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Editorial

This feature was discontinued several editions ago but at the request of various members of the Association it has now been revived.

The Annual Conference was held on October 17th at Lord's Cricket Ground and was probably the best one so far. Certainly this sell-out event was very well received by everyone who attended. Clare Harvey from Olswangs, Hamish Porter from Theodore Goddard's and Clifford Bloxham from Octagon explored issues relating to New Rights Streams in the first session. In the second of two morning sessions Ian Blackshaw, currently lecturing at the Anglia Polytechnic University; Darren Bailey who is currently Senior Legal Counsel for the International Rugby Board; Adrian Barr-Smith of Denton Wilde Sapte; and Paul Harris of Monkton Chambers dealt with Restrictions on exploitation of sports rights.

Both of the earlier sessions examined the rapidly developing area of the commercial aspects of sport and their interface with the law. After lunch we had the pleasure of listening to our President, Maurice Watkins, explain the complexities of the new contractual provisions in world football. He was followed by Jean-Louis Dupont, legal adviser to Bosman, on the legal problems surrounding the requirements on players to participate in international matches. The final session of the day involved a riveting discussion of the right to a fair hearing in disciplinary cases with particular reference to the Modahl case which had only recently been concluded in the Court of Appeal. Charles Flint QC, of Blackstone Chambers, who had acted for BAF, and Anthony Morton-Hooper, who had acted for Diane Modahl, both spoke as did Jonathan Taylor of Hammond Suddards Edge (and also leader of the Diploma in Sports Law at King's College, London).

The quality of all our speakers ensured that interest never waned and it was with some regret that Nick Stewart QC, who chaired the afternoon sessions, brought the proceedings to a close.

At the AGM which preceded the conference, we bade farewell to Robert Stinson who had served as Treasurer for several years. Our heartfelt thanks are due to him and to his son, Philip, who also retired from the committee. Since then we have co-opted Jonny Searle from Ashurst Morris Crisp Solicitors, along with Richard Verow, legal adviser to Octagon, who brings with him a wealth of experience, whilst Jonny is likely to remain our only Olympic Gold medallist on the committee for some considerable time.

Our new Treasurer is Fraser Reid of Theodore Goddard Solicitors and we are grateful to him for taking on this position.

By the time this issue appears the final event of 2001 will have taken place. This was a joint event with King's College, London, dealing with the thorny issues surrounding the misuse of drugs in sport. It promised to be another fascinating event with some

high level protagonists, including our Chairman, Nick Bitel and Mark Richardson who returned to competition earlier in 2001 having been previously disqualified.

Meanwhile sport and the law issues continued to reach the headlines of the national press. My colleague Walter Cairns deals with recent developments both in the UK and abroad but I must make a brief reference to two issues which have both resulted in the law being left in an unsatisfactory state. The first concerns the threatened strike by the Professional Footballers Association. Mercifully, this was avoided following discussions involving, amongst others, Maurice Watkins and another of our members, John Hewison, of George Davies and Co., Solicitors, in Manchester who acts for the PFA. The satisfactory outcome meant that the legality, or otherwise, of the threatened strike remained uncertain.

The second issue concerned the court ruling which prevented Steve Bruce, manager of Crystal Palace from moving to Birmingham City during the continuance of his 3-year contract. He was subject to a 9-month period of notice but whether such a lengthy period would be enforced must remain debatable as it was not challenged by the manager. We must wait for further disputes to appear to resolve these issues.

A brief reference must be made to the Court of Appeal judgment in the case of *Diane Modahl v British Athletic Federation* which was handed down on October 12th 2001. An article which I published earlier in 2001 (vol 9 Issue 1) examined the reasons for the decision of the High Court judge to find against the athlete in her action for damages based on a breach of contract. The High Court judge (Douglas Brown J.) ruled that there was no contract between Mrs Modahl and BAF which could ground an action for damages. The Court of Appeal, by a 2-1 majority, decided that there was an implied contract but that due to the fair manner in which the disciplinary proceedings had been conducted there had not been a breach of contract. Mrs Modahl and her lawyers may feel that they have at least succeeded in establishing that there is an implied contract between an athlete and the national governing body, but less than happy with the eventual outcome. The athlete was, of course, represented by Mishcon de Reya and we are indebted to Anthony Morton-Hooper for his article in this edition of the Journal. It may be that we shall return to the issues involved in a later edition.

We are, of course, indebted to all the recent conference speakers whose (amended) papers also appear in this edition.

Finally, readers will be able to read the first example of what we hope will become a regular feature i.e. short pieces written by professional journalists on a topic of their own choosing. The author of the first item is John Goodbody, Senior Sports Correspondent of The Times and the current holder of the Sports Writer of The Year Award. Our thanks are due to him for his thoughtful contribution.

RAYMOND FARRELL
EDITOR

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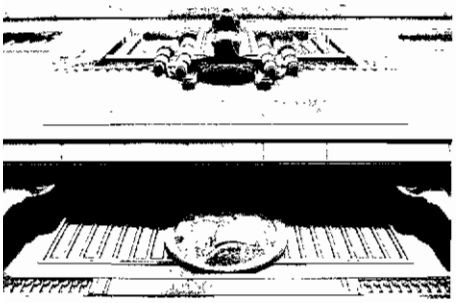

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Educating for professional life

A Journalist's View

John Goodbody

Sport in the United Kingdom remains in a state of disarray, lacking overall direction and strategy. The long drawn-out fiasco over the rebuilding of Wembley is just one example of a situation partly caused by the present structure of British sport. No one is quite sure for what they are responsible. Difficult decisions are rapidly off-loaded to other areas of administration and there is a jealousy between the different bodies, which jockey for better positions to increase their empires.

Over the last 15 years, I have become becoming increasingly convinced that until the Government takes direct responsibility for policy and funding, the U.K. will fail to achieve its potential in results, both at elite level and in grass-roots participation. Sebastian Coe, who, apart from being one of this country's most distinguished athletes, has been a vice-chairman of the Sports Council. He believes that we will never overhaul countries such as France in Olympic medal tables until we give the Minister for Sport ultimate power and responsibility. He says:

> *"It remains a job without power until we have a Minister of Sport who is accountable for his or her own department, as is a Health Minister or a Trade Minister. The Minister must not be able to deflect criticism by saying Sport England did this or UK Athletics did that or I wanted the Football Association to do that but it wouldn't."*

Note the change of preposition. At the moment, we have a Minister for Sport. In Coe's scenario, we would have a Minister of Sport.

This point has been repeatedly made over the years. At the 1997 conference of the Central Council of Physical Recreation (CCPR), Tony Banks, who was an ebullient and enthusiastic Minister, had to speak on the topic: "Who runs British sport?" His opening statement to the representatives of the national governing bodies was:

> *"Well, it's not me."*

And he was quite right.

The late Denis Howell, who has a strong claim to be the outstanding Minister since the first, Lord Hailsham of Saint Marylebone, was appointed nearly 40 years ago, asked pertinently in his book Made in Birmingham:

> *"What is the role of a Minister for Sport, who has given all his power to the Sports Council ?"*

It is question with which Ministers and British sport have always struggled to answer.

Most people believe sports ministers make decisions on the funding of projects, financed with public money. They do not. They hand over the money, which they have negotiated with the Treasury, straight to the Sports Councils. Lottery money also by-passes the Government and is dispensed by panels, made up of members of these quangos.

Yet, originally, the structure of administration was more satisfactory. When the Sports Council was created in the 1960s, Howell, then in his first six-year spell as Minister, was its chairman. However, this changed exactly 30 years ago, when the Conservatives took office and set up a royal charter in which the Government adopted the 'arms-length' principle. The Minister appointed the members and chairman and then went off on a round of speech-making, shaking hands and opening sports centres. However, although it appeared to be 'arms-length' because he could only recommend how money was to be spent by the Sports Council, in reality it was not. The Minister retained the power to 'hire-and-fire' the members. Inevitably he used it, as several members and chairmen have discovered.

This policy of not giving the Minister executive powers, as occurs in France, reached a ludicrous climax in 1989 when Colin Moynihan, the most impressive Tory Minister for Sport in history, was unable to chair the Sports Council himself. Instead, he was forced to appoint Peter Yarranton, a rugby union administrator and international from the 1950s, although Moynihan had been an Olympic silver

medal winner in the decade in which he was Minister and like Yarranton had been a member of the Sports Council. Yarranton was simply not as suitable a person to head British sport.

