article 120-2 of the Employment Code (Code du Travail)

Failure to register footballer's employment contract does not amount to breach of contract. French court decision

In the case under review (*Decision of 5/10/2006, JCP-La Semaine Juridique of 14/2/2007, p. 38*), the French Premier League club Paris St-Germain (PSG) employed a player called M. Yakin for a period of four years, commencing on 1/8/2003. A few days after this starting date, PSG concluded an agreement with the Basle (Switzerland) Football Club for the transfer of this player. Two weeks later, PSG informed Mr. Yakin that it had learned that the latter had undergone an urgent hernia operation, and reproved him for having misled the club as to his state of health and physical ability to compete at this level of football. Accordingly, the club, considering that the contract was affected by lack of consent, objected to the registration of this contract with the French football authorities, since, in their view, this contract had been deprived of its objective. Mr. Yakin, for his part, maintained that the club was fully aware of the state of his health in that, before signing the contract, he had undergone a medical examination by the club's medical department. Accordingly, he brought an action against PSG before the local industrial court (Conseil de prud'hommes), claiming that it had unilaterally terminated the contract. The Court dismissed his action, and Mr. Yakin applied to the Paris Court of Appeal.

The Labour Division of the Court of Appeal upheld the ruling of the first court. It pointed out that, under Article 254 of the Professional Football Charter referred to above, the contract of employment in question takes effect subject to the condition that the contract is registered with the football authorities; until such registration takes place, the contract is null and void – a fact which had been expressly brought to the player's attention. Accordingly, the contract between PSG and Yakin had not yet entered into effect, and could not therefore be breached by the other party. Moreover, the French football league had made registration of the contract conditional upon Mr. Yakin presenting a copy of either an acknowledgement of receipt of his application for a residence permit, or the residence permit itself accompanied by a work permit. The player had been informed of this also, by registered post, but had failed

to act upon it. Therefore, it was his failure to act which was at the origin of the non-registration of his contract.

Sailing federation is not subject to collective bargaining agreement on entertainment. French court decision

In the case under review, the French Sailing Federation (Fédération française de voile) had issued one of its secretaries with a redundancy notice on economic grounds. The secretary in question brought an action against the Federation, claiming back holiday pay and seniority bonuses under the collective agreement for the entertainment industry on the one hand, and compensation for unjustified dismissal on the other hand. The Court of Appeal dismissed the former claim but allowed the latter. On the issue of the back payments claimed, it ruled that the Federation was affiliated to the French Olympic Committee, which in turn is subject to the collective agreement on the sporting industry, and therefore not to the collective agreement relating to the entertainment sector. As to the claim for unjustified dismissal, the Court dismissed the Federation's arguments that it had met its redeployment obligations by attempting to establish whether a vacancy was available in terms of the tasks actually performed by the secretary. The Court held that this was not enough, and that the Federation should have offered her an available position (*Case No. 05-43 507 of 15/11/2006, JCP-La Semaine Juridique of 9/5/2007, p. 40*).

Sporting agencies

Israeli courts to adjudicate in Ben Haim/David Abu dispute

The ex-Bolton Israeli international who now plays for English Premiership club Chelsea, Tal Ben Haim, has for some considerable time now been locked in a bitter dispute with his former agent, David Abu. The latter is suing the international defender for £140,000 by way of alleged unpaid agency fees, as well as damages following an alleged fight between the agent and Emmanuel Ben Haim, Tal's father. This entire affair is further complicated by the fact that Mr. Abu is an unlicensed agent and, according to the rules set by the European governing body UEFA, cannot represent players. This dispute has now reached the Israeli courts.

In his writ, Mr. Abu is claiming that he represented Mr. Ben Haim in the summer of 2004 and brokered the deal to take him from Maccabi Tel Aviv to Bolton for £149,000. The transfer is said to be one of the 17

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currently under examination by the British authorities. Abu is claiming that, despite having been promised a percentage from the transfer deal by the player, he failed to receive any payments. He also claims that he was attacked by Ben Haim Sr. at the Israeli national team's hotel on the eve of their home fixture with Croatia in November 2006. Mr. Ben Haim Sr. does not deny the fight took place, but asserts that Abu was to blame for starting it (*The Guardian of 18/4/2007, p. S5*).

The central argument in the Ben Haims' case is that Mr. Abu had induced them into believing that he was a licensed agent by showing them fake documents, as well as hiding the fact that he was operating against the rules of the footballing authorities. They assert that, after the contract with Bolton had been signed, the player was invited to sign another contract with Jamie Hart, himself a licensed agent. They added that, in the agreement between Abu and Bolton, it had been stated that only Bolton would be responsible for Abu's agency fees. In addition, they are suing Abu for £37,500 after the latter had described the former as "liars and greedy", and that "no-one can stand them in England" (*Ibid*).

The outcome of the case was not yet known at the time of writing.

FIFA outline stringent new rules on agents' fees

The considerable sums paid to agents involved in multi-million pound transfer deals have been a matter of concern for the football authorities for some time, as previous issues of this Journal have amply testified. It now seems that the latter are now taking the problem very seriously, given that, in late May 2007, the Congress of the world governing body, FIFA, approved tough new proposals which will limit the middle men to a mere three per cent of any transaction. Describing the amounts paid to agents as "immoral", the organisation's president, Sepp Blatter, enjoined the clubs and players involved to show greater discipline in this matter (*The Daily Telegraph of 1/6/2007, p. S8*).

In addition, the agents' role will be defined much more clearly and the activities of unlicensed agents will be curtailed (*The Independent of 1/6/2007, p. 60*). If these proposals are approved, they could enter into effect at the beginning of next year. This news came as a report on football finance by accountants Deloitte revealed that the amount paid to agents by English Premier League and Football league clubs increased from £40 million in 2005 to £50 million the following year (*The Daily Telegraph of 1/6/2007, loc. cit*).

Academic articles on sponsorship agreements and related issues

In "The organisation of naming rights in the sporting world" (*Die Vergabe von Namensrechten im Sportbereich, [2007] 10 GRUR p. 814*), the author, Mirko Wittneben, examines the legal status and rules governing the so-called "naming rights" in German sport. This is the phenomenon whereby – as has happened in this country also – there is an increasing tendency for sporting stadiums and events to bear the name of the sponsor. The 2006 football World Cup bore eloquent testimony to this trend, featuring as it did grounds such as the Allianz Arena in Munich and the Commerzbank Arena in Frankfurt. The author passes under review the various legal issues that may arise from such arrangements, and makes a number of proposals where the relevant legislation could be updated and/or made more efficient.

In "Conflicts and some possible ways of resolving them in Europe" ([2006] 1/2 ISLJ 100) the author, well-known sports law specialist Ian Blackshaw, discusses the problem of conflicts with sponsorships and endorsements involving sporting performers. He reviews the various method of dealing with such conflicts, including (a) inserting restrictions in the standard contracts signed by FA Premier League players, (b) introducing restrictions in the French Charter of Professional Football, (c) the use of contractual and other legal rules in Germany, (d) the settlement of conflicts by the courts in the Netherlands, and (e) restrictions such as those imposed by the Norwegian Football Federation (*reviewed in [2007] 3 European Current Law p. 66*).

US appeals court decision throws FIFA sponsorship into disarray

It will be recalled from a previous issue of this Journal ([2006] 2 *Sport and the Law Journal p. 35*) that the world governing body in football, FIFA, has had its legal troubles with one of its main sponsors, Mastercard. These seem destined to continue, judging by the latest developments on the other side of the Atlantic. In late May 2007, a US court ruled that the world governing body must reconsider its decision to make it the official credit card sponsor for the coming two World Cups. The ruling in question came from the US Appeals Court, which instructed Judge Loretta Preska to review her original decision in Demeber 2006 to award the deal to Mastercard (*The Daily Telegraph of 28/5/2007, p. B1*).

This decision is a major victory for rival credit card group Visa, which has since signed a sponsorship deal with

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FIFA and has argued that it should be the one to sponsor the 2010 and 2014 tournaments. Previously, the organisation had also struck an agreement with Mastercard, and has since been taken to the US courts to determine which of the two agreements takes precedence (*Ibid*).

Other issues

Legal battle looms for America's Cup rivals

In late July 2007, it was learned that two multibillionaires – former collaborators turned bitter rivals – are gearing themselves up for a legal battle over the future of what is claimed to be the world's longest-running trophy in sport, to wit the America's Cup. San Francisco-based computer software chief attached to the Oracle company, Larry Ellison, through the Golden Gate Yacht Club, has brought an action in the New York Supreme Court claiming that the Swiss pharmaceuticals magnate Ernesto Bertarelli and the Société Nautique de Genève have infringed the terms of a deed of gift, written in 1887, which governs the competition.

In 2003, Mr. Bertarelli removed the Cup from New Zealand, and persuaded Mr. Ellison to support a new event protocol, which was supposed to bring the Cup into a new era. He then riled Mr. Ellison by arrogating to himself [consider adding "allegedly" before "unwelcome"] allegedly unwelcome levels of control before successfully defending the Cup in early July, against new Zealand in Valencia, Spain. The Swiss mogul then persuaded the Spanish challengers to hand over even more control. However, Mr. Ellison claimed that the Spanish challenge was illegal, and issued his own. He was ignored. He then requested the law firm of Latham and Watkins to ask the New York courts, which have jurisdiction because the original deed was written by the New York Yacht Club, to take action (*The Independent of 23/7/2007, p. 89*).

The outcome of this case was not yet known at the time of writing.

Legal debts push Marion Jones towards the edge of bankruptcy (US)

Five-times Olympic golden medallist Marion Jones is no newcomer to these columns, in view of the various allegations made against her in the infamous BALCO doping scandal (Journals *passim*). These various accusations have compelled her to seek legal assistance on several occasions, to the point that the fees and related costs involved have pushed her into the red. According to recent court records her bank balance is currently as low as £1,000. This is on top of the news that she is facing a court judgment made against her, and awarded to, her former coach, which will require her to pay around £120,000. This represents a tragic turnaround in the fortunes of someone who was once regarded as the "golden girl" of athletics, who could command several multi-million endorsement contracts (*The Independent of 26/6/2007, p. 45*).

Ms. Jones's financial difficulties were revealed in a 168-page deposition in a breach-of-contract action brought in Dallas against the track coach, Dan Pfaff. The latter countersued and was awarded a decision against Ms. Jones for approximately \$240,000 by way of unpaid training fees and legal expenses. In fact, as was mentioned earlier, legal costs have plagued Ms. Jones since 2003, when unproven allegations of drug use emerged, and she was linked to the activities of the Bay Area Laboratory Co-operative (Balco) following a raid by federal forces. Ms. Jones retained attorneys for her Balco Grand Jury testimony, for negotiations with the US Anti-Doping Agency (USADA) in her campaign to avoid being banned from competitions, for an action in defamation which she brought against Balco founder Victor Conte, who accused her of taking performance-enhancing drugs, and for her action against Pfaff referred to above.

Her financial plight was made worse by the fact that, for a long while, she was unable to compete in events after she had initially tested positive for the drug EPO. Although she was subsequently cleared when a back-up sample tested negative, she forfeited an estimated \$300,000 in appearance and performance fees (*Ibid*).

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Sporting injuries

Academic article on liability for sporting injury

In "Liability for professional athletes' injuries: a comparative analysis" ([2006] 1 JCLI internet), the author, M. James, compares the approaches in England and France to the recovery of damages for injuries sustained while playing sport. He also comments on the increasingly international outlook of sport, which had resulted in a higher level of player migration. He considers the increasing use of the law by sporting performers for the purpose of regulating sporting relationships. He reviews actions in negligence for sporting injuries in England and France, and assesses the need for a harmonised approach to sporting negligence (reviewed in [2006]11 European Current Law p. 233).

Victim of sailing accident fails in action for damages. Netherlands court decision

In the case under review, the action was brought against the students association of the Hotel Management School in Leeuwarden, The Netherlands. The claimant was a member of the Water Sports Committee, and thus was one of the organisers of a summer sailing weekend. During that weekend, one of the boats involved in the event, the Aqua Rose, was sailing towards a harbour with some 25 people on board. The passengers made the boat rock to such an extent that it nearly overturned. At a certain point, the motor cut out, and the claimant went to investigate. Before he was able to open the hatch in the cockpit, there occurred an explosion accompanied by a jet flame. This caused severe burn wounds to the claimant, who brought an action against the students' association alleging that the latter was liable for the loss incurred by him. The first court dismissed the action, and the claimant appealed.

The Supreme Court (Hoge Raad) confirmed the original decision. It ruled that, insofar as it could be accepted that inadequate supervision had been exercised over the event, the standard of care which was this infringed does not protect the claimant, since he himself, as one of the organisers of the sailing weekend, had failed to comply with this standard. The fact that the claimant was only one of the committee members, and as such was not exclusively responsible for exercising total supervision, does not detract from the first court's ruling that the Association was not liable, since in the absence of any evidence to the contrary the court had no reason to suppose that the claimant, as a member of

the committee, was not vested, in addition to the other members of the Committee, with the full responsibility for exercising the required supervision, or that no blame attached to him for failing to exercise this supervision (*Decision of 23/2/2007, vase CO5/27OHR, [2007] Nederlands Juristenblad p. 625*).

No liability in action resulting from paintball accident involving minors (France)

This case concerned a paintball event in which a minor suffered serious injuries to his face. The victim had removed his protective mask during the game and, because of his defective vision had been injured by a missile thrown by another minor player. The parents of the victim in question brought an action in negligence against the organiser of the event, and the matter landed before the Court of Appeal of Metz.

The Court ruled that the organisers could not be held liable for the injury suffered by the victim. On the one hand, they had complied with their obligations in such matters by issuing the children concerned equipment which was suitable and free from any defect. The fact that there was mud on the masks, which reduced the players' vision, should not cause the victim to remove it, since the relevant rules did not provide for any exception to the requirement that the mask be worn. The organiser had warned the participants of the possibility that this might happen, and the rules laid down that, in such cases, the participant in question should proceed to a designated area in order to remove the mask and clean it. On the other hand, the organisers had met their obligation to safeguard their well-being, not by supervising the playing area, which would be incompatible with the specific characteristics of the sport, but by drawing their attention to the relevant rules and the safety requirements. This obligation had definitely been complied with since the organisers had issued these warnings verbally to the players, and had required them to sign a written document specifically setting out these safety requirements. The organisers had not committed any negligent act which had contributed towards the injury.

As for the perpetrator of the injury, the Court held that, although under the rules on vicarious liability set out in Article 1384(4) of the Civil Code, his parents were liable in principle for the acts committed by their minor children which causes loss to third parties, they were exempted from such liability because the victim had committed an act of negligence which had caused his loss. The minor in question had injured the victim by hurling a missile to his face, causing him a serious injury to his eye. The

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victim had been injured had been injured having removed his protective, even though the safety instructions required the players to wear them as long as they found themselves in the playing area. These rules had made no provision for any exceptions, not even for the presence of mud on the mask. If such a circumstance arose, the relevant instructions required the participants to repair to a designated area in order to remove and clean the mask. The wearing of the mask was, moreover, compulsory during the entire game, even to the extent that, if the player considered that the game was over, he had to obtain confirmation of this fact from his fellow players before removing the mask. Therefore, the victim had committed a negligent act which was the sole cause of his injury. Therefore, the action in vicarious liability against his parents should fail (*Decision of 23/5/2006, JCP-La Semaine Juridique of 11/12/2006, 265*).