One of the few valuable changes in the last few years has been the decision to split the Sports Council into two distinct bodies, the English Sports Council and the UK Sports Council. Since Scotland, Wales and Northern Ireland had already had their own individual Sports Councils, this made sense - and also showed clearly how England was being under-funded compared to the other three home countries. The recent changes of name, such as UK Sport and Sport England, from their original titles have been purely cosmetic.

There have been several consequences of this unfortunate structure. One has been the increasing bureaucracy and duplication of responsibilities. Frequently representatives from the Government, UK Sport and Sport England, will turn up at the same events, such as conferences or the Olympic or Commonwealth Games, because each feels that they should be represented. By having either the Secretary of State or the Minister chairing both UK Sport and Sport England, there would also be no necessity for representatives of the Department of Culture, Media and Sport to attend the meetings of quangos. In Scotland, Wales and Northern Ireland, the Minister for those countries would take on the task for areas solely pertaining to their sphere of administration.

The individual ministers would make the decisions, advised by members whom they would appoint from different areas of sport, just as they do at the moment. What would also change would be that instead of being able to hide behind UK Sport and Sport England, the ministers would have responsibility for strategy. As Coe once pointed out, this would immediately push sport up the political agenda, since a minister would be liable to be questioned in the House of Commons about policy decisions.

It would also mean that the big projects would have a central base from which they would be launched. A typical example of this would be the staging of a future Olympic Games in London. Even if this might not take place for 30 years, preparations should be made now to ensure that options are not closed down. If the favoured choice is East London, as is anticipated, the sites should be identified, built in with future transport links and then reserved for possible development. Even the odd facility might be built so that it could be upgraded, if necessary, for the holding of the Games.

At the moment, no one can take a lead. The British Olympic Association has no money. The budgets of UK Sport and Sport England are restricted to sporting facilities, whereas the biggest expenditure on the Games would be the infrastructure and building of an Olympic Village, capable of housing about 20,000 people. The only body able to take a lead is the Government and the House of Commons Select Committee for Culture, Media and Sport has repeatedly recommended having a Minister of Events. This was a post that was temporarily filled for the 2002 Commonwealth Games, to ensure they were financially and administratively viable.

In one of its reports this year, this Committee of MPs stated:

> *"Our examination of events has exposed many problems of overlapping reponsibilities in the governance of sport and of too many issues that fall into the gaps between bodies. In the wider context, there is a need for a full consideration of the future role of the Minister for Sport."*

The question is whether this Government will tackle the issue. The omens are not good. Although so many ministers in the past have privately wanted a greater role in the administration, they have shirked the task when it has come to an actual decision. Civil servants may have persuaded them that it is far easier to let other people take some of the blame or all the blame for mistakes rather than have full responsibility as their ministerial colleagues in other departments do.

A further problem is that sport, after a nomadic journey round several departments in Whitehall, has been housed in the Department of Culture, Media and Sport for the last nine years. Peter Brooke, the second man to hold the post of Secretary of State in that department, once told me that if he or the Minister for Sport adopted executive powers for that area of his portfolio, it would have repercussions in others so that there would be suggestions for having an executive Minister of the Arts or of the Media.

One can see how this would clearly be unacceptable because both the Arts and the Media are (or should be) against the establishment, producing work that is unsettling for any government. It would

be unhealthy to have, say, the Royal Shakespeare Company, directly receiving its funding from the Government because it would then be worried about what plays to stage in case the RSC upset its pay-masters.

However, sport is different. It is almost entirely about promoting national identitity and confirming values of health, fitness and international success that all governments would support. This is why the Government should move sport into a different department, so following the recommendation of Derek Wyatt, the Labour MP, a member of the House of Commons Select Committee on Culture and also a former Rugby international.

He said in a debate in the House of Commons on November 22:

> *"We need a Secretary of State for sport and health education, who will be chairman of UK Sport. We have to locate the issue so that we are in control of decision-making; we can no longer allow quangos to dictate to us. Until we have such a structure, we might have debates but not much will change."*

Exactly.

John Goodbody, The Times.

Sports Law Current Survey - Issue No.3 - 2001

Walter Cairns

The Current Survey of the *Sport and the Law Journal* examines current world-wide developments in the field of sports law, in accordance with the following structure:

1. General
2. Criminal law
3. Contracts (including employment law)
4. Torts and insurance
5. Public law
6. Administrative law
7. Property law (including intellectual property law)
8. Competition law
9. EU law (excluding competition law)
10. Company law (including sports associations)
11. Procedural law and Evidence
12. International private law
13. Fiscal law
14. Human rights/Civil liberties (including race and gender issues)
15. Drugs legislation and related issues
16. Issues specific to individual sports (including disciplinary proceedings)

1. GENERAL

Boxing promoter clashes with lawyer at press conference[1]

Don King, the celebrated boxing promotor, caused quite a stir at the start of the press conference which followed the Lennox Lewis World Heavyweight fight in November, when he angrily ordered Pat English, a lawyer working for his rival Main Events, off the stage. English attributed this outburst to a fit of jealousy on King's part, prompted by the fact that the latter had lost so many times to him in various court cases. In reply, King branded English as a "despicable cad" and claimed that his opponent had attempted to prevent the fight from going ahead.

Spurs lose in-house lawyer (UK)[2]

In early November 2001, it was announced that Tottenham Hotspur, the leading North London football club, had lost its in-house lawyer John Ireland as a result of a review of the club's business operations. His role as company secretary has been taken over by Paul Viner, and there are no plans to appoint a replacement to fill Viner's previous role as finance director designate.

International lawyers' team take on Juventus[3]

Ian De Freitas, who is a partner in top London law firm Berwin Leighton Paisner, found himself in even more exalted company recently when he was selected to represent the *Union Internationale des Avocats* (International Lawyers' Union) in a fixture with top Italian side Juventus on the occasion of the UIA Conference which took place in Turin this year. The lawyers lost the game 3-1.

Bar athletes compete in London Marathon (UK)[4]

During the Spring of 2001, the (English) Bar Marathon Team took part in the annual London Marathon. Not only did some compete the course in the commendable time of 2hrs 38 minutes, but they also succeeded in raising several thousands of pounds for charity.

German Bar Association's working party on sports law holds AGM[5]

The Sports law Working Party (*Arbeitsgemeinschaft Sportrecht*) of the German Bar Association (*Deutscher Anwaltverein*) held its Annual General meeting on 22/5/2001 in the *Beethovenhalle*, Bonn. One of the items on the Agenda concerned the conversion of its members fees into Euros.

Karlsruhe Young Lawyers hold symposium on "Sport, Money and the Law" (Germany)[6]

Karlsruhe may strike the passing tourist as a rather uninteresting medium-sized industrial city in Baden-Württemberg. However, it also happens to be the seat of Germany's Constitutional Court (*Bundesverfassungsgericht*), which is why its lawyering fraternity is held in considerable regard in German legal circles. On 11/9/2001, its Young Lawyers' Association (*Junge Juristen Karlsruhe*) held a symposium on "Sport, Money and the Law" (*Sport, Geld und Recht*), which was intended as an open forum for discussing the various issues arising from this topic.

Favourites routed in lawyers' rugby tournament (UK)[7]

The Taylor Root Law Society Sevens tournament for 2001, supported by The Lawyer Group, was won by a team representing top firm Clyde & Co. In the process, they beat the favourites, holders and 11 times winners Freshfields Bruckhaus Derringer by a resounding 25-0 in the final.

Manchester law firm teams up with football supporters advisory group (UK)[8]

Leading Manchester law firm Cobbetts is currently reaping the benefit of its association with

Supporters Direct. This is a Government-funded advisory service for football supporters wishing to play a greater role in their clubs. This service, which has just celebrated its first anniversary, refers to Cobbetts, and to a lesser degree Bournemouth firm Lester Aldridge, fans who wish to set up supporters' trusts.

Thus far, the partnership has produced massive benefits for the Manchester firm, as is explained by partner Kevin Jacquiss, who said

> *"The volume of legal work we have received has been massive. We anticipated registering half a dozen trusts in the first year, but so far we have completed over 30."*

The work is carried out at a flat rate paid by Supporters Direct. The latter's director, Trevor Watkins, a partner at Southampton firm Ansor Byfield, and who was at Lester Aldridge when the scheme started up, has announced that 125 groups of supporters had approached it for assistance.

Conflict of interest accusation over money paid by IOC to Montreal law firm[9]

The cash received by the Montreal law firm of a former Vice-President of the International Olympic Committee (IOC), Dick Pound, for legal services rendered has raised serious ethical questions, according to Sergei Bubka, the polevaulter who represents athletes on the IOC Executive Board. Bubka had serious misgivings when the new IOC President, Jacques Rogge, held a closed-doors session of the Executive, having requested officials present, including secretaries, to leave the room, only to divulge to those remaining that these payments had been made.

Pound's firm was paid under an arrangement made with former IOC President Juan Antonio Samaranch in 1985 when Pound, as head of the marketing commission, had begun to lead the drive to "sell" the Olympics, which had ultimately made it the richest body in world sport. The payments were made to Pound's firm of Stikeman, Elliott. They ended in July when Samaranch relinquished the presidency, and totalled $3.2 million over 16 years. Bubka confessed to being particularly surprised at this development because it was Pound who had led the investigation into IOC members who became involved in the Salt Lake City scandal which prompted ten IOC members to leave.

Pound, however, denied any suggestion that there was a conflict of interest involved in this matter.

Australian law journal focuses on legal issues arising from Sydney Olympics

The University of New South Wales Law Journal recently devoted an entire issue to the legal issues arising from the Olympic Games which were held in Sydney in September 2000.[10] It includes a set of papers covering the widest possible range of legal topics concerning the Games, which are summarised below.

In "The legal structure of the Sydney Olympic Games"[11], author Mark Brabazon documents the major elements of the legal structure erected for the purpose of accommodating the Sydney Games, and subjects to a thorough critical analysis the appropriateness of some of the measures adopted in the process of creating this major state-sponsored, but non-governmental, public event. He adds a Table which sets out the chronology of various developments in relation to the organisation of the Games.

The author is particularly critical of what he sees as the unnecessary secrecy which has surrounded many aspects of these Games. Not only can legitimate objections be raised against the secrecy affecting the legislation and covert agreements concerning the exercising of statutory discretion. There are also grounds for questioning the appropriateness of specific exemptions from the Freedom of Information (FOI) Act for documents created or received by the various bodies involved in the organisation of the Games which contained material which is "confidential to" the International Olympic Committee (IOC) or the Australian Olympic Committee (AOC). The author is of the opinion that the Act already contains adequate exemptions in relation to confidential information, and fails to see why these were deemed insufficient for the purpose of protecting the legitimate interests of the Olympic movement. The restrictive policies adopted in relation to FOI Act requests for information is also criticised by the author.

The issue of "ambush marketing", and the relevance of this practice to the Sydney Olympics, has

already been dealt with in an earlier issue of this organ.[12] This is the practice whereby a firm attempts to create an association between itself and a sponsored person, team or organisation where no such association exists. This issue is tackled head-on by authors Jane Sebel and Dominic Gyngell in "Protecting Olympic gold: ambush marketing and other threats to Olympic symbols and indicia"[13]. This paper examines the practice in question and the manner in which it has developed as a threat to the viability of Olympic sponsorship. The authors also analyse the lawfulness of this practice. They explain that in Australia, the threat presented by this phenomenon arose from the inadequacies of Australia's intellectual property law system and the failure on the part of the legislature to introduce proper measures for the protection of Olympic symbols. The authorities responded to this threat by adopting the Sydney 2000 Games (Indicia & Images) Protection Act 1996.

On the basis of examining the past history of ambush marketing against the background of this Act, the authors conclude that, because this practice involves a spectrum of behaviour ranging from the glaringly obvious to the ambiguous and subtle, the various sponsors would have little recourse against most of the ambush marketing which was expected to materialize during the Games. However, this seems to have been contradicted by the findings of the author M. Roper-Drimie, cited in the previous issue of this column.[14]

In "The Green Games - the legal obligations that have arisen from the 'green' bid",[15] author Roderick McGeogh examines some of the legal implications of the claim, often made by the organisers, that the 2000 Games would be the most environmentally sound Olympics ever staged. More particularly he examines the question whether the Games are set to live up to the pledges made in the *Environmental Guidelines for the Summer Olympic Games (Environmental Guidelines)*, which contain a commitment to the use of refrigerants and processes which were free from CFC, HFC and HCFC. He also examines the capacity of various accountability mechanisms, whether statutory, contractual or otherwise, to enforce compliance with these guidelines. Finally, he demonstrates that the environmental policies of the "Green Games", whether legally enforceable or not, have set a precedent for future Games and future urban developments.

It was inevitable that the drugs issue would feature prominently in any discussion of the legal implications of any present-day Olympics, and it is the Hon. Justice Tricia Kavanagh who tackles this issue in this set of papers in a piece which examines the role to be played by the Court of Arbitration for Sport (CAS) in this regard.[16] The author is herself an Arbitrator and mediator with the CAS, and therefore writes from a position of considerable experience in this area. She examines the legal complexities and legal principles revealed in a number of doping cases which have arisen before the Court, and traces the measures adopted by those involved in sports law which are aimed at introducing a measure of consistency and integrity to international sports law, through the establishment of a new International Court of Arbitration for Sport, governed by revised rules and procedures. She particularly emphasises the need for effective monitoring to be built into the process in order to protect the interests of all parties. Thus it is imperative, in her view, that the Court should promptly publish reasons for any decision. She also believes that this will lead to the emergence of a distinctive *lex specialis* on this topic.

As a condition for selection onto the team representing the host nation, the relevant athletes were required to sign the 2000 Australian Olympic Team Membership Agreement. The author Tony Buti[17] advises the athletes in question to peruse this Agreement with the utmost attention, as he considers that it not only places certain obligations on them, but also affects their civil liberties as well as restricting their freedom to engage in media and sponsorship contracts. He examines the "lawfulness" of the clauses in the Agreement which deal with (a) media, sponsorship, marketing and promotions, (b) anti-doping measures and strict liability, and (c) HIV disclosure and testing.

As regards the restrictions on the athletes' freedom to exploit their skills and abilities to obtain media, sponsorship, marketing and promotional contracts, he concludes that these raise major concerns of unreasonable restraint of trade, but adds the rider that the Australian Olympic Committee, which imposes this Agreement, would be more than likely to succeed in defending any challenge to such clauses based on restraint of trade. However, as regards the anti-doping and HIV constraints mentioned under (b) and (c), these present major difficulties which could lead to successful restraint of trade litigation by the athletes concerned. More particularly as regards the HIV clauses, the author considers that the focus should be on ensuring that proper medical procedures be followed rather than on imposing mandatory disclosure and possible testing requirements.

In "An Olympian effort: workplace relations and the Sydney Olympic Games"[18], authors Robbie Walker,

Darren Isaacs and Kieran McPhail provide an overview of some of the more interesting industrial relations aspects to have arisen from the preparation for the Sydney Olympics, focusing specifically on the following issues:

- who are the various organising bodies in relation to Olympic staffing issues;
- what will be the economic impact of the Olympics;
- the award provisions covering the staff of the organisations involved in the organisation and staging of the Games;
- staff recruitment and the use of labour hire firms;
- Trade union involvement in, and access to, the Olympic sites;
- the use of a volunteer labour force;
- Olympic games industrial dispute resolution;
- the various employment programmes sharing the common duty of promoting the career and "after-sports" interests of the athletes, and
- occupational health and safety issues relating to Olympic workplaces.

The author's conclusions are extremely positive, holding that all parties concerned, including organisers and trade unions, have undertaken the task of award regulation with considerable focus, tempered by a willingness to compromise. He even suggests that the workplace relations established for these Olympics could become a blueprint for the Games of the future.