More French skiing accident decisions

In the first case under review, the Court of Appeal in Grenoble ruled that a skier and his skis constitute a whole, and the skier's movements depend narrowly on his skis, so that even if it is only his body that collides with a third party, it is the skis which were the instrument causing the loss, and it is the rules on liability for things under one's control which become applicable. As a result, in the absence of any contributory negligence on the victim's part, the skier which is responsible for his skis, the speed of which was at the origin of the damage, is the person who is bound to compensate in full the loss suffered by the other skier with whom he collided (*Decision of 5/12/2006, JCP-La Semaine Juridique of 4/7/2007, p. 55*).

In the second decision, the accident in question had been caused whilst a number of skiers were using a chair lift. The victim had proceeded towards the boarding area but, seeing that his son had jammed his ski sticks in the gate, he turned back in order to help him. He was then hit by one of the chairs on the chair lift, since the apparatus was still moving. The employee responsible for supervising the boarding operations had conducted himself in a diligent and efficient manner by immediately helping the child to disentangle itself even before the father had started to intervene. There was therefore no reason to stop the chairlift. Therefore, it was the victim's negligence which was the exclusive cause of the loss, since he placed himself on the track along which the chairs were moving, thus taking up a position which was dangerous and unforeseeable by the employee. His action for damages was therefore dismissed by the Court of Appeal in Chambéry (*Decision of 9/1/2007, JCP-La Semaine Juridique of 20/3/2007, p. 65*).

Libel and defamation issues

[None]

Insurance

Victim of skiing accident unsuccessful in claim under company accident insurance (Germany)

In the case under review, the claimant was an employee who was insured against accident with a professional association. During a skiing trip to Italy, organised by the sports club of the company with whom she was employed, she became injured whilst skiing, sustaining a fracture of the ankle and foot. She claimed compensation under the accident insurance scheme. Both the Industrial Court and the Industrial Court of Appeal having dismissed the action, she applied to the Supreme Industrial Court (*Bundessozialgericht*).

The Supreme Court confirmed the first to decisions. It ruled that, for the accident insurance to apply, events organised by company sports clubs must meet the following conditions (a) they must be purely for relaxation, and not for competitive purposes, (b) they must take place on a regular basis, (c) they must be essentially be confined to company employees, (d) their timing and duration must be related to the company's normal activity, and (e) the sport in question must have been organised in connection with the company's normal business. These conditions were not fulfilled in this case. (*Decision of 13/12/2005, [2007] 6 Neue Juristische Wochenschrift p. 399*).

Victim of cycling accident and organiser of the event held jointly liable. French court decision

In this case, a cyclist had been the victim of a fatal traffic accident as he was taking part in a cycling tour organised by, amongst others, a sporting association. The insurer of the car driver who caused the death was required to pay compensation in full to the victim's heirs. The insurer then sought to recover this amount from both the sporting association and the victim's heirs.

The Court of Appeal at Angers ruled that this action for recovery could only be based on Article 1382 of the French Civil Code, which regulates tort liability, and not on any provisions of the law of contracts, since the

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victim's heirs had no contractual link with the organising association. Given the importance of the cycling event, as well as the level of participation of the association, which clearly constituted a good deal more than the mere provision of logistical support and thus definitely amounted to actual collaboration, it is necessary to regard that association as a joint organiser of the event. However, the negligence ascribed to the latter – in terms of absence of any training of, and information to, the supervisors, absence of any co-ordination during the event – merely constituted a secondary cause of the accident, since the victim had been extremely negligent in riding onto a crossroads to which access was prohibited, and had done so without taking any precaution or visibility. Therefore, the liability of the association should be restricted to 20 per cent of the total amount (*Decision of 17/1/2006, JCP-La Semaine Juridique of 14/11/2006, p. 325*).

Other issues

Netherlands Supreme Court holds car-racing federation liable for cancellation of go-kart competition

In the Netherlands, the organisation and control of go-kart racing is regulated and monitored by the Royal Car-racing Federation (KNAF). This federation has a section dealing with go-kart racing, which issued the claimants in this case with licences to take part in a major international cup tournament in Venray. The registration form had the KNAF logo on it, and the event itself was organised by the "Kart Club Noord Nederland". The KNAF prescribed the use of Bridgestone tyres for this event; however, the operator of the racing track already had a contract with an importer of Maxxis tyres. As a result, the event was cancelled. The would-be participants in this event brought an action for damages against the KNAF because of the expenses which they had incurred in preparation for this event.

The action was based on two legal grounds: unsatisfactory performance and, in the alternative, on negligence. The first court, followed by the Court of Appeal dismissed the first ground. However, the first court awarded the action to the claimants on the alternative ground, on the basis that, inter alia, the contract for the hiring of the track had been concluded by the KNAF. The latter appealed against this decision. The Court of Appeal merely allowed the claimants to provide evidence that the hiring agreement had been concluded by the KNAF. However, it awarded the action to the appellants, stating that the claimants had not

succeeded in providing such evidence. The claimants applied to the Supreme Court (Hoge Raad).

The Supreme Court disagreed with the Court of Appeal decision. It ruled that the Court of Appeal had been wrong to narrow the issue of negligence down to the question whether or not the KNAF had concluded the hiring agreement, even though the claimants had based their negligence claim on broader grounds, which related to the close involvement by the KNAF in the organisation of the race. The KNAF had argued that because the claimants had failed to challenge the narrow formulation of the alternative plea this precluded them from broadening the basis of their action. The Court disagreed, stating that the claimants were perfectly entitled to broaden this basis without needing expressly to make this challenge. The Court went on to state that, even if the KNAF had not concluded the hire agreement, there were other grounds for accepting that it had acted negligently.

The Court accordingly set aside the Court of Appeal decision, and directed that it be referred to a different court of the same rank (*Decision of 6/4/2007, [2007] Nederlands Juristenblad p. 1067*).

The liability of football clubs for crowd disturbances and racialism. German academic article

The measures taken against football clubs whose supporters and/or spectators engage in violent disturbances or racist insults are well documented, both in this country and abroad. However, the tort liability of such clubs is an area which is as yet relatively unexplored. This issue has recently been examined in depth by a German author in a recently-published article (Weller, M-P, "Die Haftung von Fußballvereinen für Randalen und Rassismus", in: [2007] 14 Neue Juristische Wochenschrift p. 960). His conclusions are as follows:

where crowd disturbances result in material loss, the hosting club will be liable for damages under the ordinary rules of tort liability (Haftung), where the latter had failed to comply with such safety and protective measure as it is required to observe for mass spectator events, and this failure was one of the contributory factors in causing the loss.

Under existing employment legislation, football clubs must protect the players whom they employ against racist spectators inasmuch as it is possible for them to do so in fact and in law. Should they fail to meet this obligation, they should be entitled to compensation and,

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according to some, also to immaterial damages.

Racialism can be countered not only through employment legislation, but also on the basis of a general duty to provide safe premises.

The hosting club is subject to a general obligation to take appropriate measures against racism by virtue of its duty to provide a safe environment in a way which protects the player's general personality rights. This protection also covers the players of the opposing team/ Where the club fails to meet this obligation, and this failure is one of the contributory causes towards racist behaviour, any player whose personality rights have thereby been seriously infringed, will have an action in tort against the club in question.

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Sports policy, legislation and organisation

Chinese checkers: praise for Beijing Games organisation, flak for its host's politics

IOC "overwhelmed" at progress in building programme....

There is a familiar pattern developing among those bodies and individuals who monitor the progress towards the Beijing Games scheduled for 2008, both in their official and unofficial capacity. The country playing host to next year's Olympics attracts praise for the material aspects of its organisation, but increasingly voluble criticism for its policies, both domestic and foreign, which have a direct and indirect bearing on the success of this major sporting jamboree. This pattern has been faithfully repeated during the period under review.

Certainly the material side of the entire operation appears to have progressed at an astounding pace. With a little over 500 days to go before the opening ceremony is due, the International Olympic Committee (IOC) made a discovery almost unprecedented in its history – to wit, that everything is being built on time. Rather than the empty construction sites and tales of bureaucratic woe which usually greet them, the Olympic chiefs were astounded at the speed with which the venues have risen from the ground for the 2008 games. In addition, the country's reputation for putting speed ahead of style in its building projects also receded, IOC member Hein Verbruggen pronouncing himself "overwhelmed" on beholding such venues as the National Stadium, where the opening and closing ceremonies and the athletics events will be held. It has been nicknamed the "Bird's Nest", because of the striking design of interlocking girders (*The Sunday Telegraph of 29/4/2007, p. 32*).

The organisers and local officials also won praise for their combined efforts to tackle the spiralling pollution problems in the host city, as China's rapid economic growth places its environment under ever greater strain. They are experimenting with several contingency plans to reduce air pollution, including pulling a million cars off the streets, a strategy which could be in place next year if it proves successful (*The Guardian of 7/7/2007, p. 36*). The hosts are also putting much effort into cleaning up the city's image – almost literally in the case of its increasingly strict campaign against spitting. It fined many people for engaging in this unhygienic practice when inspection teams from Beijing's management department and civilisation promotion office visited major tourist areas such as Tiananmen Square in order to monitor this habit. The officials also handed 10,000

rubbish bags to tourists in the same spirit (*The Guardian of 8/5/2007, p. 21*).

In a further bid to bolster its health and safety image, by declaring the Olympics in 2008 a smoke-free zone (*The Daily Telegraph of 31/5/2007, p. 23*). Unhygienic taxis should also be a thing of the past, with the Beijing publishing a 12-point code of conduct aimed at compelling the relevant taxi drivers to clean up their act and vehicle – or face a two-day suspension (*The Daily Telegraph of 19/4/2007, p. 17*). The all-conquering authorities even believe that they can defeat the weather gods as well and ensure blue skies throughout the event. Chinese meteorologists are reported to be preparing one of mankind's greatest-ever assaults on the heavens during the period covered by the Olympics – being August, which is the month in which the capital receives almost half its annual rainfall. Two satellites have been launched to monitor the movements of threatening clouds. The country's fastest supercomputer will then process data, while hundreds of meteorologists and security staff are being trained to shoot down cumulonimbus targets (*The Guardian of 12/5/2007, p. 8*).

...but accusations of human rights violations continue

Various issues of this Journal have already related the concern that has been felt, both before and after Beijing was awarded the 2008 Games, at the country's record on human rights, particularly where these have been associated directly or indirectly with this major sporting event, as well as the manner in which those protesting internally at this dismal record have been treated. With the 2008 Games now well in sight, human rights groups have continued to criticise the crackdown by the authorities on domestic human rights activists, as well as the continued use of laoiao, or "re-education through labour" programmes, and other forms of detention without trial.

Activists have also attacked the manner in which people have been compelled to leave their homes in traditional hutong laneways in order to make way for Olympic developments, often without receiving adequate compensation. In addition, they are maintaining that Beijing has failed to meet its promises on ensuring media freedom. The human rights organisation Amnesty International states that, whilst positive steps have been made in some limited areas, more particularly in terms of reforming the death penalty system and greater reporting freedom for journalists in China, it remained concerned as these developments were being overshadowed by other negative trends. More especially it claimed that:

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“the image of the Olympics continues to be tarnished by ongoing reports of the “house arrest”, torture or unfair trial of Chinese activists and the extension of systems for detention without trial in Beijing as part of the city’s “clean-up” ahead of August 2008” (The Independent of 7/8/2007, p. 23).

Also recently, the Foreign Correspondents Club of China released a survey which claimed that the government continued to harass reporters and had failed to meet its promise of total media freedom. Robert Ménard, the Secretary-General of Reporters Without Borders, claims that the authorities “have kidnapped these Games” (*Ibid*). However, lord Coe, who heads the 2012 London Games project, firmly believes that the 2008 Games are proving to be a “catalyst for change” which is already apparent (*The Independent of 4/8/2007, p. 61*).

Child exploitation controversies damage Games image

The Beijing 2008 image has also been dented by allegations that Chinese children have been mercilessly exploited in various ways during the run-up to the Games.

In mid-June 2007, there appeared a report which claimed that children as young as 12 were being employed to make officially licensed products for next year’s Games. This message came from no lesser source than Chen Feng, the deputy director of marketing for the Beijing Olympics, who has summoned four manufacturers to answer charges of labour law infringements in the production of Olympic goods (*The Independent of 14/6/2007, p. 51*).

The report in question, entitled “No Medal for the Olympics on Labour Rights”, claims that four factories located in Southern China infringed national employment law on child labour, overtime pay and minimum wages in order to produce souvenirs for the 2008 sporting jamboree. The four in question concede that they operated under Olympic contracts, but denied the charges made in the report, which was published by the Brussels-based PlayFair 2008 organisation. The report also alleges that the Beijing organisers – as well as the IOC – are doing little to guarantee ethical working conditions in the manufacture of official products which will bear the Olympic logo (*Ibid*).

Even more serious was the case of eight-year-old Zhang Huimin, perhaps the most extreme example of the fervour for sporting success sweeping China during the run-up to the Games. Standing only over 4 ft tall, and barely over 3st in weight, she looks tiny and fragile. For some she represents the Olympic spirit of

determination to succeed against all the odds; to others she incarnates a kind of mania which may end in disaster. Her daily routine is a punishing half-marathon run at dawn, before going to school, doing her homework when she returns, and training with makeshift weights before retiring to bed. Her ambition is to win a gold medal at the 2016 Olympics, the first for which she would be old enough to qualify (*The Observer of 5/8/2007, p. 35*).

However, concern has arisen about the effects this schedule has on her health. Hong Kong-based sports doctor Patrick Yung, who is affiliated to the International Federation of Sports Medicine and the Hong Kong Sports institute, has expressed his worry that she will burn out – or worse – long before she has a chance to compete at that level. He stated:

“When you start to train as a kid, the problem will be over-use injuries which can affect the musculo-skeletal system, like bone, soft tissue, ligaments and muscles. As she is still growing, her plates may become affected and she could even end up with one leg longer than the other. When she gets to 10 or 11, she should start to menstruate, but long-term intensive training will affect her menarche, so that will be an immediate problem in two or three years’ time” (Ibid).

Although it should be stressed that young Huimin is in no way being coerced into these routines by any official Chinese body, there are some who are concerned that the authorities may be less than vigilant in the way in which they monitor vulnerable young athletes such as she. (The concern shown by the Indian authorities over the case of Budhia Singh, as related below (p.83), appears to betoken a greater awareness in this regard than is on display in China).