In "Conflict of interest, accountability and corporate governance: the case of the IOC and SOGOC"[19], Saul Fridman examines the rules of the International Olympic Committee in the light of the virtually unrestricted rights which it has to regulate and organise every aspect of the Games. In so doing, he asks the question whether this event should either be given to others to manage, or be retained by the IOC whilst accepting certain reforms. He examines the manner in which the IOC is organised and operates in the light of the corporate model, but concludes that this model is not entirely appropriate for the purpose of proposing reform. However, there is another organisation which bears a close resemblance to the IOC in many of its organisational respects, and which could provide better indicators for reform - i.e. the Catholic Church! After all, states the author, it is clear that

> *"the Roman Catholic Church is not a democratic organisation, that its functionaries are subject to a form of internal discipline that is independent of state action and that it is accountable to no terrestrial body or person. Furthermore, the Church depends for its success on grassroots participation and the unpaid efforts of millions of volunteers. In these respects it is closely analogous to the IOC. In fact, when one examines the fundamental principles of modern Olympism, they are not entirely dissimilar to good Christian values."*[20]

The author makes this comparison not out of facetiousness, but to make a serious point. Although the behaviour of certain priests has given rise to controversy, it has never been proposed that the Roman Catholic Church should, in spite of its "public"nature, be forced to submit to some type of democratic reform supported by national law. However, if a locally constituted subsidiary of that church infringes national law, that subsidiary is clearly subject to national law. In that respect, so too is the "incorporated subsidiary" of the IOC in Australia, which is the Sydney Organising Committee for the Olympic Games (SOGOC). However, in the final analysis the author believes that any reform will need to be voluntary - without resorting to the mere parroting of corporate norms.

The financing of the Games is also an issue which is fraught with legal implications. In "The Olympic stadium: innovation in project financing"[21], author John M Shirbin focuses more specifically on Stadium Australia, completed in 1999, which was largely financed by the private sector rather than by the taxpayer. The author describes the nature of this financing exercise as well as its contractual and commercial underpinning, and engages in a general discussion of this method of financing a public facility. In so doing, he establishes that the Australian Government took a commendable initiative in attracting innovative proposals from the private sector for the development and financing of this stadium, and succeeded in this endeavour. The proposal made by the consortium known as the Stadium Australian Group (SAG) was to combine Olympic rights, long-term members' entitlements and an equity investment, and to offer the combined package to sports fans in the form of a public issue. This gave access to a previously untapped source of funds. As a consequence, the Government were in a position to have the principal Olympic facility developed at minimal cost to both itself and the taxpayer. In addition, it is the SAG and not the Government which bears the ongoing risk relating to the Stadium. This is clearly a blueprint to follow by others engaged in similar projects.

Considerably less euphoric is the view taken by authors Kylie Kilgour and Polly Porteous on the human rights implications of the Games' organisation.[22] Although the New South Wales Government promoted the Games by calling upon Australians to "share the spirit", invoking the ancient ideals of community and solidarity, the authors feel that, whilst the business community has certainly benefited from the Games, the Government has been indifferent to the plight of many members of Sydney's local communities. They argue that the economic boom provoked by the Olympics would have an adverse effect on these sections of the community who are already the most vulnerable. This creates the potential for human rights infringements. They also show concern for such aspects as the banning of rallies and protests in certain areas during the Olympic period, and the use of private security guards to undertake certain policing functions during the Games. They also call for legislation ensuring that tenants, boarders and lodgers have secure affordable housing during this period, when accommodation capacity in Sydney would be stretched.

The manner in which the host city for the Olympics is selected is also a subject-matter for legitimate enquiry, according to author Kate Hasan.[23] This is particularly the case in the light of the various accusations of corruption and bribery which were made against the IOC in relation to the selection of Salt Lake City as host for the 2002 Winter Olympics, and which resulted in the expulsion of six IOC members. All this has brought the process for the selection of the host city into sharp focus. The author outlines the current process of selecting the host city and the rules and procedures governing this process, and highlights a number of flaws in this process. Although the guidelines laid down by the IOC on this subject are quite sound, they are not strictly enforced and candidate cities are not subject to any penalties for infringing them. Nor does the selection process seem to recognise the principles of the Olympic Charter. It also fails to take into account that IOC members come from many different countries with varying degrees of wealth. Thus using the IOC to promote the sporting future of one's country may be a valid and honourable act within certain countries even though in so doing it infringes IOC rules. There are also inconsistencies between the IOC Guidelines and the Olympic Charter in defining what constitutes inappropriate behaviour in this regard.

Among the reforms suggested by the author are that the selection process should be open with a clear and transparent system of assessment. If under the selection process a number of host candidates are equally suitable for the Games, the decisive criterion should be which of those cities is the best suited for the athletes.

Dispute resolution also comes under scrutiny in this series of papers. In "Learning the lessons of history: disputes and the Olympic Games"[24], author Tom Altobelli examines the lessons to be learned from dispute-related experiences in other cities having hosted the Games. He holds the view that, if this past experience is anything to go by, the Sydney Olympics will also be punctuated by costly and time-consuming litigation. He accordingly suggests a few alternative models. The options favoured by him are the establishment of an office of the Dispute Resolution Adviser for the 2000 Olympics, or a Centre for the Prevention, Management and Resolution of Olympic Games Disputes.

One of the more everyday legal issues which arise in the context of any major event is that which results from glitches such as overbooking, overcrowding, delays and disappointment. Authors Trudie-Ann Atherton and Trevor Atherton[25] examine the legal pitfalls facing visitors as a result of these factors, as well as addressing some of the risk management strategies which deal with these problems. On the latter issue, they make the point that an awareness of the potential legal liability for overbooking, etc., is the first step towards managing the risks involved. Only then can appropriate quality assurance systems be developed in order to minimize, to the extent possible, the likelihood of such mishaps occurring. It is crucial in this context to disclose the risks to consumers and to deal with the method of sharing the risk clearly and fairly, in brochures, contracts and other forms of documentation. It is no longer possible for the organisers merely to disclaim all responsibility or exclude liability for such occurrences. Another useful risk management strategy is to attempt to shift responsibility to others by seeking indemnities from them for the cost of meeting claims. However, there will clearly be at least one party who cannot pass the buck any further. The ultimate risk management tool which is insurance, has the advantage of spreading the risk across many transactions and among different operators. However, it should be undertaken in conjunction with other risk management strategies because ultimately, the cost of the premium will reflect the operator's residual risk after these other strategies have been implemented.

The Olympic Games as a brand have suffered a number of setbacks in recent years, particularly as a result of some of the corruption scandals which have increasingly come to beset their authorities, in particular the International Olympic Committee (IOC). Proposals and blueprints for reform have been

mooted regularly, some of them in the *UNSW Law Journal* feature in question (see above). Should the IOC fail to reform itself satisfactorily, it will fail to restore integrity and confidence in the Olympic Movement. The author James B Perrine[26] investigates possible market solutions if the IOC fails to do so. More specifically, he presents the incorporation of the IOC and the creation of a new "Olympic" brand supplier as possible alternatives to the status quo. He concludes that corporate backers of the Olympics may well turn to such market-based solutions in order to protect their investments.

Inevitably, and however efficiently it is organised, any event of this scale will spawn at least some criminal activity. This automatically places an additional strain on the penal justice system. In "Sooner, later, never: the Olympic Games and the criminal justice process", author Nicholas Cowdery QC[27] examines the measures taken by the local judiciary in order to try to cope with this phenomenon. This has consisted mainly in considerably extending the operational times of the available courts rather than creating any new or special courts. However, the author goes further and considers some areas of possible reform for which the Games have provided an ideal opportunity. Thus he proposes that it would facilitate considerably the conduct of court proceedings involving residents of foreign countries if their evidence could be taken before they leave Australia, or by videolink once they have returned home. Consideration should also be given to extending the availability of legal aid to those who will appear in the courts during the altered arrangements mentioned above, at least for the limited purpose of giving advice. He fears, however, that whatever measures are put into place, the backlog of cases to be heard in NSW will have risen again by the date of the "true beginning" of the new millennium.

That the drugs issue would raise its ugly head at various stages of the Games was never seriously in doubt, as has already referred to earlier (*supra* p.10). One of the legal issues which this raises - and which has thus far perhaps received insufficient attention in the relevant literature - is the issue of the procedural fairness in doping disputes. This problem is tackled head-on by the author Fiona Blair (no relation).[28] She goes through the various requirements of procedural fairness in general, and measures them against the existing procedures of the main governing bodies in sport, pointing out certain flaws. Although the application of these rules of natural justice may not place a burden on the disciplinary tribunal in question, they must be seen to operate fairly in view of the serious impact which any positive test result can have for an athlete's career.