Now China’s foreign policy also comes under attack

It is not only on the internal front that China’s Olympic effort is being marred by political factors. In late April 2007, officials of Beijing 2008 and the IOC faced fresh accusations of endorsing the country’s controversial policies – this time over the civil war in Sudan. In what must rank as one of the more bizarre stories to affect the image of the Games, IOC president Jacques Rogge was compelled to field some awkward questions on the Chinese Government’s continued support for the Sudanese Government, in spite of the atrocities which were being committed in the Darfur region. The issue came particularly to a head when the Hollywood actress, Mia Farrow (who is a United Nations Goodwill Ambassador) began a campaign aimed at putting pressure on the IOC over Darfur by labelling the Beijing Olympics as the “Genocide Games”.

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In particular, Ms. Farrow targeted Steven Spielberg, the world-famous film director, who is operating as an artistic advisor to China for the Games, warning him that he risked becoming the “Leni Riefenstahl of the Beijing Games”. Mr. Spielberg responded by writing to Chinese president Hu Jintao, condemning the killings and requesting the Beijing government to use its influence in Sudan to persuade them to allow access to a UN peacekeeping force. The Chinese have considerable oil interests in Sudan and supply weapons to the African state, where 200,000 people have died and a further 2.5 million have been displaced during the violence. However, in a sudden shift shortly after this intervention, the Chinese government despatched a senior official to Darfur for a tour of refugee camps, and in order to press the Sudan government into making concessions over their refusal to admit the UN force. The Chinese deny that the Olympics or Mia Farrow had any part in this, but the issue once again highlighted the sensitivities which the IOC and China are continuing to face over this issue (*The Daily Telegraph of 26/4/2007, p. 12*).

Several weeks later, China’s Foreign Ministry announced the appointment of a new special representative to Africa and confirmed plans to send 275 military engineers for UN peacekeeping operations. This followed an open letter by 108 US Congressmen warning that the 2008 Olympics could be disastrously marred by protests if there was no change in the host nation’s position (*The Guardian of 11/5/2007, p. 11*).

Other bids for major sporting events

Sochi wins right to host 2014 Winter Games

Although less prominent and newsworthy, the race for the four-yearly Winter Olympic Games can be just as intense and competitive as it is for the “general” Games, and the 2014 has been no exception. Several free-spending bids were submitted, from Sochi (Russia), Pyeong Chang (South Korea) and Salzburg (Austria) (*The Guardian of 11/5/2007, p. S2*). In the event, it was the Russian resort which clinched it, by the very narrow margin of four votes. This was the second time that Pyeong Chang had lost out, having been edged out by Vancouver in 2003 for the 2010 Games. It appears that the presence of Russian president Vladimir Putin at the voting session had been a vital element in the Russian win. The Pyeong Chang development director, Jeon Yong-Kwan, described the decision as being “stabbed in the back” (*The Independent of 6/7/2007, p. 56*).

Race hots up for right to stage 2014 Commonwealth Games

Two bids were officially submitted by the time the deadline for applications had expired, i.e. from Glasgow and from Abuja (Nigeria). The two bids seem quite evenly matched, although it is thought in some quarters that the continuing human rights problems besetting Nigeria – including the discrimination against gay people which is inherent in the country’s legislation – may count against the latter bid (*The Guardian of 17/5/2007, p. S8*).

Azerbaijan applies for 2016 Olympics

In mid-April 2007, it was learned that the former Soviet republic of Azerbaijan has submitted a bid to host the 2016 Olympics. The country’s president Ilham Aliiev, considers this a viable proposition in view of the “growing economic might” which is currently in evidence. He stated that Azerbaijan, which has abundant oil and gas resources from the Caspian Sea, has built 11 Olympic-standard sports facilities since 2000 (*The Daily Telegraph of 10/4/2007, p. S10*).

World heritage status plea for bullfighting – despite growing opposition and safety concerns (Spain – Mexico)

At the risk of tedium, the present author would stress that the only occasions on which the barbarous pastime of bullfighting makes it in these columns is when its status and/or legitimacy as a “sport” is under challenge or discussion. Previous issues of this Journal have focused on attempts to have this practice banned and consigned to the history books. However, it would seem that the proponents of bullfighting are currently staging a fightback. The Peruvian novelist Mario Vargas Llosa and the Spanish actress Paz Vega are just two of the many high-profile names heading a campaign to convince UNESCO to class bullfighting as part of Spain’s national heritage.

The pro-bullfighting Platform for the Defence of the Fiesta Nacional are hoping that, if UNESCO grants it this status, this may protect it from future attempts by opponents who are seeking to have it outlawed, and give it a badly needed financial boost after years of declining popularity in Spain. Other well-known figures associated with the campaign include the songwriter Joaquin Sabina and the dramatist Albert Boadella. The campaign claims to have 1,300 supporters in Spain and its directors believe that it will have 5,000 members by the end of the year (*The Independent of 27/4/2007, p. 29*).

However, the move to give bullfighting a status which is equal to that of buildings such as Antonio Gaudi’s unfinished Sagrada Familia in Barcelona, or the

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Alhambra palace in Granada has provoked strong opposition from the anti-bullfighting lobby. They point not only to the declining popularity of this pastime in Spain, but also to mounting political moves within Spain against what is still regarded there as a sport, but attracts widespread condemnation from outside the country. Recently, a "written declaration" against bullfighting was signed by some 200 members of the European parliament, including many from the UK. In Spain itself, Barcelona has declared itself to be "anti-bullfighting" in 2004. The last bullring in the Catalan capital is scheduled to close after this season for want of spectators. The city's other two bullrings have already closed their doors (*Ibid*).

Such opposition is likely to grow following incidents which highlight the extreme dangers of this "sport". Thus in Latin America, where this practice is also engaged in for the gratification of the paying public, there has recently arisen a craze for child bullfighters. One of these youngsters, 14-year-old Jairo Miguel, was recently gored in the thorax and had his lung punctured by a 900lb bull in Mexico City during a corrida. The bull had lifted the slightly built teenager into the air and carried him several yards on one of his horns during the event. At least in Spain, there is a ban on child matadors, but this does not apply in South America. Miguel had in fact sought to evade this ban by operating in Mexico – in fact, this is a trend which has been noticeable for some time in the increasingly competitive world of los toros. This habit has also been attacked by anti-bullfighting groups, doctors and child protection organisations as grossly irresponsible. Dr Luis Romero, the surgeon who treated the unfortunate Miguel, pronounced the boy fortunate to survive, saying that if the four-inch cut had been one inch closer to his heart, this might have been a "catastrophe" (*The Independent of 18/4/2007, p. 29*).

Croatian Law on the regulation of sport and sporting activities passed

In June 2006, the Croatian Parliament adopted this legislation, which regulates all aspects of sporting activity, including funding and monitoring (*Law of 9/6/2006, reported in [2006] 8 European Current Law 195*). The fundamental principle behind this Law is that sport is voluntary and must be available to all, regardless of age, race, gender, faith, nationality, social position, political or any other opinion. Strengthening the development of sport is undertaken by the setting up and maintenance of sporting establishments, the promotion of sporting education, the taking of scientific initiatives and the stimulation of partnerships between governmental and

non-governmental organisations, as well as funding by the state and by local and regional units. The National Sport programme is a document which defines the goals of sporting development, and lists those activities which are necessary for the achievement of these goals. The Programme is adopted for a period of eight years and contains three subprogrammes, to wit a programme setting down conditions for the development of sport in schools, a programme establishing conditions aimed at achieving optimal results for Croatian sporting performers in international competitions and a programme laying down conditions for recreation activities with the aim of improving the health of citizens. The programme also identifies the relevant public authorities, local and regional units of self-government, national sporting unions and sporting associations. The Ministry of Sport will provide the funds for realising the National Sporting Programme, and the main institution charged with developing the quality of sport is the National Sports Council.

Irish Sports Campus Act adopted

In early July 2006, the Irish Parliament adopted the National Sports Campus Development Act ([2006] Irish Law Times 66). No further details are available at the time of writing.

Environmental issues

Eastwood defeated over golf course plan by coastal commission (US)

Clint Eastwood may – at least on the film set – have defeated scores of gun-wielding desperadoes and wrongdoers. However, during the summer of this year he proved that he is no match for the California Coastal Commission, its members having voted, by eight to four, to reject a bid from the world-famous actor and other celebrity investors to build a golf course in an area of protected forest on the Monterey peninsula. Executing the plan would have meant felling up to 18,000 trees, including 15,000 of the locality's signature species, the Monterey pine. Mr. Eastwood is the owner of the Pebble Beach Company, which operates five golf courses in the area. The proposed 18-hole golf course would have made it the ninth on the peninsula, one of the world's finest golf locations, with cliff-top holes overlooking the Pacific. Pebble Beach's investors include Tiger Woods, whilst actors such as Bill Murray are among those paying \$475 to play at the famous Pebble Beach Golf Links, founded in 1919 (*The Guardian of 15/6/2007, p. 21*).

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Viewed from a distance, the area gives the appearance of a pristine primeval forest, one of only five stands of Monterey pine remaining in existence. However, this appearance is deceptive, since the forest, which is accessible only via a 17-mile private toll road around the rugged coastline, has already been chopped up for development with around 3,000 expansive homes and, as is mentioned earlier, has no fewer than eight golf courses. The Eastwood links would have been carved out of the 150 acres of native Monterey pine that still remain around the other eight courses. It would also have destroyed the habitat of an endangered orchid, Yadon's piperia, and removed the wetlands that are so important for the region's wildlife (*The Independent of 15/6/2007, p. 39*).

Public health and safety issues

Increased safety pleas after French long jumper is speared by javelin in Rome

The "Golden league" athletics meeting in Rome, held in mid-July 2007, experienced a dramatic turn of events when French long jumper Salim Sdiri was hit by a javelin and had to be taken to hospital. The Olympic Stadium was reduced to silence by the incident, which saw a wayward attempt by European silver medallist Tero Pitkamaki, from Finland, veer to the left and leave the infield. An ambulance had to drive around the track to collect Mr. Sdiri, who was hit on the right side of his body, although a spokesman later said that he was not seriously injured (*The Guardian of 14/7/2007, p. S6*).

Not unexpectedly, this incident raised serious health and safety concerns. It appears that Mr. Sdiri was standing near the long jump area when he was hit, so the incident cannot be attributed to his straying into an unauthorised or unsafe area. Steve Backley, the British Olympic silver medallist, feared for the future of the event, stating:

"My fear is the officials will look at this and ask if it is safe enough to hold in a Golden League, a Grand Prix, where there's (sic) a lot of people in the infield" (*The Mail on Sunday of 15/7/2007, p. 114*).

At the time of writing, it was not yet known whether any official inquiry into this incident had been held.

Police bar boy wonder from long-distance events (India)

The reader may recall (*[2006] 2 Sport and the Law Journal p. 68*) the case of Budhia Singh, the five-year-old Indian boy who gave rise to controversy when he became the world's youngest marathon runner. Concern has increasingly been expressed over the effects on the boy's health – both in the short and in the long term – and in early June, the authorities took action for Budhia's protection. The boy had planned to embark on a "walkathon", in the form of a 10-day trek from the capital of Eastern Orissa State to Calcutta, in neighbouring West Bengal. However, the police prevented him from executing this plan, with officers lining the road in the state capital, Bhubaneswar, to block his path. In so doing, they cited a Government order which declared the child's 65-km run last year to amount to "torture" (*The Independent of 7/6/2007, p. 28*).

However, this move was not to everyone's taste. As the police moved in, a small crowd unfurled home-made banners, chanting "Long live Budhia", and commenced a sit-in. The boy's coach and foster father, Biranchi Das, stated that he would lodge an appeal with the local court. Budhia has in fact become something of an iconic figure in Indian public life, having appeared in television commercials and toured the country in a manner reminiscent of a Victorian travelling circus. However, the mood has changed following protests from children's rights activists. He was subjected to a series of tests by state doctors, who declared him to be undernourished, anaemic and under cardiac stress (*Ibid*). Exactly how long the ban referred to above will apply is not known at the time of writing.

Racehorses infected by herpes (Hong Kong)

In mid-April 2007, it was learned that an outbreak of equine herpes had infected 132 racehorses in Hong Kong, which will host the equestrian events for the 2008 Olympics. Ironically, the equestrian events were switched from the Games' host city, Beijing, because of difficulties in establishing a disease-free zone in mainland China (see also above). Hong Kong officials have attempted to allay any concerns which the outbreak may have triggered, saying that containment measures were working, and that problem will have subsided by the time the Games are to be held (*The Daily Telegraph of 11/4/2007, p. S17*).

5. Public Law

Nationality, visas, immigration and related issues

Russian tennis chief overcomes visa difficulties (US)

The Federation Cup is one of the most important competitions in women's tennis. One of the semi-finals in this year's competition pitted Russia against the US, to be played on the latter's territory. This fixture threatened to descend into off-field controversy when, with a week to go before the semi-final the Russian team captain, Shamil Tarpishchev, announced that he had been denied a visa, and accused the US authorities of obstructing their team's preparations. He also claimed he was being blacklisted after having been linked to the Russian mafia in the past – a charge which he vehemently denied (*The Daily Telegraph of 10/7/2007, p. S18*).

However, with two days to go before the event, the US did issue Mr. Tarpishchev with a visa, after the Russian government had involved itself in the controversy, complaining about "bureaucratic procrastination" (*The Guardian of 13/7/2007, p. S2*). No official reason for the initial delay was provided.

Cubans leave Pan American Games in defection scare

In late July 2007, the Cuban athletes taking part in the Pan American games held in Brazil were called home early following the defection of four fellow-athletes. Amid fears of further defections, the delegation proceeded to Rio de Janeiro Airport, leaving the men's volleyball team with no time to collect their bronze medals (*The Daily Telegraph of 30/7/2007, p. 16*).

Homeless Cup players go missing in Denmark

This tournament is an annual footballing event which aims to change the lives of homeless people. This year's tournament, however, which was played in Denmark in August, had unintended consequences when it was learned that 14 Africans and one Afghan citizen had left their teams and gone missing, according to Copenhagen police. This was announced the day after their visas expired. Police stated that they would arrest and deport them if they were found (*The Independent of 7/8/2007, p. 19*). No further details are available.

Sporting figures in politics

Imran Khan banned in Karachi following accusations (Pakistan)

The former Pakistani Test all-rounder and captain, Imran Khan, has sought a career in politics following his retirement from the cricket field. As a citizen of one of the most volatile societies in the world, this can be described as an extremely hazardous career move. The country is currently ruled by semi-military regime under General Pervez Musharraf, who has given the US full backing in its "war on terror". This stance, along with alleged human rights abuses, has inspired much opposition to the régime, to the point where several attempts have already made on the General's life.

Although he has not gone to such extremes himself, Imran Khan is nevertheless a passionate opponent of the régime, particularly after a commando assault was made on the radical Red Mosque in Islamabad in early July 2007, in which more than 200 people were killed. Describing the leader as an "American puppet" in an interview with a leading British newspaper, Mr. Khan called upon him to resign, saying that the longer he stayed in power, the longer the backlash of extremism would continue. Khan also warned that if the General attempted to impose martial law or tried to have himself re-elected ahead of next year's general elections, he would be challenged in the country's Supreme Court. For this purpose, he had heralded as a defining moment for Pakistan the Supreme Court's ruling the previous week that the country's Chief Justice be reinstated after having been dismissed by Musharraf (*The Daily Telegraph of 31/7/2007, p. 16*).

Earlier, Mr. Khan had been barred from entering Karachi after he had called Altaf Hussain, the London-based head of a political party, a "terrorist". Hussain is the leader of the Mutahida Qaumi Movement, which is allied to General Musharraf's régime, and he was accused by Khan of stoking violence during a visit by the suspended Chief Justice referred to earlier, in which 41 people were killed (*The Daily Telegraph of 28/5/2007, p. 16*).

5. Public Law

Laporte to become French Minister of Sport

Shortly after the French presidential elections, won by Nicolas Sarkozy, it was announced that the latter had appointed the current French national rugby coach, Bernard Laporte, as Minister of Sport once the World Cup, to be held in the autumn of this year, ended. Earlier, Mr. Laporte had announced that he would quit rugby at the end of the tournament for a career in business. However, his long-standing links with the new French president appear to have rendered a political career more attractive (*The Times of 20/6/2007, p. 60*).

Other issues

“Vote my way or lose F1” threatens Ecclestone (Spain)

Bernie Ecclestone, the Formula One racing magnate, is no stranger to these columns – or indeed to political controversy (witness his infamous donation to the British Labour Party in 1997). He was once again at the centre of a political storm in mid-May 2007, when he announced that he would give the Spanish city of Valencia an annual F1 race – but only on condition that the voters of that city returned a conservative politician at the forthcoming regional elections.

More particularly, Mr. Ecclestone informed Spanish journalists that the agreement to hold an annual race through the city streets, similar to the traditional Monte Carlo Grand Prix, depended on the re-election of Valencia’s regional Premier, Francesc Camps, of the People’s Party. Mr. Ecclestone said that he placed his faith in Mr. Camps, who had reportedly pledged £28 million per year for the rights to organise a Formula One race, and that the deal would be signed “when Mr. Camps wins” (*The Guardian of 12/5/2007, p. 10*). This was naturally not to the taste of Spain’s Socialist government, which accused the dealmakers of attempting to influence the local and regional elections. In the words of the deputy Prime Minister, Maria Teresa Fernandez de la Vega:

“These are lamentable, unfortunate and worrying statements. In the first place, because it shows a clear lack of democratic culture, and secondly, because it’s an insult, a lack of respect to everyone, to the people of Valencia and all Spaniards” (Ibid).

Mr. Camps’s election opponent, Joan Ignasi Pla, called Mr. Ecclestone’s statements a “means of blackmailing the electorate”. In the event, Mr. Camps was re-elected.

6. Administrative Law

Planning law

[None]

possible if the criminal procedure is followed. This situation gave rise to a question put to the Court of Arbitration (Arbitragehof) as to whether this difference in treatment constituted discrimination as prohibited by the country's constitution.

Judicial review (other than planning decisions)

Belgian football safety procedures do not infringe discrimination principle. Court of Arbitration decision

Under Belgian law instances of hooliganism may be dealt with by criminal or by administrative proceedings. If the administrative procedure is opted for, under the Law on Football Safety (Voetbalwet), penalties such as stadium banning orders are issued by specially designated public officials. During this procedure, the designated public official may delegate to a different official the task of hearing the oral defence by the defendant or by his/her lawyer. However, this is not

The Court replied to this question in the negative. The fact that, under the criminal procedure, there can be no possibility of allowing a different judge to hear the oral evidence follows from principle of the "continuity of the bench", as laid down in Article 779 of the Judicial Code. This principle does not apply to administrative procedures. Whether or not a criminal or an administrative procedure is laid down is the prerogative of the legislature. This choice is not in itself discriminatory; however, if there is a difference in treatment which flows from this choice, this can only be allowed if it is justified. The administrative procedure in question had sufficient guarantees as regards the rights of the defence to justify this difference (*Decision of 29/11/2006, [2006-07] Rechtskundig Weekblad p. 1517*).

7. Property Law

Land law

[None]

dated 28/2/2007, [2007] 24 Neue Juristische Wochenschrift p. 4.

Intellectual property law

Inclusion of Borussia Mönchengladbach logo in painting does not infringe trade mark. German court decision

The portrayal of a club logo, in this case that of leading German football team Borussia Mönchengladbach, as well as other club insignia in a painting representing a football match does not infringe a trade mark where the reproduction of such insignia was only done in order to portray real life which was only slightly distorted by art, and where these insignia were included in the overall picture without catching particular attention. In the case in question, the action for trade mark infringement also failed because the artist in question was also able to plead the constitutionally guaranteed freedom of artistic expression (*Decision of the Düsseldorf Court of Appeal*

The legal protection of a person's name, which follows from his/her general personality rights, also extends to a nickname which is publicly used. For this protection to apply, it is not necessary that the name already has "secondary meaning" (i.e. acquired distinctiveness). The protection in question applies where the nickname, which is used by third parties, has been assumed by the person bearing that nickname and has been used by him/her as a name or as a sign (*Decision by the Munich Court of Appeal of 8/3/2007, [2007] 24 Neue Juristische Wochenschrift p. 4*).

Article on ambush marketing in Switzerland

In "Switzerland: new legislative steps against ambush marketing" (*[2006] 3 ISLR 77*) the author, Daniel Hufschmid, comments on Swiss proposals to amend the law against unfair competition in order to ban ambush marketing prior to the 2008 European Championships in football. He also reports on public objections to these proposals (*reviewed in [2006] 10 European Current Law p. 180*).

8. Competition Law

National competition law

Doping as unfair competition in German law. Academic article

In "Doping als unlauterer Wettbewerb im Profibereich", the authors, Jürgen Frisinger and Thomas Summerer, examine the increased incidence of doping at the top level of sport from the point of view of unfair competition law in Germany. They ask the question whether sporting performers who lose out against doped competitors have a right to compensation on the basis of such competition law. They examine thoroughly whether in fact professional sporting performers come within the scope of such legislation. They arrive at the conclusion that they are "business people" within the meaning of this legislation, and that they have an "actual competitive relationship (konkretes Wettbewerbsverhältnis) with their sporting opponents. In addition, the consumption of performance-enhancing illegal substances is an act of unfair competition within the meaning of this legislation, which gives rise to claims for compensation ([2007] GRUR 558).

organisations remain free to formulate their rules subject to proportionality. Finally, she examines the prospects for further litigation (*reviewed in [2006] 7 European Current Law p. 34*).

In "The Premier League-European Commission broadcasting negotiations" ([2006] E&SLJ 4), the authors, Daniel Grey and Mark James, report on the negotiations aimed at seeking approval from the European Commission for an agreement between the English Premier league clubs and the broadcaster BSkyB. They explain why the Premier League modified the auction procedure previously used, in order to ensure that no single broadcaster should hold exclusive rights to all football games. They also examine the question whether the new deal is in the interest of the consumer (*reviewed in [2007] 3 European Current Law p. 50*).

In "Playing Fair" ([2006] 8 Legal Week 18), the author, Victoria White, reviews those issues in which sporting bodies should act autonomously, without the intervention of EC law, as identified in the Independent European Sport Review (IESR) 2006 commissioned by European sports ministers to create a more stable legal framework for sport. She also sets out the IESR proposals on what exemptions to Articles 81, 82 and 86 should be applied to football (*reviewed in [2007] 6 European Current Law p. 38*).

EU competition law

Academic articles on EU competition law and sporting activity

In "Fair play" ([2007] 9 Legal Week, 30) the author, Jeremy Simon, considers the impact of the European Court of Justice ruling in Meca/Medina on the scope of the "sporting purposes" exemption from the EU rules on anti-competitive agreements. He also comments on the effect of this decision in terms of pooled media rights, as well as on the FIFA rules for mandatory release of players to national teams (*reviewed in [2007] 4 European Current Law p. 8*).

In "Don't look back in anger" ([2007] 2 GCR 9) the author, Jeremy Robinson, reviews developments in EU competition law during 2006, including the decisions of the European Court of Justice (ECJ) on the application of Article 81 EC Treaty to sport (*reviewed in [2007] 4 European Current Law p. 7*).

In "Competition and Sport" ([2007] European Law Review 95), the author, Erika Szyszczak, discusses the ECJ ruling in Meca/Medina on the question whether the regular activities of sporting organisations are subject to EC competition law. She reviews the development of EC policy on sport. She also considers the extent to which sport is treated as a special case and sporting

9. EU Law

EU law (excluding competition law)

SC Charleroi v FIFA case reaches ECJ

It has been reported in previous issues of this Journal that the Belgian club SC Charleroi, supported by the influential G14 group of top European football teams has gone to law against world governing body FIFA over the release of players for international duty. The Commercial Court of Charleroi has now referred the matter to the European Court of Justice (ECJ) in order to obtain a ruling on the question whether EU law has been infringed.

The case was still under consideration at the time of writing. However, we now know the question which has been referred to the ECJ. It reads:

“Do the obligations on clubs and football players having employment contracts with those clubs imposed by the provisions of FIFA’s statutes and regulations providing for the obligatory release of players to national federations without compensation and the unilateral and binding determination of the coordinated international match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of the fundamental freedoms conferred by the EC Treaty and are they therefore contrary to Articles 81 and 82 of the Treaty or to any other provision of Community law, particularly Articles 39 and 49 of the Treaty?”

The ECJ is expected to give its ruling within the next few months.

Academic articles on EU law and Sport

In “Sport and the EC Treaty: a tale of uneasy bedfellows” ([2006] 6 *European Law Review* 821) the authors, Stefaan Van den Bogaert and An Vermeersch, discuss the legal basis for EC policy on sport. They consider whether the development of a direct sports policy is limited by the absence of explicit provisions in the EC Treaty, focusing on the funding of sporting events and the discussion on anti-doping policy. They also review the approach by the ECJ towards the rules of sporting organisations, on the basis of the free movement of persons and the non-discrimination principle. They further examine the application of competition law to the rules of sporting organisations by the Commission and the Court of First Instance. Finally, they analyse the way in which reforms could be introduced to clarify the status of sport in EC law, and the powers of the EU to regulate sport (*reviewed in [2007] 2 European Current Law p. 56*).

In “The European Union and the fight against doping in sport: on the field or on the sidelines?” ([2006] 4 *E&SLJ Internet*), the author, An Vermeersch, poses the question whether the EU should take a leading role in the international campaign against doping in sport. She reviews various EU initiatives in this regard and discusses the obstacles which may make it difficult for the EU to become a policy-making leader in this area. In addition, she examines what legal foundations could be used in order to harmonise legislation on the subject. Finally, she criticises the Court of First Instance decision in Meca-Medina on the applicability or not of EC rules to anti-doping rules (*reviewed in [2007] 5 European Current Law p. 45*).

In “Study into the possible participation of EPFL and G-14 in a social dialogue in the European professional football sector” ([2006] 3-4 *ISLJ* 61), the author, Robert Siekmann, considers whether the Association of European Professional Football Leagues (EPFL) and the powerful G-14 group of football clubs could take part in a social dialogue in European professional football in the capacity of European employers’ organisations. He further examines the objectives and independent status of the EPFL, G-14 and national football associations. He discusses the EU admissibility criteria for social dialogue, the representativeness test, the specificity of sport, and topics to be discussed in the course of such social dialogue (*reviewed in [2006] 9 European Current Law p. 76*).

In “Caught behind or following on? Cricket, the European Union and the “Bosman effect” ([2006] 3 *E&SLJ Internet*) the author, Simon Boyes, examines the problem raised by foreign cricketers in English county teams in the light of the Bosman and Kolpak decisions. He reviews the England and Wales Cricket Board (EWCB) regulations and argues that, since England is the sole Test-playing country within the EU, restrictive measures imposing quotas on foreign players in order to ensure the development of domestic talent for the international team are lawful (*reviewed in [2007] 3 European Current Law p. 84*).

In “Extra time: are the new FIFA transfer rules doomed?” (2006) 1-2 *ISLJ* 66) the author, Jean-Christian Drolet, examines the question whether the rules applied by the world governing body in football, FIFA, infringe Article 39 EC Treaty on the free movement of workers. He discusses the concept of transfer fees and the impact produced by the Bosman decision on the question whether transfer fees charged for a player who has ended his contractual relationship with a club amounted to a restriction on the free movement of

9. EU Law

persons. He also reviews the governing body's 2001 rules on the length of players' contracts and compensation for the training and education of young players. He also highlights the changes introduced in the 2005 transfer rules, including training compensation and special provisions for Europe. He finally comments on the FIFA mechanism for allowing players to terminate their contracts of employment unilaterally (reviewed in [2006] *European Current Law* p. 53).

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

[None]

Other issues

Legal personality of sporting bodies in Romania. Academic article

In "lawful and determined purposes required for legal personality of sports structures in Romania" ([2006] 1-2 *ISLJ*, the author, Alexandru Virgil Voicu, discusses the requirements made of a legal entity in Romania, including an independent structure, distinct assets, and a lawful, distinct purpose. He considers the effect of the law on Physical education and Sports, which requires that physical education and sporting activities must fall within the scope of the activities of sport structures. Finally, he comments on the negative consequences produced by sporting activities being carried out by business associations other than sporting bodies (reviewed in [2007] 11 *European Current Law* p. 79).

11. Procedural Law and Evidence

Procedural law and evidence

Court of Auditors given jurisdiction in sporting federation dispute (Italy)

In June 2006, the Supreme Court of Italy (Corte di Cassazione) was called upon to give a ruling on the appropriate court to deal with a case in which the President of a regional sporting association, accused of having misappropriated the funds of that association. The difficulty was that, in the course of the judicial handling of the case, the association in question had been transformed into a private company, which could remove it from the jurisdiction of the Court of Auditors. The Supreme Court ruled that it was the Court of Auditors (Corte dei conti) which had jurisdiction, even though the action against the president referred to had been brought after the association had become converted into a private company (Decision of 20/6/2006, [2007] II Foro Italiano 486).

12. International Private Law

International private law

[None]

13. Fiscal Law

Fiscal law

Tax breaks for sporting professionals? Academic article

In "Arguments for and against tax breaks for sport's professionals" ([2007] 5 WSLR 6) the authors, Alexandre Miguel Mestre and Costa Joao, explore the decision by the Portuguese Government to increase from 50 per cent to 100 per cent the proportion of sporting performers' and referees' income which is subject to taxation. They present the arguments for and against this increase (reviewed in [2007] 3 European Current Law 98).

14. Human Rights/Civil liberties

Racism in sport

Serbian racism in football continues

As has been reported in earlier editions of this Journal, players from ethnic minorities who disport themselves in Serbian football grounds – or indeed any football ground where the country is represented among the spectators – need a strong stomach in order to face up to the viciousness of the racist abuse levelled against them from some extreme sections of the crowd. This unpleasant trait was once again in evidence in mid-June 2006, when the England side was competing against Serbia in the European Under-21 tournament in Nijmegen, The Netherlands. Nedum Onuoha, the Manchester City defender, was particularly incensed, and described to the press how three members of his family were compelled to sit through “sickening” racist abuse hurled at him by Serbian “Ultras” (*Daily Mail of 19/6/2007, p. 76*).