Finally, to what extent should athletes be allowed to express ideology on the occasion of the Games? This is the issue engaged with by author Darren Godwell,[29] who highlights the double standards and hypocrisy which surrounds the issue of keeping the Games "apolitical". Athletes such as Cathy Freeman were not allowed to raise both flags of the nations she represents, yet on the other hand we have the display of nationalist symbols such as national flags and anthems, as well as the rampant commercialism which has been allowed to penetrate the games, especially since those held in Los Angeles in 1984. He questions whether the Olympic movement wishes to continue to pay lip service to the vision held by Pierre de Coubertin (founder of the modern Olympics) of ancient Greek ideals, or whether the Games should move into the next millennium with a more inclusive and refined sense of social justice, international standards and the advocacy of the indivisible human rights. He concludes that individual athletes should at no time be required to subvert their political beliefs in a state of fear of repercussions for the duration of the Sydney Games, and must be free to express their opinions.

What role does "playing the game" have in adjudication - both sporting and general? Articles in academic periodical

The notion that to "play the game" is one of the main principles to be observed is normally thought to be the exclusive preserve of sporting activity. However, in a recent book, the author A.C Hutchinson[30] has asked the question whether this is not a general rule which should be applied to the wider issue of adjudication. This has prompted responses from two of the leading authors in this field, i.e. David Fraser and Frank Michelman, writing in a recent issue of the *Osgood Hall Law Journal*.

In the first paper,[31] David Fraser starts by providing a number of examples where the full meaning of this phrase can be explored on the basis of a number of recent incidents in the world of sport at the top level. Thus he cites the case of the final Cricket Test between South Africa and England at Centurion Park, Pretoria. The South Africans had already won the series, and the first four days were washed out by rain. In order to escape the inevitable draw, both captains agreed to an unprecedented move: the South African captain would declare his innings closed after setting England a target which would give both sides an equally realistic chance of winning the game; in return, the England captain

would declare his side's first innings closed without batting. Although there were some question marks over the technical legality of this procedure, this move was generally hailed as a triumph for the "spirit of the game", and as an example of the "good faith" requirement which is deemed to inform this notion. Or it was until certain revelations began to filter through about the seamier side of international cricket - i.e. the scandal, well documented in these columns, of match-fixing. For the South African captain in question was none other than W.J. "Hansie" Cronje. It appeared that the "sporting declaration" in question had not been made for the sake of living up to the "playing the game" principle, but because some of his bookmaker associates stood to win a good deal of money out of an entirely unforeseeable England victory.

Fraser then proceeds to extrapolate this example, applying it more widely to the general world of adjudication. More particularly he examines the case of those who have been either barred from their profession, or heavily criticised to the point of virtual excommunication, on grounds which have nothing to do with their professional competence. Thus Matthew Hale graduated as a lawyer and applied for admission to the Illinois (US) Bar. He was rejected on the grounds that Hale was the leader of the World Church of the Creator, a pseudo-religious organisation which espouses racist theories. This has been justified on the grounds that "playing the game" here involves the game of democracy. However, exactly what constitutes the essence and meaning of democracy leaves room for a good deal of interpretation and debate. In addition, there are legitimate question marks over the question whether we can make democracy the ultimate criterion of "fair play" and "good faith". It is to this aspect that Fraser reserves his most serious criticism of Hutchinson's approach, since

> *"in his apparent insistence that judging, adjudication, good faith and greatness are to be determined to some extent against the template of democratic values and conversations, however contingent, he comes perilously close to kicking an own goal. Matthew Hale does not get to play the game, or even to sit on the bench, while [Lord] Denning gets to make the rules, because, at some level, Hale is an un- or anti-democratic racist. Denning, on the other hand, was a racist and a bigot committed to some contingent version of democracy in which he could innovatively find ways to exclude the Irish and Afro-Caribbeans."*

It is this element of uncertainty and doubt which, in Fraser's view, constitutes the greatest objection to Hutchinson's work.

Frank Michelman, for his part, also has serious reservations about Hutchinson's approach in his paper[32] - this time based on the actual methodology used, more particularly the parallels drawn with the world of sport. Hutchinson's work, states Michelman, attempts to persuade us toward some ludic answers to the question "what do/can/should judges do?". The author applauds and admires the substance and spirit of the arguments used by Hutchinson, based as they are on the rejection of that which Hutchinson describes as "foundationalism" on the one hand, and of that which he calls "nihilism" in legal theory. However, is the rhetorical dress appropriate? Whilst the emphasis placed on the elements of play in adjudication at its best seems quite appropriate, Hutchinson's constant tacking in and out of images taken from the worlds of football and cricket seem to Michelman a "losing proposition". He fears that what risks getting lost in the process is a clear sense of what it is that makes sporting games *games*, in morally significant contradistinction to some other normatively constituted and competitive social practices. Troping adjudication as a game carries the danger of obscuring the element of commitment in games that makes them morally serious matters in their own way.

Lawyers kept busy on legacy bequeathed to cricket clubs[33]

The cricket club of Preston Nomads, which despite its name lies at the foot of the South Downs, and Sussex County CC have little in common in terms of status and resources. However, their fate has recently been linked by the need for sound legal advice. When Spen Cama, a wealthy property developer who had a passion for cricket, died, he left both clubs large sums in his will. It appears that the Nomads, who were found a home by Cama in the 1920s, stand to benefit by £1 million, whereas the county club could well receive an even greater sum, no doubt because it had Cama as its President in the 1980s.

The reason for this uncertainty about the sums involved is due to the complex nature of the legacy. Much of it depends upon the proceeds realised by the sale of property, some of it having life tenants. In addition, the will is understood to have been left unaltered since 1965 and to refer to the Nomads

as "my club" and "my ground". Nor are the county club anxious to have the details of the sums they may receive discussed in public, as this may compromise a Lottery grant which they are currently negotiating. As if this did not complicate matters enough, the outcome also depends on the search for any living relatives of the India-born benefactor. There are thought to be none alive, but this must be seen against the alleged reasons for the disappearance of Mrs. Cama, who was said to have vanished with the ship's purser whilst she and her husband were taking part in a cruise on the Amazon.

The search could therefore be a protracted one.

2. CRIMINAL LAW

GENERAL ISSUES

Incorrect label on performance-enhancing food supplement leads to fine (UK)

In October 2001, Maximuscle, a food supplement firm endorsed by athletes Mark Richardson and Doug Walker, was fined $1,500 by an English court after one of its products was held to have been incorrectly labelled. The product in question, a protein powder called Promax-159, was advertised as being "lactose-free" but was in fact found to contain lactose to the proportion of 4.9 per cent.[34] This caused the Trading Standards Officer of Southampton City Council to take the company to court on the grounds that it was making an unsubstantiated claim for the product.[35] Although there was no suggestion that the product contained any illegal substance, this finding will be of some concern to competitors using nutritional supplements in order to enhance their performance, especially since a recent International Olympic Committee study has found that 20 per cent of such supplements contain contaminants. UK Athletics and the International Association of Athletics Federations recommend that athletes do not take nutritional supplements.[36]

Sprinters Walker and Richardson, as well as hurdler Gary Cadogan, had earlier tested positive for nandrolone whilst endorsing Maximuscle products, but since then have all been cleared as innocent victims.[37]

Mountaineer causes deliberate fall of potholer and is held criminally liable. French court decision[38]

In the case under review, a well-qualified mountaineer had, on the pretext of seeking to clean a site, used the opportunity to cut an abseiling rope installed on a rock located at the exit of a cave being used by potholers. One of the potholers made use of the rope and made a fall of over 100 metres, sustaining serious injuries. The Court of Appeal of Chambéry ruled that this constituted voluntarily committed grievous bodily harm (*blessures volontaires*) given that the mountaineer in question could not have been ignorant of the use to be made of that rope; his action therefore expressed the desire to cause injury to another person, the more so because insulting messages addressed to the potholers in question had been found in the visitors' book of a mountain refuge. However, this fact could not prompt the conclusion that to this offence had to be added the aggravating circumstance of premeditation, since it had been established that these messages had been inserted in the book after the offence had been committed.