This was followed by a formal complaint lodged by the English Football association to the European governing body in football, UEFA. However, the complaint was levelled not only against some members of the crowd; it was also alleged that at least one Serbian player had racially abused members of the England team. The British Sports Minister, Richard Caborn, also pledged to raise the issue in writing with his Serbian counterpart in order to express his “disgust” at these developments (*The Guardian of 19/6/2007, p. 39*). UEFA responded by initiating proceedings against Serbia, although England were also indicted for “improper conduct” by their players after the match (*Ibid*).

In the event, however, the penalties imposed by UEFA were far from draconian, and they provoked outrage from antiracist groups when they opted to fine the Serbian Football federation a mere £16,500 for the racist abuse hurled at English black players at Nijmegen. The England football authorities were fined £2,000 following the “improper conduct” charge (*Daily Mail of 14/7/2007, p. 76*). The Anti-racist group Kick it Out insisted that UEFA should have expelled Serbia from the tournament (they went on to lose in the final against the Netherlands – and called for swifter action from Europe’s governing body in the future (*Ibid*)).

Revelations about racism that scarred Woods’s early career (US)

The already extraordinary story of Tiger Woods, the black US golfer who became the dominant player in a sport best known as a stronghold of social conservatism, took on an even more amazing turn in mid-July 2007, when it emerged that the world No. 1 developed his skills as a

teenager against a background of harassment, some of it racially motivated, at his first club in Southern California. In a series of exclusive interviews, friends and contemporaries of Mr. Woods, as well as his late father Earl, described how the young prodigy was targeted by a small minority at the Navy Club in Cypress, who attempted to make his life as unpleasant as possible (*The Guardian of 16/7/2007, p. S1*).

Thus Bob Rogers, a former US Army officer, was one of an informal group of players – including Mr. Woods and his father – who played at the military-owned golf course every weekend. He remembers a “wonderful young man” and a superb golfer who maintained his dignity. Mr. Rogers went on:

“When he won the US Amateur he offered to let them display the trophy. They did not even acknowledge he had made the offer. Nothing was said at the time, but I know there were some hurt feelings. The club should have rolled out the red carpet. They acted like (sic) there was nothing special about him” (*Ibid*).

Shortly after Mr. Woods won the first of three US Amateur titles he became, according to several accounts, the target of a racial epithet by a former club employee who accused him of hitting balls into a garden. For many years, the club failed to acknowledge that Woods had been a regular player with them, but Joe Grohman, an assistant professional at the club, is hoping to mount a display in the clubhouse dedicated to him. Gregg Smith, a spokesman for the US navy, acknowledged that Mr. Woods had been badly treated by a small minority, but added that these people were not representative of the club or of the Navy (*Ibid*).

Human rights issues

State monopoly for sports betting assessed under German human rights law

The German state monopoly for the organisation of sports betting is only consistent with the fundamental right of professional freedom (*Berufsfreiheit*) as protected by Article 12 of the German Constitution where it has the conscious objective of countering the dangers of addictive betting. Thus decided the German Constitutional Court in a dispute in which this monopoly came under challenge from private operators who sought to evade the provisions of the German Criminal Code on this subject (*Decision of 28/3/2006, [2006] GRUR 688*).

14. Human Rights/Civil liberties

Gender issues

US “shock jock” dismissed over sexist insult

The airwaves on both sides of the Atlantic have for some time been graced – if that is indeed the correct term to use – by the rants of the so-called “shock jocks”, or disc jockeys “with character” (in other words, rude and opinionated bigots). However, one such personality to be inflicted upon the US people, to wit Don Imus, recently discovered to his cost that there are limits to the toleration of such invective when he described members of the Rutgers University female basketball team as “nappy-headed hos”. For those unfamiliar with Transatlantic slang, “nappy heads” refers to the tightly-curled hair of many black females, and “hos” are another way of describing prostitutes (*The Guardian of 11/4/2007, p. 24*).

This prompted Mr. Imus’s employer, the celebrated US broadcasting station CBS, to dismiss him forthwith. His removal came after objections had been raised by Senator Barack Obama, the black Democratic presidential candidate. Protests were staged by civil rights leaders Jesse Jackson and the Rev. Al Sharpton, and advertisement deals were cancelled by a host of major sponsors. His fate was sealed by an emotional press conference when the members of the team whom he had insulted described the hurt caused by his remarks (*The Daily Telegraph of 13/4/2007, p. 14*).

Who’s the woman in the black? She’s German

In mid-June 2007, it was learned that Germany is to have its first woman referee in professional football. The German Football League (DFB) has appointed a 28-year-old police officer, Bibiana Steinhaus, from Hanover, to referee Second Division fixtures after several years’ experience in regional matches. Volker Roth, head of the DFB’s refereeing committee, commented that employing a woman was “not an issue” in German football (*The Guardian of 19/6/2007, p. 38*).

Other issues

French president condemns ageism in French football league

Although age discrimination is, albeit slowly, outlawed in most modern democracies, the message does not seem to have seeped through to all the levels of society – including sport. Thus the new French president, Nicolas Sarkozy, found himself condemning the French football league for refusing to allow Guy Roux to be appointed coach to top team Lens because he is too old. The 60-year-old Roux, who was appointed by Lens in June 2007, may not act as head coach because he is over the age limit of 65. According to a spokesman, the President believes that it is the rule, rather than Guy Roux, which is old. Mr Roux himself went further, and described the rule as illegal, adding that measures should be taken to stop it (*The Guardian of 29/6/2007, p. S10*).

Academic article on discrimination in German Sport

In “Bans on discrimination and duties to differentiate in the German law of sports organisations ([2006] 3-4 *ISLJ* 96), the author, Klaus Vieweg, examines the law applicable to German sports clubs and associations in relation to discrimination and the duty to differentiate. He reviews the case law on the right to admission and exclusion, and comments on the various ways in which participation is enhanced. Finally, he considers the duties to differentiate, focusing on equality of opportunity (*reviewed in [2007] 4 European Current Law p. 88*).

15. Drugs legislation & related issues

General, scientific and technological developments

Should we allow drugs in sport? Ethics specialist in plea

"Thinking the unthinkable" has become a somewhat overblown phrase applied by and to politicians who – mostly in their own estimation – are going boldly where others fear to tread, and in the process challenge some long-held orthodoxies. In the field of sports doping, such a figure seems to have recently emerged in the shape of Julian Savulescu, a professor of ethics. Writing in a leading British newspaper (*The Daily Telegraph* of 30/7/2007, p. S10), he advocates a regulated market in performance-enhancing substances. He claims that not only are existing drugs hard to detect, as is the case with EPO and growth hormone, but also that a new generation of drugs is on its way which will be even harder to identify, such as gene doping.

There are two ways in which the sporting authorities can react to such trends. They can either step up the war on doping, but he predicts that this will fail, in spite of the expulsions which have recently taken place in events such as the Tour de France. The other option is to regulate their use. He points out that some performance-enhancing drugs, such as caffeine, which were once illegal, were legalised because they were found to be sufficiently safe. This has not had any adverse effect on sport, and has removed the problem of cheating. Therefore, he opines:

"A rational, realistic approach to doping would be to allow safe performance-enhancing drugs which are consistent with the spirit of a particular sport, and to focus on evaluating athletes' health. Some interventions would change the nature of a sport, like creating webbed hands and feet in swimming, and should be banned on these grounds. But the use of drugs to increase endurance is a part of cycling's history" (Ibid)

Given the incentives in terms of glory and cash, some sporting performers will always seek access to a black market in dangerous banned drugs which confer an extra advantage. Overall, however, regulated access is better than prohibition, since the honest athlete currently has no access to performance-enhancers.

It remains to be seen what resonance these views will have in the relevant official circles.

Doping issues and measures – international bodies

Bans all round in Austrian Winter Games doping scandal

The reader will recall the dramatic events of the Turin Winter Olympics in 2006, when a police raid on an apartment housing Austrian athletes resulted in a discovery of medical equipment which was consistent with a professional and organised programme of doping (*[2006] 2 Sport and the Law Journal* p. 77). Naturally, this came to the attention of the International Olympic Committee, which, in late April 2007, issued the heaviest anti-doping penalties in its history when it banned six of the skiers for life. Biathletes Wolfgang Perner and Wolfgang Rottmann, as well as the cross-country skiers Martin Tauber, Jürgen Pinter, Johannes Eder, Roland Diethart and Christian Hoffmann, were all declared "permanently ineligible" for future Olympics. They are the first penalties to have been issued on the basis of the possession of doping paraphernalia rather than a positive test. Their severity was increased by evidence of what the IOC described as a "conspiracy and a cover-up" (*The Guardian* of 26/4/2007 p. S10).

Another feature of the case is that it is just the latest example of anti-doping officials using evidence gathered by the investigatory authorities to ban drug users. IOC President Jacques Rogge confirmed this trend, saying

"The sports movement from time to time needs the help of the judicial authorities. We have the Puerto (cycling) case in Spain, which is still not decided but no-one could have discovered that without tapping phones or surveillance. Hopefully it will not be very often, but sometimes we need to use these methods" (*The Daily Telegraph* of 26/4/2007, p. S7).

Nor were the athletes themselves the only ones to be penalised. One month later, the IOC fined the Austrian Olympic Committee more than £500,000 in connection with this affair, on the basis that it had "violated the Olympic spirit" (*Daily Express* of 25/5/2007, p. 66). The Austrian Committee in turn handed lifetime bans to 14 team officials linked to this scandal, Markus Gandler, the sports director for the cross-country and biathlon teams, being the highest-ranking administrator banned. Also included was Walter Mayer, the former Nordic coach who was banned from two Olympics following a blood doping case at the 2002 Winter Olympics. It was Mayer's presence in the Austrian team that caused the police to raid the flat in the first place (*The Guardian* of 30/5/2007, p. 2).

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Doping issues and measures – national bodies

Polish Olympic Committee official suspended and arrested on drug-dealing charges

In early June 2007, it was learned that the Vice-President of Poland's Olympic Committee, Artur Pilka, had been suspended on a suspicion of drug-dealing. He was suspected of acquiring about one kilogramme of cocaine over the past three or four years. He had, ironically enough, served on EU anti-doping committees (*Daily Mail of 9/6/2007, p. 76*). He was later arrested on the same charges. The Justice Minister, Zbigniew Ziobro, said that his line of defence was that he was doing this for his own personal use (*The Guardian of 9/7/2007, p. S17*).

Portugal approves anti-doping convention

In March 2007, it was reported that Portugal had approved the International Anti-Doping Convention 1989. The purpose of the Convention, which is contained within the framework of the strategy and programme of the activity organised by UNESCO in the field of physical education and sport, is to promote the prevention of and the campaign against doping in sport (*reported in [2007] 3 European Current Law p. 56*).

Gatlin affair continues to fester (US)

It is now more than a year since, as was reported in these columns (*[2006] 2 Sport and the Law Journal p. 85*), joint world record holding sprinter Justin Gatlin tested positive for testosterone, once more plunging athletics into a crisis of confidence over the extent of the doping problem. The cascade of recent cases involving US athletes, as well as Mr. Gatlin's association with Trevor Graham, the coach who was closely associated with the Balco scandal, would appear to have made this an open-and-shut case. However, following an arbitration hearing in Atlanta, held in August 2007, Mr. Gatlin was growing increasingly confident that he would at least obtain a reduction in his eight-year suspension – possibly to enable him to compete in the Olympics next year. This would put the US authorities on a collision course with the world governing body, the IAAF, which could overshadow preparations for Beijing 2008.

The main cause for Mr. Gatlin's resurgent confidence resided in the testimony given by Jeff Novitzky, an FBI agent who led the investigation into the BALCO affair. The latter testified that Gatlin had secretly recorded more than 10 telephone calls with Graham during which

there was no evidence that he had been given, or that he had taken, any performance-enhancing substances. Mr. Novitzky, who testified for more than two hours, claimed that Gatlin was the only athlete to provide undercover assistance during the five-year BALCO investigation of steroid use in sports. His compelling evidence could well persuade the panel to consider Gatlin's case more favourably. This would truly be a remarkable double, given that, six years ago, the athlete succeeded in convincing another arbitration panel that a stimulant for which he had tested positive had been taken because he was suffering from attention deficit disorder, and consequently he served a much shorter suspension than would normally have been the case (*The Observer of 6/8/2007, p. S8*).

There is every likelihood, however, that the IAAF will be extremely unrelaxed if Gatlin's suspension is lifted or reduced on the basis of this testimony. They operate a strict liability policy which means that an athlete who tests positive for a banned substance has to account for what is found in his body. Thus far, Mr. Gatlin has been unable to persuade the IAAF of this [suggest "thus far, Mr Gatlin has been unable to persuade the IAAF of this] (*ibid*).

Police make large doping haul in Norway

In mid-May 2007, Norwegian police seized around 175,000 pills and capsules of illegal performance-enhancing drugs in one of the country's most successful doping operations. Police added that they also found £200,000 in cash during the raid, which resulted in the arrest of a 38-year-old man. The discovery was made after customs agents opened a suitcase which had been delayed on its way to Oslo airport (*The Guardian of 22/5/2007, p. 2*).

Indian athletes test positive

In mid-June 2007, India's Olympic association announced that eight Indian athletes faced doping penalties at the national championships for that year. Four athletes tested positive for the steroid nandrolone, and others for the diuretic furosemide (*The Guardian of 16/6/2007, p. 12*). No further details are available at the time of writing.

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Doping issues and measures – Cycling

Tour de France ends in doping chaos – yet again

Background

This year's Tour de France started against the most inauspicious of backgrounds. For one, the event was still smarting under the – as yet unresolved – Floyd Landis affair, which saw the 2006 winner disqualified because of a positive drug test. Secondly, the Tour also risked being caught in the long-term effects of Operation Puerto, the doping probe which, as was related in these columns at the time, led to the publication of a list of potentially implicated riders. Although some of these, such as the 2006 Giro d'Italia winner Ivan Basso and the 1997 Tour de France winner Jan Ullrich, have since retired or been banned, some 50 more riders are said to be under suspicion as the affair makes its laborious way through the Spanish courts. At least some of these will have competed in this year's Tour, and although – being mere suspects – they were in a legal limbo as the Tour got under way, they cast the spotlight on the annual two-wheeled jamboree for all the wrong reasons.

Not that one could have guessed as much as the final preparations were being made in London, where the Tour was to start for the first time in its history. Ken Livingstone, the London Mayor, tried to put the best possible gloss on the dark clouds which (metaphorically if not climatologically) hung over the event by blaming the media, stating that if the British public read the newspapers about the Tour's 48 hours on English soil, they would not realise it was the same event they had just seen (*The Independent on Sunday of 8/7/2007, p. 85*). This seemed a little disingenuous on the part of the UK capital's leader, not only because of the manifold cases of doping which have bedevilled the sport as a whole for many decades – Mr. Livingstone may care to ponder the fate of one of his compatriots who died in mid-race almost exactly 40 years to the day when he made his somewhat vacuous pronouncement – but also since it was most improbable that any positive doping tests would emerge during the opening days of the Tour.