The Court also found that the two fellow mountaineers who were persent when that rope was being cut were guilty of a failure to prevent a crime (*non-obstacle è la commission d'un crime*), or of an offence against the person, given that it was perfectly possible for them to intervene without exposing themselves to any danger. It was established that these two mountaineers had the opportunity either to prevent the author of the main crime from climbing towards the rope, or to prevent the knife being used. They could not argue in their defence that they made their objections known, since, even if it was established that these objections were actually made, they would be inadequate for the purpose of preventing the offence. In addition, being experienced mountaineers themselves, they could not argue that they were unaware of the danger represented by their colleague's action.

Boris Becker's fiscal tribulations - an update[39]

In the previous issue,[40] it was reported that former Wimbledon champion Boris Becker was facing the

possibility of a jail sentence as a result of a five-year investigation into alleged fiscal irregularities by the former tennis star.

In the meantime, it has been confirmed that the German tax authorities have demanded DM 50 million (£16.5 million) in back taxes. They claim that he ran his affairs from his parents' home in Leimen (near Heidelberg), Germany, whereas Becker claimed that he had operated in Monaco since 1985. He has the opportunity of settling the matter out of court - as indeed did his colleague and compatriot Steffi Graf after her father and manager Peter had been jailed for tax evasion.[41]

Wanchope incident at Norwich City leads to police investigation (UK)

One of the early fixtures in Division One of the Nationwide Football League was between Norwich City and Manchester City at Carrow Road. At a certain point the visiting side's Costa Rican striker, Paolo Wanchope, was alleged to have shoved Stuart Frohawk, a 15-year-old local ballboy, in attempting to snatch away the ball in the 85th minute (the home side were leading 2-0 at the time).[42] Over a month later, Wanchope was quizzed by Norfolk police over the incident after the latter had reviewed videotape evidence of the incident.[43] However, no charges were brought as a result.

Cadamarteri found guilty but not jailed (UK)

In an earlier issue[44] it was reported that Everton footballer Danny Cadamarteri had been charged with assaulting a woman in Liverpool city centre in October 2000. The victim sustained a broken cheekbone as a result. Almost one year later, Cadamarteri was found guilty of assault, but escaped a jail sentence on the grounds that the incident in question did not constitute an unprovoked attack.[45] He was later fined £2,000.[46] During the trial, the court heard the victim, Joeline Joel, describe how the footballer and two of his friends followed her and a friend and demanded a sex act. The men were told to "grow up" but persisted with their demands, and the next thing she knew was a fist coming towards her.[47]

However, another witness, Paul Bell, claimed to have seen Ms. Joel punch one of Cadamarteri's friends twice in the face, and that she was about to strike the footballer when he lashed out. Previously, the Everton star had admitted striking the victim, but alleged that he did so in self-defence and accidentally hit her face with the heel of one hand.[48]

Later, a judge who oversaw Cadamarteri's earlier court appearances expressed some concern at the fact that the footballer, who earns £10,000 per week, was awarded legal aid without contribution. He had been awarded legal aid as a matter of course under the Access to Justice Act introduced two years ago in order to speed up certain types of cases which could be heard either in the Magistrates' Court or in the Crown Court.[49]

Everton later announced that they would henceforth dispense with the convicted player's services.[50] He was later given an opportunity to rebuild his career with Nationwide league side Stoke City.[51]

Effenberg agrees to settlement following slap accusations (Germany)[52]

In a case not dissimilar to the one described in the previous section, Stefan Effenberg, the Bayern Munich star who captained his side to victory in the European Champions League earlier this year, was accused of having slapped a London woman in the face following an argument over the booking of a table at a Munich nightclub in October 2000. The victim, Claudia Soyoye, was alleged to have thrown a glass of champagne over Effenberg, who then reportedly retaliated with a slap.

The German footballer was originally fined £133,000 for this offence, but he refused to pay, and a court case bringing charges of bodily harm against him was due to commence on 17/8/2001 in the District Court (*Landgericht*) of Munich. However, in a last-minute settlement between the footballer and his alleged victim, Effenberg agreed to pay a fine of £40,000, as well as £7,000 by way of compensation. The case was dropped by the Court following this deal. The player's lawyer, however, pointed out that this settlement did not amount to an admission of guilt on the part of his client, but a solution which put an end to media interest in the case.

Robber of Gary Mabbutt watch given non-custodial sentence (UK)[53]

In September 2001, Damien Burke, a teenager who stole a £10,000 Rolex watch from former England and Spurs footballer Gary Mabbutt, was sentenced to 60 hours' community service and instructed to pay £2,500. Judge John Samuels QC informed Burke that he was extremely fortunate to escape a prison sentence.

Is child abuse rife in British sport?

Various sporting bodies are facing accusations that scores of young athletes have been subjected to bullying, verbal assaults and sexual abuse by coaches who were supposed to be grooming them for stardom. Research by the National Society for the Protection and Care of Children (NSPCC) published in late October 2001 purports to show that sadistically minded adults and paedophiles are deliberately targeting children's sport. The NSPCC has established that sports such as swimming and football are in the process of investigating up to 50 complaints of abuse by their coaches at any one time.[54]

The Society's figures showed that between January 2000 and April 2001, eight sports had received 179 complaints of mistreatment by coaches. Top of the list was the Football Association, with 70 complaints. The Amateur Swimming Association was close behind with 65. Sports involving one-to-one tuition such as swimming, gymnastics and ice-skating tended to be beset with greater problems in this regard than team sports.[55]

The NSPCC research is backed up by actual convictions imposed by the criminal courts. Thus in 1999, Richard Bristow, a former senior development gymnastics officer with Dudley Borough Council, was given a three-year prison sentence after having indecently assaulted four girls, one as young as six, in the swimming pool, the medical room and the gym. When he sentenced Bristow, Judge Patrick Thomas QC told the accused, a father of two, that the life of at least one of the victims had been seriously blighted by his abusive actions.[56]

(See below, p.20, for details of abuse charges brought against former Somerset cricket captain Peter Roebuck.)

Manchester United memorabilia sales thought to be behind Bury death threats (UK)[57]

The atmosphere at Bury FC, a modest team in the English Nationwide (Football) League, became distinctly tense in October 2001, when a number of letters started to arrive at its headquarters threatening death and assault. Police were called after a knife arrived in the post together with a letter threatening to "cut people up". Some Bury players also received threats, one of which was addressed to goalkeeper Paddy Kenny and pledged to "get him at training".

It was thought that an angry fan, one of the many who are incensed that Manchester United memorabilia are on sale at Gigg Lane, may be behind these letters.

Former top East German sports administrator jailed for organising systematic use of drugs[58]

Between 1961 and 1988, Manfred Ewald was Chairman of the Gymnastics and Sports Federation (*Turn- und Sportbund*) of the German Democratic Republic (GDR). Recently, he was indicted on charges of having been an accessory in causing serious injury to 20 sportswomen, who had unwittingly had anabolic steroids administered to them with seriously adverse consequences for their health and well-being, whilst under the supervision of the Federation. It was alleged that he was the mastermind behind the systematic and secret use of drugs amongst sporting competitors in the former East Germany. He was given a probationary jail sentence of 22 months by the Berlin Court of Appeal. This decision became effective after the Fifth Criminal Division (*Strafsenat*) of the (Supreme Court (*Bundesgerichtshof*)) rejected an application for review of this sentence.[59]

Another accused who had been sentenced to a similar penalty by the Court of Appeal, who was a

well-known sports doctor in the GDR, did not challenge his sentence before the Supreme Court. Although the facts on which the decision was based occurred beyond the limitation period normally applicable in German criminal law, the Supreme Court had recently decided that such limitation periods did not apply to systematic offences committed during the GDR regime which had gone unpunished.[60]

Retrial of Leeds United footballers commences (UK)

In an earlier issue of this organ[61] it was reported how the criminal proceedings brought against several men, including Leeds United players Lee Bowyer and Jonathan Woodgate, on charges of causing grievous bodily harm to an Asian student, had collapsed following the appearance of a prejudicial article in a Sunday newspaper before the jury had arrived at a verdict. The retrial relating to these charges commenced in October 2001[62] and was still proceeding at the time of writing

The retrial began with a statement issued by the judge to the jury that all parties to the trial had agreed there was no evidence of any racial motives behind the assault.[63] He blamed inaccurate reporting in the media for having created a different impression.

The next issue of this column will provide full details of the eventual outcome.

Fraud case against promoter Eliades collapses (UK)[64]

In October 2001, it was learned that the Crown Prosecution Service (CPS) had dropped 23 charges of fraud against boxing promoter Panos Eliades, which were due to be heard at Harrow Crown Court the following month. The CPS had spent over three years investigating the liquidation business operated by Eliades before deciding that it could offer no evidence to the court.

At the time of writing, Eliades was planning to sue the CPS for damages amounting to £50 million, claiming that the charges brought against him had affected his business activity to the extent that he had his licence to act as a chartered accountant and liquidator withdrawn.

Was Freddie Mills "Jack the Stripper"? New allegations concerning former boxing champion (UK)[65]

In July 1965, Freddie Mills, the boxer who won the world light-heavyweight title in 1948, was found slumped in the back of his car, shot in the head and with a small calibre rifle resting between his knees. The police ruled that his death had been a case of suicide, although his family and many of his closest friends claimed that he had been murdered. Inevitably the manner of his death gave rise to a good deal of speculation. One theory which has recently been advanced is that his demise may have been related to the possibility that Mills was in fact a vicious serial killer responsible for the death of at least eight young women whose naked bodies were found in the river Thames between 1959 and 1965. The killer, dubbed Jack the Stripper, has never been identified. This allegation is made by a reformed London gangster, Jimmy Tippet, who has interviewed three generations of criminals and boxers and thus believes he has uncovered the truth about the former champion.

Brazilian football match degenerates in brawl[66]

In November 2001, a Brazilian championship fixture erupted in a brawl which involved nearly all the players, as well as team officials and directors. This incident followed the issuing of two red cards. The match in question, between Palmeiras and Fluminense, was delayed for nearly 10 minutes by the incident which occurred shortly before half-time. Having fallen behind 4-1, Palmeiras players lost their cool, with midfielder Galeano being sent off for headbutting opponent Diniz, who was also dismissed for retaliation. As they left the field, the pair resumed their battle and were joined by members of both benches.

Top equestrian rider's horse impounded by police (Russia)[67]

In September 2001, Yelena Sidneva, Russia's leading equestrian rider, had her horse Podkhod

impounded by the police after the animal's owners demanded its return. Ms. Sidneva said that she had hired a lawyer and sought assistance from the Russian Equestrian Federation, but to no effect. She claimed that the horse would be only fit for destruction if it stood still in its box without being moved.

Cricketer's attackers jailed (Australia)[68]

In February 2001, West Indian cricketer Marlon Black was assaulted by three men in Melbourne and left unconscious. The attackers were jailed for three years by the Victoria State Court.

Hospital to be investigated by police after rugby player's death (UK)[69]

Anthony Young, a chemical engineer who was also a young rugby player, was rushed to a casualty unit in the throes of a diabetic crisis in November 1999. An infected abscess on his back had been left untreated by Whiston Hospital, Merseyside, causing an insulin imbalance to arise. This was in spite of a referral by Mr. Young's GP several months earlier. Once admitted to the emergency unit, he was not seen by a doctor for almost half an hour, despite pleas from his anguished mother. He was finally examined, but shortly afterwards suffered a heart attack and was placed on a life support machine. Five days later his family decided to turn off the machine when brain scans showed that the patient was clinically dead.

At the time, Mr. Young's death was ascribed to natural causes. However, in October 2001, the Home Office agreed to a coroner's request for an investigation. The outcome of this inquiry was not yet known at the time of writing.

Different standards of criminal liability apply during training sessions as compared to competitive fixtures. Italian court decision[70]

When a pupil at the Sicilian AIKK karate school caused a personal injury to another during a training session, the Justice of the Peace (*Pretore*) of Messina did not impose any criminal penalties on him, on the grounds that the kick which caused the injury did not constitute an offence (*reato*). This decision was challenged by the Public Prosecutor (*Procuratore Generale*) of the Messina Court of Appeal, but the latter did not overturn the first court's decision, stating that the latter was correct to allow the defence that the injured party had consented to the act, and adding that the training session between the defendant (a black belt) and the victim (a white belt) had taken place in accordance with the rules of the game. In addition, it was the less accomplished competitor - i.e. the white belt - who had indicated his desire for an encounter with a more experienced competitor, and the kick which caused the damage was a "circular kick", which is one of the first kicks which pupils are generally taught and which should normally be easy to parry.

This still did not satisfy the Public Prosecutor, who applied to the Criminal Division of the Supreme Court (*Corte di Cassazione*) for a review of this decision. For this purpose, he advanced two arguments:

(a) the rules of the sport of karate may be relevant to the actual competitive fixtures which take place, but do not apply during training sessions between practitioners between whom there was a marked difference in their level of competence. This being the case, a greater standard of care was expected of the more competent pupil in relation to a beginner; more particularly the former could be expected to feign direct kicks to the body;

(b) the Court of Appeal had been wrong not to order a new investigation, more particularly for the purpose of establishing whether or not the victim had sustained a permanent disability as a result of the incident. This could affect the view of the court on the element of consent on the part of the victim.

The Court awarded the application to the prosecution on the first count. It held that the extenuating circumstance of consent on the part of the victim during sporting contests had already received numerous qualifications on the part of the Italian courts. More particularly it was held not to apply where the rules of sporting fairness have been infringed and a serious infringement has taken place of

the opponent's physical integrity. In addition, training sessions require a greater standard of care and caution in order to avoid that the opponent receives serious physical injuries, and therefore also demand greater restraints on the competitive ardour on the part of those involved.

In view of the positive response to the prosecutor's first ground of review, the second became redundant.

This decision was commented by the author Mariacristina Macrì,[71] a Turin barrister, who praises the approach displayed by the Supreme Court, which shows a sense of nuance and qualification on this difficult question. By requiring different standards of care during training sessions, the Court rightly distanced itself from the rather abstract approach adopted by the first and second courts in this case. The latter had assumed that there was one single standard of care to be applied to all sporting situations; the Supreme Court has demonstrated that the individual circumstances of each case should be taken into account when making this assessment.

British banker admits to swindling sporting stars[72]

A British banker operating in Monaco has recently admitted to forging the signatures of a number of high-profile customers, including motor racing champion Michael Schumacher, in order to remove nearly £7 million from their private accounts. In September 2001, police arrested Stephen Troth in the Mediterranean tax haven of Monaco, where he currently awaits trial on charges of fraud, theft and abuse of trust. The outcome was not yet known at the time of writing.

Former County cricketer given suspended jail sentence for caning youths (UK)

Peter Roebuck captained Somerset County Cricket Club during their highly successful period of the late 1970s. In October 2001, he was given a suspended prison sentence after admitting that he caned three young cricketers whom he was coaching. He denied three charges of causing actual bodily harm, but admitted three accusations of common assault involving three South African teenagers in the course of 1999.[73]

Roebuck had originally been accused of indecent assault, but pleaded guilty to the lesser charge of common assault. He maintained that the harsh treatment which he administered to the boys in his care was for their own good. However, the judge did not accept the purity of Roebuck's motives, stating that it was not appropriate to administer corporal punishment to boys of that age in circumstances such as these. It seemed so unusual that it must have been done to satisfy some need in the accused, added judge Graham Hume Jones. The fact that, according to the boys in question, Roebuck had asked them to show the marks left by the cane following the beating would appear to give credence to this view.[74] The judge also informed Roebuck that he had abused his power and influence over the youths, who were far from their homes and families.

Roebuck had caned the youths for failing to meet his standards during coaching sessions in Taunton.

Peruvian football legend arrested[75]

Hector Chumpitaz is a legend of Peruvian soccer, having captained his country during the 1970 and 1978 World Cup tournaments. In October 2001, he was placed under house arrest on charges of receiving money from the detained former spy Vladimiro Montesinos. He had been named in a video secretly taped by the spy chief as having accepted payments of $10,000 per month to be a candidate for a post with Lima Council in 1998. He denied the charge. The spy chief in question, who was President Fujimori's right-hand man, sparked off the country's worst ever scandal in 2000 when he was seen in another secretly recorded video apparently bribing an opposition politician. The scandal caused the President's downfall.