More revelations in the Puerto affair mar run-up to Tour

Another unfortunate aspect of the Mayor's airy statements came the day after they were made, when yet more revelations were forthcoming in the Puerto affair. First Jesus Manzano, the cyclist whose confessions led the police to mount the operation in the first place, was making more allegations about doping in the sport, claiming that cyclists in recent Tours had received consignments of drugs from a woman nicknamed the "White Dove". He added his conviction that there would be more deaths from drug-taking to follow that of 1998 Tour winner Marco Pantani, and alleged that blood doping was continuing to occur in Spain despite the Puerto operation (*The Guardian of 6/6/2007, p. S8*).

More light was apparently shed on the affair when the German current affairs magazine Der Spiegel featured an interview with a professional German rider, Jörg Jaksche, the winner of the 2003 Paris-Nice race and one of the cyclists expelled from the 2006 Tour because of his involvement in the affair. He confirmed that he had actually been a client of the doctor at the centre of the blood doping ring, Dr. Eufemiano Fuentes, in 2005 and 2006. The three bags of blood which had been taken from his body in order to be reinjected bore labels showing the number 20, and the rider himself was referred to as Bella, the name of his pet dog. Removing the blood took around 15 minutes, re-injecting it half an hour. He compared it to "draining oil out of a car". He went on to describe described Dr. Fuentes as a:

"master of dissimulation. None of his clients knew who any of the others were. Even in our team, we didn't know who any of the other guys working with him were. He was not like a butcher, but had something kindly about him. He was the kind of guy who might go through a red light, just to see what happened" (*The Guardian of 2/7/2007, p. 31*).

Jaksche admitted that he had taken drugs throughout his nine-year career, which included spells at Polti, Telekom and CSC. When, during the 1998 Tour, the French police seized the blood booster EPO from the Festina team, he claims that his Polti team immediately hid their supply of EPO in a vacuum cleaner (*Ibid*).

Questions arise over Vinokourov association with Ferrari

At the same time as these further revelations concerning the Puerto affair, doubts were being voiced – appropriately as it later turned out – about the probity of the overwhelming favourite for the 2007 Tour, i.e. the Kazakh rider Alexander Vinokourov. His team, Astana, had already been the focus of suspicion concerning

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their alleged involvement in drug-taking. More particularly there had been claims in the media that their riders might be training in mufti in an attempt to evade random doping tests, and that Matthias Kessler, a German team member, had tested positive for testosterone – all previously denied emphatically by the Kazakh and his entourage (*The Guardian of 7/7/2007, p. 34*). Suspicions hardened when, two weeks before the Tour was due to start, Vinokourov confirmed that he had been spotted training with the controversial Italian doctor, Michele Ferrari.

The latter had already served a suspended sentence for sporting fraud over drugs allegations in October 2004, although that verdict was later reversed on appeal (*The Guardian of 2/7/2007, loc. cit.*). However, in his case summary, the presiding judge reaffirmed that the Italian had indeed prescribed illegal substances to professional cyclists during the 1990s (*The Sunday Telegraph of 1/7/2007, p. S11*). Mr. Vinokourov claimed that he had earlier avoided making his association with Dr. Ferrari public because he “feared the way people would react”, given that one heard so many “bad things” about him. However, he asserted that he had never felt any guilt about associating with Ferrari, because he knew the way the doctor operated, and he had done nothing to be ashamed of (*Ibid*).

Cycling authorities try to avoid a new scandal – but come under heavy criticism

But there was an even better reason to take Mr. Livingstone’s *bons mots* with a good dose of kitchen condiment, which is that the Tour organisers themselves were under few illusions as to how the event of which they had charge was viewed by the outside world. With three months to go before the event, they had issued a strong call for concerted action to establish the innocence or guilt of the cyclists implicated in the Puerto inquiry by the time the Tour started. The new man heading the race, Christian Prudhomme, explained that the position had changed after the revelation, made in early April, that bags of blood found by the investigators had been linked through DNA testing to the German cyclist Jan Ullrich, one of the riders to have been expelled from the race before the start of the previous year’s race in Strasbourg. He said:

“Today, we can say something about this business: it is possible to know. Cycling cannot afford to let riders named in this affair to start the Tour if suspicion has not been removed. We are in the same situation now as we were last year in Strasbourg, apart from one detail: we know it is possible to find out the truth” (The Guardian of 21/4/2007, p. S9).

Mr. Prudhomme emphasised that the situation needed a collective response, despite the poor relations prevailing between his company, Amaury Sport Organisation, and the world governing body in cycling, the UCI, saying that the important thing was to get the maximum number of teams together at the starting line. Less auspiciously in the light of subsequent developments, he said that whereas the Tour was tarnished last year, “it will not happen again” (*Ibid*). It must be admitted that the cycling authorities made a valiant attempt to avoid yet another doping controversy by requiring all 600 riders who were possible starters in the Tour to sign a document by which they confirmed that they were not involved in any current anti-doping investigations, and that they were prepared to provide their DNA if necessary so that it could be compared with the blood samples seized by the Spanish police during Operation Puerto. The cyclists also pledged to surrender one year’s salary in the event of any infringement of the anti-doping rules. The document was not legally binding, but the UCI and the Tour organisers were relying on public pressure being brought to bear on team managers, sponsors and riders to enforce it (*The Guardian of 20/6/2007, p. S1*).

In the event, all 189 Tour starters signed the document, but at one stage it looked as though two teams, CSC and Quickstep, might stand out. This was not only because of the aforementioned questions over the legal validity of the pledge, but also because the teams resented the lack of consultation on the UCI’s part over this document. Their reservations were echoed by Briton David Millar, who has become a leading light in the campaign against doping since his return in 2006 from a two-year doping ban. He commented:

“The bottom line is we have to sign it but, if you take a step back and look at it in the real world, it’s a complete fallacy. It’s another thing they’re doing to help the fight against doping, and maybe it’ll scare some guys, but the bottom line is that the guys who cheat now don’t care, do they? You’re already risking everything if you dope, so what do you care? As if they’re going to be able to get a year’s salary off you anyway. I wouldn’t say it’s lip service, it’s just an extreme measure but a short-term one. It’s a big gesture before the Tour but that’s all it is (The Guardian of 4/7/2007, p. 34).

It did not take long for Mr. Millar’s words to become tragically prophetic, as can be seen below.

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The first cracks: Sinkewitz tests positive, broadcasters pull the plug

The initial euphoria which had enveloped the Tour, referred to above, did not – indeed could not – last. After 11 days of smiles, triggered by the festive spirit which lit up the prologue in central London, followed by the stage going through Kent, a frown returned to the event which had hoped to be lifting the cloud of suspicion that seemed permanently to be hanging over it. At the conclusion of Stage 10, from Tallard to Marseille, the news broke that German rider Patrik Sinkewitz had failed a drugs test for testosterone. The rider, who had already pulled out of the Tour following a collision with a spectator which left him requiring surgery for a broken nose and jaw, was immediately suspended by his team, T-Mobile, pending the outcome of the B sample (*Daily Mail of 19/7/2007, p. 86*).

This shattering news naturally represented a heavy blow to the organisers, sponsors and participants of an already tainted event. Among the immediate consequences was not only Mr. Sinkewitz's dismissal from the team. The next day, in a move was the first of its kind by any of the broadcasters covering the event, the German state channels ARD and ZDF announced that they were leaving, and discontinuing coverage of, the race. This move was more than a symbolical gesture, since the broadcasters in question had been a massive presence at the race since 1997, when Jan Ullrich presented Germany with its first ever win in the Tour. In fact, they had given considerable thought to this possibility before starting coverage of this year's race following the news of Ullrich's involvement in the Puerto case, as well as revelations about doping amongst German riders in previous months (see for example the Jörg Jaksche case described above) (*The Guardian of 19/7/2007, p. S10*).

This drastic decision predictably drew immediate criticism from the T-Mobile team, more particularly from Linus Gerdemann, who was the team's second-placed rider. He commented:

"I don't understand why they stop now – this is surely the system working. I don't know the particular facts of the Sinkewitz case, but the tough testing is now in place and people who cheat will get caught. The system works. Good." (*The Daily Telegraph of 19/7/2007, p. S18*)

The T-Mobile team felt particularly deflated, since they had been leading the fight against doping over the previous 12 months, recruiting a new "clean" squad and undertaking rigorous internal testing. Only the previous month, they had expelled Serhiy Honchar following irregular test results taken by the team itself (*Ibid*).

Pre-race favourite joins hall of infamy

If the race organisers thought that this incident represented the nadir of their fortunes this year, they were sadly mistaken. Just days after the Sinkewitz affair, it was learned that Alexander Vinokourov, the pre-race favourite, had tested positive for a homologous blood transfusion following his victory in the individual time trial held at Albi, Southern France. The 33-year-old veteran, as well as his Astana team, immediately withdrew from the race. Mr. Vinokourov was found to have two types of blood in his system. Transfusions are used by cyclists to assist them in recovering between stages by replacing blood lacking red cells which carry oxygen with fresh samples. A more sophisticated system of blood testing was reported to have been used on samples taken from riders competing in the 13th stage (*The Times of 25/7/2007, p. 66*).

The blow to the Tour's image was all the more stinging because Vinokourov's recovery from a stage 5 crash to win the time trial was one of the race's more positive moments this year (*Daily Mail of 25/7/2007, p. 79*). This development had begun to lift some of the clouds of suspicion which had hung over the Kazakh even before the race commenced (see above). Poignantly, the news of this latest disgrace broke just as David Millar was giving a press conference. On hearing the news, Mr. Millar delivered himself of the opinion that, in the light of this news, all the riders might as well pack their bags and go home, before breaking down in tears. However, Patrice Clerc, the Tour president, announced that, despite the latest scandal, stopping the race had not crossed his mind. He referred to the campaign against drugs as a war, and "in a war there are always casualties", adding that he was "convinced" that the battle could be won (*The Daily Telegraph of 25/7/2006, loc. cit.*)

Although there was, not unexpectedly, a feeling of total despondency among all those involved in the race, it was possible to agree with Mr. Gerdemann (see above) and discern the slightest shaft of light in the form of the effectiveness displayed by the increasingly rigorous dope-testing régime. This was possible thanks to a change of direction taken by the testing team. In addition, to organising routine and mandatory tests, they went into a more pro-active mode and targeting teams and riders whom they considered to be suspect. Four entire nine-man squads were randomly tested every morning before breakfast, whilst there were also widespread random tests after every stage in addition to those affecting the three podium riders and the race leader. The Astana team were believed to have been on the drug testers' "suspicious" list – indeed, this was yet another outcome of the Puerto affair, since at the

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time of that scandal, Vinokourov was riding for the Liberty Seguros team, which was heavily implicated in this affair (*The Daily Telegraph of 25/7/2007, p. S7*).

The "B" sample also proved positive after the Tour had finished. As a result, Mr. Vinokourov was dismissed by the Astana team with immediate effect (*Daily Mail of 31/7/2007, p. 72*).

The final nail in the coffin? Rasmussen forced to leave Tour.....

By this time, there were those who believed that some curse had been cast over this year's event. But even worse was to follow, when it was learned that the race leader, Michael Rasmussen had been expelled from the event by his own team, Rabobank. The Danish rider, who was thought to have virtually sown up the race with only two days to go, had been dogged by suspicion for some time. US amateur rider Whitney Richards had, the previous week, given a detailed account to a cycling website of Rasmussen allegedly asking him to transport blood doping products in 2002. Mr. Rasmussen had confirmed that he was acquainted with the American cyclist, but had refused to comment on the specific claims, as well as denying that he had ever taken drugs. Rasmussen had also been dropped from the Danish national squad after the Danish Cycling Union had announced that he had failed to provide adequate notice of his whereabouts for testing purposes. The UCI in fact confirmed that the Dane had been warned for missing two tests (*The Mail on Sunday of 22/7/2007, p. 105*).

All this controversy was starting to heap up the pressure on Rasmussen, particularly since the UCI President, Pat McQuaid, had declared that it would reflect badly on the sport if Rasmussen, who had assumed the leader's yellow jersey in the wake of Vinokourov's dismissal, went on to win this year's race (*The Independent of 24/7/2007, p. 50*). His exit, when it came, was unprecedented. No wearer of the yellow jersey has been withdrawn from the race by his team over drug offences. The last race leader to leave the event in similar circumstances was Michel Pollentier, from Belgium, who was caught attempting to defraud a doping control on 1978.

It was reported that Rasmussen had informed the team that he was in Mexico in June, whereas in fact he had been in Italy. This was regarded as a breach of team rules by Rabobank, who promptly asked him to leave the race. On being questioned about this, Rasmussen confirmed that he had received not one, but four warnings from the UCI and the Danish Anti-Doping

Agency, but underlined that he had been tested 14 times during this year's Tour and all had been negative (*The Guardian of 26/7/2007, p. S1*). He hit out at his team's bosses, and insisted that victory in the event was his (*Daily Mail of 28/7/2007, p. 112*).

Yet another rider tests positive...

The exit of the Danish contender for final victory was, alas, only part of an extremely chaotic day. The stage had started with a protest by some teams over the presence of cyclists considered to be part of the doping scene, and ended with the announcement that a rider from the Cofidis team, Cristian Moreni, had tested positive for testosterone the previous week. This was followed by the exit of the team in question – including Britain's Olympic champion Bradley Wiggins – as police searched the team's hotel and vehicles (*The Guardian of 26/7/2007, p. S1*). Mr. Moreni had been lying 54th overall when he crossed the line in what was to be his last stage in the Tour. Ironically, he had been randomly selected to perform another drugs test, even though he had already been found positive, before being led away by police for questioning. Later, the remainder of his team were also taken to the police station for questioning, returning to the hotel in the evening (*The Independent of 26/7/2007, p. 54*).

The next day produced developments which almost ventured into the surreal. Mr. Rasmussen was never a man to go quietly, and he did not disappoint on this occasion either. Not only did he, as is mentioned earlier, continue to maintain that he was in Mexico rather than the Dolomites where he had been spotted, but at one stage suggested that Theo de Roy, the team boss who gave him his marching orders, was mad. More particularly he claimed that:

"It's all the work of a desperate man who is at the end of his nerves. My boss is mad. I wasn't in Italy, no way. That's the story of one man (former cyclist and currently an Italian television presenter, Davide Cassani) who thinks he saw me. But there's not the slightest proof. This business has left me broken and destroyed with nowhere to turn" (The Daily Telegraph of 25/7/2007, p. S7)

Such was the turmoil into which the entire race had been cast that the International Olympic Committee took the unusual step of making an official statement on the affair, regretting these developments but insisting that the battle against doping had to continue, and that the various penalties which had been imposed indicated a "painful, slow, but none the less significant shift in attitudes" against those who chose to break the rules" (*Ibid*).

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Contador wins – but immediately faces questions

In the end, there were just about enough competitors left in the race to fill the victory podium in Paris. Alberto Contador, who took over the yellow jersey as soon as Rasmussen was ousted, and succeeded in maintaining his lead until the end of the final stage. But did the Tour end with a deserving winner? It is true that, although he had been removed from the 2006 Tour because of the fall-out from the Puerto affair, he had later been formally cleared (*The Guardian of 27/7/2007, p. S1*). However, no sooner had the last confetti been removed from the Champs Elysées than the spectre of doping scandal started to rear its ugly head once again – this time on the initiative of the world body especially established to oversee the campaign against doping in sport.

It was, of course, only a matter of time before the World Anti-Doping Agency (WADA), and its ubiquitous Chairman, Dick Pound, became involved in the saga. Mr. Pound decided to pursue further investigations into alleged evidence that linked Mr. Contador to the world of doping – and which threatened to stain the yellow jersey beyond redemption. These links seemed once again to hark back to the Puerto affair, with Contador facing fresh inquiries into his connection with Dr. Fuentes, who was at the centre of the controversy. Although, as was mentioned earlier, the Spanish authorities had dropped the case, not only against Contador, but also against all the cyclists implicated, Mr. Pound announced that WADA and the UCI were going through 6,000 pages of documentation gathered in the course of the investigation. It also emerged that documents seized at the home of Dr. Fuentes by the Guardia Civil were also being studied by German prosecutors, who were weighing up whether they could open proceedings for fraudulent behaviour against a number of German nationals involved in the case (*The Mail on Sunday of 29/7/2007, p. 118*).

At the time of writing, the matter was still under investigation. Crucial to Mr. Pound's inquiries will be a document written in Spanish in what seems to be Dr. Fuentes's handwriting. It describes what is alleged to be individual doping plans for riders of the Liberty Seguros team in 2005, when Mr. Contador was a member of the team. Thus under the initials RH, thought to refer to the disgraced Spanish rider Roberto Heras, numbers appear under the headings I-2, I-3 and TGN. The latter is alleged to be a reference to a banned growth hormone, whilst it is understood that I-2 and I-3 refer to banned insulin growth factor. The initials of what appears to be all members of the squad are listed, including one identified as AC. The programme for the latter is listed, in Spanish, as "nothing or the same as JJ". And JJ's plans for 2005 were "always to have I-2" (*Ibid*).

It is, of course, possible that AC was given "nothing" throughout the programme, and therefore infringed no rules (*Ibid*). However, a few days later, the German authorities announced that they had received documents from doping expert Dr. Werner Franke, which, according to the latter, showed that the Spanish cyclist had taken HMG-Lepori as a testosterone booster, as well as "an asthma product called TGN". Christian Brockert, a spokesman for Germany's Federal Criminal Police Office stated that his office would be taking the matter up with the public prosecutor's office which was deemed to be responsible for this case (*The Guardian of 1/8/2007, p. S8*).

....oh yes, and another rider tests positive...

Normally, the Tour organisers would expect the dust to settle somewhat after the event, however, turbulent, has ended. Not, however, in this case. Four days after the official end, it was announced that Spanish rider Iban Mayo tested positive for EPO as a result of a sample taken on the second rest day. He was immediately suspended by his Saunier Duval team pending the outcome of the B sample (*The Guardian of 31/7/2007, p. S8*).

At the time of writing, the results of the B sample in question had not yet materialised, which was somewhat strange given that normally this is done within a few days of the A sample results being announced. Clearly, there is more to this than meets the eye, and the next issue of this Journal will undoubtedly have more to reveal about this affair.

So does the Tour still have a future?

Rather predictably, the media went into speculative and caricatural overdrive over the sorry shambles that this year's Tour ultimately became, and some of the less reverent of these were ready to sound the death knell for this world-renowned race. The French newspaper France Soir even published a mock death notice on its front page, announcing that Le Tour, first organised in 1903, died during this year's event "at age 104, after a long illness" (*The Daily Telegraph of 27/7/2007, p. 20*). So it is no longer fanciful now to ask the question whether – if the reader will forgive the mixed metaphor – this is truly the end of the road for this venerable event. This is far from being a knee-jerk reaction, for the vast majority of fans and observers have exercised as much forbearance as it is possible to have, in the expectation of better things to come. Every year the same encouraging noises seem to be made that "this time it will be different", and that all the "lessons have been learned" and appropriate action taken. We have passed this way many times before, only to be brutally disabused of our optimism before the race reaches the fair city of Paris.

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Essentially, there are four schools of thought currently prevailing. The first is that the event, like the sport itself, is beyond redemption and that it will only continue as a grotesque mixture of a freak show and a tradition which is now so deeply ingrained in the French psyche that irreversible damage would be done to the nation's morale and self-esteem if it were allowed to die a natural death. The second follows the approach advocated by Professor Savulescu outlined earlier, which proposes a "controlled market" in sports doping. The third belongs to the Dick Pound school of enlightened thought, and grimly insists that the battle can be won by even more stringent measures; fiat justitia, pereat mundus. The fourth sees the problem in much wider terms, and advocates the "humanising" of the Tour and its riders, who have been increasingly become cocooned and cut off from their fans and spectators. This approach places the onus very much on the sponsors. Rather than spending money on non-vital personnel or equipment, they should redirect their budget into more urgent issues, such as keeping scientific tabs on their riders all year round and simultaneously ensuring that they are visible and accessible (see the approach advocated by journalist Alasdair Fotheringham, in *The Independent* of 30/7/2007, p. 54).

At the risk of having his moral courage called into question, the present author declares himself agnostic, given that he has neither the first-hand experience nor the passion. However, one thing is certain: nothing stands to be gained from the incessant blame game and one-upmanship which sometimes passes for international leadership in this sport. A good example of this was on display yet again as the Tour crisis was at its height, when the race director, Christian Prudhomme, criticised the UCI for its failure to combat doping, claiming that the world governing body actually wanted the Tour to be racked by doping difficulties. Asked in a leading German newspaper whether he intended to discontinue co-operation with the UCI, he replied:

"Yes, that is the case. Next year we will work hand-in-hand with WADA and the French anti-doping agency. The UCI never wanted a clean tour" (*The Guardian* of 28/7/2007, p. S4).

The UCI president, Pat McQuaid, naturally rebutted these allegations with considerable vigour, refuting any suggestion that it had "provided the riders with banned substances" (*Ibid*). Whatever the rights and wrongs in this particular spat, it is suggested that this is not the best way forward in solving the current crisis affecting the race.

Basso admits Puerto involvement following new investigation

It has been mentioned earlier (p.95) that the 2006 Giro d'Italia winner, Ivan Basso, was implicated in the Spanish police investigation into blood doping, known as the Puerto affair, which ended inconclusively when it was suspended by the Spanish authorities. Since then, Mr. Basso has maintained his innocence about his involvement in the affair, although he was barred from the 2006 Tour de France because of these suspicions. However, the affair resumed its momentum in late April, when Italian investigators reopened inquiries into the matter, and fingered Basso as one of the suspects. The Discovery team immediately suspended the Italian rider, pulling him out of the Flèche Wallonne one-day classic race (*The Daily Telegraph* of 25/4/2007, p. S18). He was summoned to appear before the anti-doping body of the Italian Olympic Committee (CONI) accused of the use or attempted use of a prohibited substance or a prohibited method (*The Guardian* of 25/4/2007, p. S10).

From that point onwards, matters started to move quite fast. On the eve of his appearance before the Committee, Basso resigned from the Discovery Channel team "for personal reasons related to the reopened investigation". The team's sponsor, being the well-known television channel, is not renewing its support after its present arrangement comes to an end, and this was clearly a factor (*The Guardian* of 1/5/2007, p. S6). The following week, Mr. Basso finally "came clean" and admitted his involvement in the scandal, and had pledged to CONI the "maximum collaboration" in this matter. It emerged that Mr. Basso had made an impromptu appearance the day before to explain his position. He had appeared at the scheduled hearing referred to above, but this had been adjourned with no new date fixed (*The Daily Telegraph* of 8/5/2007, p. S14). However, he insisted that his involvement had been restricted to "attempted doping", but that he never "went through with it" (*The Daily Telegraph* of 16/5/2007, p. S18).

Finally, and inevitably, Basso was issued with a two-year suspension by the Italian cycling federation on two counts: possession of banned substances and use, or intended use, of banned drugs or banned practices. He becomes eligible again in October 2008, since the suspension was backdated, but he will miss next year's Tour de France and Giro (*The Guardian* of 16/6/2007, p. S12). The International Cycling Union had requested that the maximum ban be issued. There are severe doubts as to whether he will race again professionally even after his sentence has been served.

15. Drugs legislation & related issues

Landis fight to clear his name continues... (US)

Whilst this year's Tour de France was experiencing the convulsions referred to above, the fall-out from last year's event was continuing in the shape of, inter alia, the Floyd Landis affair. It will be recalled that the US rider had failed a dope test following his dramatic last-gasp win in 2006, and was now embroiled in a bitter and protracted legal battle to avoid suspension and being stripped of his title.

The saga took its umpteenth bizarre twist in late April 2007, when a US arbitration panel ruled that several urine of the rider's samples, which previously had been ruled clean, could be retested (The Daily Telegraph of 13/4/2007, p. S17). The following week the French sports newspaper L'Equipe alleged that these further tests, conducted in Paris, had once again detected testosterone in these samples. Landis counter-charged furiously, claiming that his observers had been denied access to the laboratory where the tests were being performed (The Independent of 24/4/2007, p. 51). He also claimed that the relevant procedures, as well as the testing laboratory itself, were flawed, in the following terms:

"We're looking at the potentially deliberate falsification of results and wilful destruction of evidence which was one of our arguments against re-testing being done at the lab in question. This (leak to the French press) represents a massive failure on the part of WADA to manage the critical fight against doping" (The Guardian of 24/4/2007, p. 18).

Matters became even more bizarre a few weeks later, when Mr. Landis claimed that he was offered a reduced sentence by the US Anti-Doping Agency (USADA) if he gave "incriminating evidence" about fellow-US rider Lance Armstrong, the seven-times winner of the Tour de France (who, although suspected in several quarters of drug abuse, has never had anything proved against him) (The Daily Telegraph of 12/5/2007, p. B20). The surreal nature of the case continued the following week, when Landis dismissed his business manager for allegedly intimidating a witness. The latter was no lesser person than Greg LeMond, the only US rider prior to Armstrong to have won the Tour de France, and who had been cited as a witness in the case by USADA. Mr. LeMond explained that he had been contacted by Landis shortly after news of the positive urine test broke. They talked about the danger of hiding a secret should the B sample test positive, and, by way of example, LeMond related his pain at keeping confidential the fact that he had been sexually abused as a youngster. He alleges that an anonymous caller subsequently threatened to reveal details of this abuse if he materialised at the hearing to testify. This call was

traced back to Landis's business manager, Will Geoghegan (The Daily Telegraph of 19/5/2007, p. B21). Landis later admitted that he was present when the relevant telephone call was made (The Guardian of 21/5/2007, p. 17).

At the time of writing, the matter had yet to come to a definite conclusion. The public hearing was concluded in late May – and ended as it had begun, with the Landis legal team renewing their attack on the French laboratory which had analysed the original samples. Maurice Suh, Mr. Landis's chief attorney, claimed in his closing statement that he had proved USADA's case against his client to have been a "disaster". In a sustained attack on the Chatenay-Malabry laboratory, he claimed that technicians had made errors in testing the urine samples, including "rule violations, incompetence and miscalculations". He added:

"We believe in clean sports, we believe in clean athletes, we believe in real science. What we do not believe in is incompetent laboratories and cherry-picked data" (The Independent of 25/5/2007, p. 72).

The panel's decision had not yet been made public at the time of writing.

Other cases (all months quoted refer to 2007 unless stated otherwise)

Erik Zabel. The German rider, who had been one of the top performers during the past 15 years, has confessed to using EPO, the banned blood-booster, whilst competing for the Telekom team at the 1996 Tour de France. This brought the number of Telekom riders who have admitted to using dope to five – Bert Dietz, Christian Henn and Udo Bolts having also confessed (The Daily Telegraph of 25/5/2007, p. S18). He will not accordingly compete at the 2008 Olympics (The Daily Telegraph of 6/6/2007, p. S10). These confessions prompted the International Olympic Committee to open an investigation regarding drugs violations at previous Olympic Games. This inquiry could put pressure on Jan Ullrich, who also rode for Telekom, who won gold and silver medals for Germany at the 2000 Olympics in Sydney (The Times of 31/5/2007, p. 86) (See also below).

Bjarne Riis. In late May, the Danish rider who is currently the sporting director of the CSC team, admitted to using EPO, cortisone and human growth hormone when he won the Tour de France in 1996 (The Guardian of 28/5/2007, p. S9). It was somewhat ironic that Riis had himself excluded Ivan Basso (see above) before the 2006 Tour (The Guardian of 31/5/2007, p. S5).

15. Drugs legislation & related issues

Mr. Riis agreed not to accompany his team at this year's Tour, after allegations made by German rider Jörg Jaksche that Riis oversaw his consumption of drugs in 2004 (*The Daily Telegraph of 6/7/2007, p. S1*)

Jan Ullrich. The 1997 Tour rider has already admitted to his involvement in doping. Now a former massage therapist has added to the pressure for Ullrich to be penalised by claiming that he gave the Team Telekom rider an injection for EPO, at an undisclosed race in France (*The Independent of 28/5/2007, p. 42*).

Alessandro Petacchi. In late June, the Italian rider was suspended by his team, Milram, after the results of his post-Giro stage controls were revealed 'non-negative' for Salbutamol. The suspension came after the Italian cycling federation (FCI) had requested the Italian Olympic Committee (CONI) anti-doping offices to investigate Petacchi's positive test result. This was in spite of a plea by Petacchi that he had a doctor's certificate allowing him to use the asthma medicine Salbutamol (*The Guardian of 29/6/2007, p. 37*).

Peter Weibel. In late May, the German Cycling federation (BDR) suspended the coach of its under-23 team, Peter Weibel, after he was accused of providing cyclists with banned drugs during the 1990s (*The Daily Telegraph of 1/6/2007, p. S18*).

It is a fact that golf has yet to adopt a coherent anti-doping policy, with many in the sport wondering what advantage could be conferred by substances which increased strength. However, even before Mr. Player made this statement, the governing bodies were engaging in talks aimed at tackling the problem. The Royal and Ancient experimented with random testing at the World Youth Championships in October 2006, and the European Tour will launch random testing next season (*Ibid*). However, not everyone was cowed by Mr. Player's eminence in the world of golf into unquestioning acceptance of his statements, and within days, a chorus of top-ranking players challenged him to name and shame those whom he was accusing of cheating (*The Independent of 20/7/2007, p. 69*).

No such reticence was – perhaps predictably – on display from Dick Pound, the Chairman of the World Anti-Doping Agency (WADA), who praised Mr. Player for breaking the silence on the subject. He said:

"I think it's a great forward step. Gary Player is somebody with no axe to grind. It's not as if somewhere out there who's finished third is complaining about someone who finished ahead of him. He's beyond that and is speaking for the good of the game. I think they should be paying a lot of attention to the matter" (*The Sunday Telegraph of 22/7/2007, p. S5*).

Mr. Pound added his concern that some golf officials remained "in denial" about the doping issue, in particular in the United States. In addition, the Professional Golfers' association (PGA) have refused to place a time-scale on testing, blaming the logistical and jurisdictional difficulties associated with devising a world-wide programme. This was in spite of the fact that its spokesman, Ty Votaw, had already announced that all the bodies concerned were "in agreement" and that it was just a matter of "dotting some i's and crossing some t's" (*Ibid*).

At the time of writing, there appeared to be no further progress on this issue.

Doping issues and measures – Golf

How "clean" is the professional circuit? Gary Player stirs up controversy

Previous issues of this Journal have already indicated that the sport of golf, whose connections with toxic substances have thus far been restricted to "whiskies all round" in the clubhouse after a hole-in-one, may harbour a deep-seated problem with performance-enhancing substances. This controversy was reawakened in the most spectacular fashion on the very eve of one of the sport's major showpiece events, the British Open Championships, which this year took place in Carnoustie, Scotland, when one of the game's éminences grises, South African Gary Player, delivered himself of the public statement that doping was a fact of life in golf, and that current players were using human growth hormones such as Creatine or steroids. Mr. Player, himself the winner of nine major titles, urged the Royal and Ancient Club to introduce random testing at the earliest opportunity (*The Guardian of 19/7/2007, p. S1*).

15. Drugs legislation & related issues

Doping issues and measures – Other sports

Cricket

Overturing of Asif/Akhtar ban stands – CAS

It will be recalled from a previous issue of this Journal ([2006] 1 Sport and the Law Journal p. 88) that the Pakistan bowlers Mohammed Asif and Shoaib Akhtar had been suspended for one year and two years respectively after testing positive for nandrolone. The Pakistan Cricket Board, however, lifted the bans after the two test players claimed that they had not knowingly taken the drug. In early July 2007, the Court of Arbitration for Sport (CAS) ruled “with some considerable regret” that it had no jurisdiction to reverse this decision (*The Daily Telegraph* of 3/7/2007, p. B18).

Weightlifting

In late April 2007, Australian weightlifter Aleksan Karapetyan, who won two Commonwealth Games gold medals, was suspended for two years for the use of banned substances. He had tested positive for the stimulant BZP during a competition in the US (*The Daily Telegraph* of 24/4/2007, p. S17).

16. Family Law

Family Law

No parental supervision required for ice skating. German court decision

In February 2006, the District Court of Bonn ruled that children aged seven who are almost eligible for compulsory education, do not require any parental supervision when sliding on a slope which does not allow any pronounced speed (*Decision of 9/2/2006, [2007] 19 Neue Juristische Wochenschrift p. 1370*).

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Football

FIFA bans high-altitude international matches (but not if you lobby hard enough)

In late May 2007, it was announced that the world governing body in football, FIFA, had banned international matches from being played at more than 2,500 metres above sea level. The organisation's Executive Committee explained that there were medical concerns in relation to matches being played at high altitudes because the thin air makes breathing difficult and strains the heart of those who are not acclimatised. However, this was badly received by such high-altitude countries such as Bolivia, Ecuador and Peru, who described this as an injustice perpetrated by countries whose teams struggled to adapt while playing in the Andes, South America (*The Guardian of 29/5/2007, p. 17*).

In Bolivia, matters took a somewhat unreal turn when the FIFA decision assumed the dimension of a national crisis. Old ladies danced in the streets, police cadets flipped through flaming hoops, and President Evo Morales played in four football matches as fans across the Bolivian Andes rallied against the ban. The president himself had vowed to fight this measure. The main object of their anger seemed to be Brazil, whom the crowds saw as the principal instigators of the restriction (*The Guardian of 31/5/2007, p. S2*). Ultimately, FIFA President bowed to the South Americans' concerns and agreed to hear their objections (*The Independent on Sunday of 3/6/2007, p. 28*).

As a result of these soundings, FIFA raised the altitude limit from 2,500 to 3,000 metres. This allowed Colombia and Ecuador to play in their capitals, Bogota and Quito respectively. However, this still left Bolivia and Peru subject to the restriction – the former because its capital, La Paz, is 3,650 above sea level, the latter because it wanted to move its internationals from the capital, Lima, to Cuzco (3,400 metres) (*The Independent on Sunday of 1/7/2007, p. 29*). Further lobbying by Bolivia resulted in their obtaining a temporary exemption for La Paz, in that the qualifying games for the 2010 World Cup may be staged there. However, Bolivia will be required to build a stadium at 2,800 metres or below near La Paz if it wants the capital to continue staging international matches (*The Guardian of 16/7/2007, p. 13*).

Italy favourites, but East Europeans clinch Euro 2012

In mid-April 2007, the Executive Committee of Europe's governing body for football, UEFA, was due to reach a decision on the location of the next European championships, to be held in 2012. Candidates were Italy, as well as two joint bidders, Croatia/Hungary and Poland/Ukraine. Initially, Italy was regarded as the favourite to win. However, there were factors which militated against this. Not only was Italian football attempting to recover from the corruption scandals which had enveloped it over the previous 12 months (see above and Journals passim) but there was also the problem presented by the manner in which their police had handled – and perhaps even contributed to – disturbances in and outside its football grounds. In particular the trouble which marred the AS Roma v Manchester United tie had not cast the forces of Italian law and order in a very favourable light (see above).

Came the day of the fateful UEFA meeting, and the announcement that it was Eastern Europe which had won the day, in the shape of the joint Polish/Ukrainian bid – by the surprising margin of eight votes to four. The result was the first major decision taken under the presidency of Michel Platini, and was seen as the first step in delivering on his pledge to spread the wealth and power in European football more widely. He had courted the East European countries during his election campaign, and even though Ukraine publicly supported his opponent, Lennart Johansson, the result could be interpreted in some quarters as a kind of payback for the support which emanated from former Eastern Bloc countries (*The Guardian of 19/4/2007, p. S2*).

Mikel hit by Nigeria ban

In mid-June 2007, it was learned that the Chelsea midfielder, John Obi Mikel, had been indefinitely suspended from representing his native Nigeria at international level because of his failure to make himself available for the national team. He had pulled out of the African nations Cup qualifier against Uganda three weeks previously, citing a hamstring injury. Chelsea confirmed that he was undergoing treatment in London, but had failed to release him for independent assessment by Nigerian doctors (*The Independent of 22/6/2007, p. 76*).

17. Issues specific to individual sports

Cricket

Heads roll after World Cup fiasco – but were they the right ones?

The devotees of leather-on-willow amongst our readership will need no reminding of the chaotic, nay shambolic, manner in which the 2007 World Cup ended. The final played between Australia and Sri Lanka ended in farce, when officials ruled that, following a stoppage for bad light, play would resume the next day. To avoid this, players bowled three overs in darkness. In fact, the minimum 20 overs required had already been bowled. It was clear that someone would be required to expiate these sins, and in late June, the world governing body, the ICC, decided to suspend the five match officials involved, to wit referee Jeff Crowe, umpires Steve Bucknor and Aleem Dar, as well as reserve officials Rudi Koertzen and Aleem Dar (*The Independent on Sunday of 24/6/2007, p. 87*).

This move drew protests from some quarters, notably the Professional Cricketers' Association, whose Chief Executive, Richard Bevan, expressed himself in these somewhat unparliamentary terms:

"This is the latest in a litany of fundamental errors by the ICC. That includes their handling of Zimbabwe, the SuperSeries, the Champions' Trophy and the Future Tours programme. If I acted like it I would expect to have my a**e kicked. But nobody seems to take responsibility. Instead of looking forward and suggesting a better structure, the ICC are prepared to lose some of their best umpires from a major tournament. What's happening?" (Ibid).

This may seem a somewhat intemperate outburst, given that at least some of the match officials had to shoulder the blame for the comedy of errors which marred the said Cup Final. However, Mr. Bevan is far from isolated in his more general criticism of the top administrative echelons in the game. Thus a month earlier, it appeared that the ICC had forfeited the confidence of the players. In a survey conducted by the federation of International Cricketers' Associations (FICA), 56 per cent of the players doubted the ICC's ability to govern the game, with 89 per cent rating the recent World Cup as average or worse. FICA Chairman Tim May claimed that it was the committees, rather than Chief Executive Malcolm Speed, which are responsible for the recent problems besetting the sport (*The Daily Telegraph of 16/5/2007, p. S18*).

Was Gilchrist squash ball ploy was legitimate? (Australia/Sri Lanka)

In spite of the farcical events described above, the World Cup final did feature some memorable performances, notably that of wicketkeeper/batsman Adam Gilchrist, whose 149 laid the foundations for his side's victory. It later transpired that, for some reason, Mr. Gilchrist was batting with a squash ball in his glove during his performance. Sri Lankan Cricket Board chairman Kangdaran Mathivanan objected to this, questioning whether this was "within the spirit of the game" and promising to raise this with the ICC at a forthcoming meeting. However, Australian batting coach Bob Meuleman dismissed these objections as "a little sad" (*The Daily Telegraph of 9/5/2007, p. S18*).

Athletics

"Blade runner" could feature in 2008 Olympics

Oscar Pistorius, a disabled sprinter from South Africa nicknamed "Blade Runner" because of his curved prosthetic legs, has extremely keen to compete in the Olympic Games to be held in Beijing next year. Thus far, he has fallen foul of a rule recently introduced by the International Association of Athletics Federations which banned any runner who is deemed to benefit from artificial help (*The Daily Telegraph of 25/6/2007, p. S31*). The athlete has already achieved remarkable results in able-bodied races, finishing runner-up in the 400m at the South African national championships (*The Guardian of 29/6/2007, p. S10*).

However, the IAAF have pledged to engage in the necessary research in order possibly to reconsider his case. As part of this research, they allowed Mr. Pistorius to compete in the British Grand Prix in Sheffield, held in July 2007 (*The Independent of 29/6/2007, p. 72*). He finished last in the 400m event, and was disqualified because he had run out of his lane. However, he drew encouragement from this event, which had enabled him to compete on equal terms with the world's best (*The Independent of 16/7/2007*). However, the South African was less than enchanted with the manner in which the IAAF was monitoring his progress, calling them "amateurs" and "unprofessional". He later apologised for these remarks, but his actions had caused some in the IAAF to believe that the money expended on their research into his case could be better spent (*The Guardian of 17/7/2007, p. S10*).

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Nevertheless, the matter was far from resolved at the time of writing. Mr. Pistorius's ambition has remained as strong as ever, and shortly after the ill-fated Sheffield race he indicated that he would be prepared to submit to further tests in the autumn (*The Mail on Sunday of 22/7/2007, p. 102*).

Rugby Union

European Rugby Cup disagreement settled – but for how long?

It will be recalled from the previous issue of this Journal (*[2007] 1 Sport and the Law Journal p. 66*) that all was not well with Europe's premier inter-club competition, the Heineken Cup. Essentially, the top French sides had threatened to withdraw from the competition for two reasons: (a) the fixture congestion which threatened the "Top 14" domestic broadcasting deal, and (b) the argument between their English counterparts and the Rugby Football Union, which was refusing to hand over its shareholding in European Rugby Cup Ltd. The English Premiership clubs, entirely dissatisfied with the manner in which the Cup was run and the small revenue which it generates, announced that they would support the French decision.

These developments have naturally ruffled some feathers among the top echelons of the sport's administration – not least the world governing body, the International Rugby Board (IRB). Indeed, its Chairman, Syd Millar, at a certain point described the threatened boycott by the French and English clubs as "disgraceful and selfish". He accused the English clubs of manipulating the Chairman of the French National Rugby league, former international winger Serge Blanco, who had been at the forefront of the boycott, stating that the latter had been "very badly advised" and "allowed himself to be used by certain people in England" in order to disrupt the established order in world rugby (*The Independent of 10/4/2007, p. 65*).

Premier Rugby (PRL), the umbrella organisation representing the 12 top-flight English sides, made its official response to this outburst the following day, in the following terms:

"Now is not a time for accusation. It should be a time for urgent discussion on how to resolve differences, and should involve all the parties. We have made it clear we support a new European competition inclusive of all countries and under IRB governance, which reflects the interests of all parties" (*The Independent of 11/4/2007, p. 50*).

In spite of this assurance, the IRB took a hard-line approach, backing the six European unions in their attempts to ensure that a cross-border club competition would continue for the next five years. Its insistence that governance of the game remained with it and the national unions. Mark McCafferty, the PRL Chief Executive, saw this as a "direct attack" on the club game, and stated that it looked as though this matter was heading for the law courts. In addition, any lingering hope that that the PRL and their French counterpart may have harboured of being given, as of right, an equal shareholding in European Cup Rugby Ltd were dashed. The IRB insisted that a split of the shareholding would remain within the gift of the national unions. Significantly, however, the statement also reiterated that no other cross-border competition would be sanctioned, thereby scuppering the possibility of an Anglo-French tournament to fill the blank weekends of the European boycott (*The Independent of 13/4/2007, p. 65*).

Thus the impasse remained, and it looked increasingly likely that the boycott would take effect. The breakthrough came as a result of a largely positive meeting of the tournament stakeholders in Dublin aimed at lifting the impasse. Under the deal proposed as a result of this meeting, the RFU would retain its shareholding in the European tournaments in return for a five-year guarantee of participatory rights to the top-flight teams – a highly satisfactory outcome for the clubs, who had long feared an RFU attack on their elite status when the current domestic arrangements expire in 2009 (*The Independent of 9/5/2007, p. 50*). The parties involved, who included Messrs. Blanco and Millar, as well as Tom Walkinshaw, the Chairman of PRL. The parties were to take the proposal back to their organisations, and a deadline for agreement was set for 18 May.

It soon became clear that this deadline would not be met. However, there were encouraging signs that the two sides were drawing much closer together. One of the reasons for the delay was that the PRL management was divided over its acceptance. Whereas Mr. Walkinshaw was very much in favour, the Leicester chief executive, Peter Wheeler, had doubts over the intentions of the RFU (*The Guardian of 17/5/2007, p. S9*). However, the deal was announced on 20 May, with ERC Chairman Jean-Pierre Lux announcing that the leading French and English clubs would participate in next season's Heineken Cup. Nevertheless, there were doubts as to how long this goodwill would last. Only a few days later, it was learned that the French clubs wish to reduce their participation in the Heineken Cup

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to four teams, and pull out of the European Challenge Cup completely. They were concerned that only their “big four”, i.e. Stade Français, Toulouse, Biarritz and Clermont Auvergne had the financial and playing resources to compete in Europe and the demanding 14-strong First Division in France (*The Guardian of 1/6/2007, p. S9*). 