Italian cyclist's conviction for "sporting fraud" overturned on appeal[76]

In a previous issue[77] it was reported that in December 2000, an Italian criminal court had imposed a suspended three-month jail sentence on cyclist Marco Pantani for "sporting fraud", on the basis that

he had allegedly used a haematocrit (solid matter in the blood) in excess of the levels permitted in cycling. In October 2001, however, the Bologna Court of Appeal (*Corte d'appello*) overturned this conviction, on the grounds that doping offences could not be equated in law to fraud.

"Death by misadventure" verdict recorded for paintball victim (UK)[78]

Paintball is not one of the better-known sports even in an era in which even the most esoteric of sporting activities seem to have found a niche on some television channel or other. In January 2001, a 29-year-old competitor became the first person in the world to have died of a paintball injury. This death led to an inquest at Bedford Coroner's Court. The victim in question, Kenneth Costin, died ten days after he was hit in the back of the neck by a paintball, fired from a distance of approximately 8-10 feet whilst participating in a tournament with friends.

The Court heard that during the game in question, Mr. Costin's neck had not been protected by the headgear he was wearing. It was also informed that there were no rules to stipulate that which was regarded as a safe distance from which to fire a paintball, but that players were generally requested to adhere to standards of "gentlemanly conduct" and refrain from firing at point-blank range. The consultant neuropathologist called to give evidence stated that Mr. Costin had suffered a stroke; the resulting trauma to the head and neck could have caused his arteries to go into a spasm. As a result, the Coroner recorded a verdict of death by misadventure.

Watford footballer knifed by burglar (UK)[79]

Paolo Vernazza, a midfielder playing for Nationwide League side Watford, was returning to his home with Andrew Douglas, who plays for Ryman league side Grays Athletic, in October 2001 when they were confronted with an intruder in the hallway and were attacked. Mr. Vernazza was stabbed in the leg, whilst Mr. Douglas was knifed in the chest.

Widow of South African cricketer in poisoning probe[80]

Last year, Tertius Bosch, a 33-year-old fast bowler who had played Test and one-day cricket for South Africa, died from what was at first believed to be a rare nerve-wasting disease. His widow, Karen-Anne, inherited his $400,000 estate and lost little time in moving her new lover into the family home. The suspicion of the criminal authorities was alerted when his sister employed a private detective who discovered a will in which Mr. Bosch disinherited his wife, who had played the part of the supportive wife during his illness but who was also alleged to have engaged in a number of extramarital affairs.

The body was accordingly exhumed, and tissue removed from the body. Tests were then carried out in order to establish whether any evidence of poisoning could be discovered. The outcome was not yet known at the time of writing.

Football Association offices raided by computer thieves (UK)[81]

The build-up to the vital World Cup qualifying fixture between Germany and England in September commenced in curious circumstances with the theft of computer equipment worth $50,000 from the heavily-guarded headquarters of the English Football Association (FA) in Soho Square, London. The thieves had entered the premises through the roof terrace on the seventh floor and ransacked the floor below where the marketing department is based.

On what legal basis can bookmakers be penalised in relation to sports betting offences? Article in German academic periodical[82]

Sports betting - generally understood to be betting on all sports except for horseracing - is a form of gambling which has gained increasing popularity in many countries, including Germany. As this activity inevitably involves the intervention of bookmakers, the question of any criminal law implications was always going to engage the interest of the leading authors on this subject. The author of the article under review is faced with a particularly difficult prospect, since sports betting is

not as yet regulated at the federal level, leaving it therefore to the *Länder* to take the initiative in this regard. The resulting disparate nature of the legislation in question has prompted a number of questions requiring answers.

One of the issues which is important for the criminal liability which may be incurred under this type of gambling is whether sports betting is an activity based on chance or based on skill. The author finds it difficult to arrive at a single and straightforward conclusion on this question. He concludes that each sport involved must be assessed on its merits, since some require skill in forecasting the outcome of contests, whereas this is not, or less, the case in relation to other sports. In any case, any automatic assumption that this type of betting is based on chance must be avoided.

Another important issue concerns the question whether bookmakers can be penalised if they engage in sports betting without having obtained the necessary permission from the authorities. The major difficulty encountered on this issue is the fact that, in seven *Länder*, it is impossible to obtain any licence or permit for this type of betting. Does this mean that sports betting is prohibited in principle or allowed in principle? On the basis of the existing case law on other types of gambling, the author concludes that bookmakers are in principle free to engage in sports betting without requiring any official authorisation.

The author's general conclusion is that, in view of the manifest lack of clarity and certainty which prevails in this area, a drastic overhaul of the existing legislation is long overdue, and that this should occur at the federal, rather than the regional, level.

False passports allegations continue to beset football (UK)

In a previous issue,[83] this column highlighted the various ways in which footballers were attempting to obtain "nationalities of convenience" through the illegal acquisition of passports. Since then, there have been further developments in this field.

Although the investigations into these practices commenced in February 2001, it was not until mid-September that these inquiries began to produce the first results, when police, acting on information obtained from the Immigration Service, arrested Norberto Solano, the Newcastle midfielder.[84] The case has been referred to the Crown Prosecution Service (CPS) which will need to decide whether or not to press charges on the question how Solano, who initially joined Newcastle on a Peruvian passport in 1998, acquired a Greek passport in 1999.

It now appears that this may only be the uppermost part of the proverbial frozen lump. As many as 20 foreign players are still under suspicion of having played in England under EU passports which have been unlawfully obtained.[85] Even after Solano's arrest, Home Office immigration officials have continued to study the documents of players whose credentials are in question following the eight-month enquiry referred to earlier. This column will obviously follow developments in this regard with the keenest interest.

US sporting figures continue to hit the headlines for the wrong reasons

The increasing propensity on the part of the cream of US sport to fall foul of the criminal authorities has been highlighted in earlier editions of this organ. It gives the present author no pleasure to record that there appears to be no downward trend in this phenomenon. Particularly the various cases of drugs offences, sexual abuse and assault involving these athletes is giving cause for concern.

Drugs offences (off-field): in July 2001, Shalicia Hurns, a forward in the Purdue women's basketball team, who had already been suspended from the team for under-age drinking, was charged with the possession of marijuana (as well as leaving the scene of an accident).[86] During the same month, Todd Marinovich, the former Los Angeles Raiders quarterback, was sentenced to a new drug-treatment programme for allegedly possessing heroin, facing three years of "felony probation" if he failed to complete the programme.[87] Later, in October, Chander Bingham, a US basketball forward who played for British side Thames Valley Tigers last season, was indicted for his part in a two-year cocaine distribution racket believed to have secured over $2.5 million. He was arrested after US Drug Enforcement Administration officers intercepted a shipment of the prohibited substance in Richmond, Virginia, in August 2001 and detained him as he arrived to pick up the consignment later.[88]

Later that month, sprinter Jon Drummond appeared in court over an incident involving the carrying of marijuana through Los Angeles International Airport. This made him the third athlete in the Hudson Smith International group, which includes the 100 metres champion Maurice Greene, to have had their names linked with drugs.[89]

Sex offences: July 2001 was a particularly eventful month in this regard. First Jimmy Kibble, the former Virginia Tech all-conference punter, had a six-month jail sentence imposed on him for having had sex with two 16-year-olds at a high school where he was employed as assistant coach. Previously he had pleased guilty to four counts of contributing towards the delinquency of a minor.[90] Then Attila Cosby, the suspended centre on the basketball team of George Washington University, was found guilty in D.C. Superior Court of seven of nine counts in a sexual assault case. This stemmed from an incident the previous year in which prosecutors alleged that Cosby picked up a prostitute and assaulted her at his University dormitory.[91] In addition, Stacey Mack, a reserve running back for the Jacksonville Jaguars, was arrested for propositioning an undercover police officer for oral sex.[92] Top Basketball player Anthony Mason was accused of sexually assaulting a woman at a hotel,[93] and Shawn Hood, an assistant basketball coach at Rhode Island, resigned amid allegations that he inappropriately touched a nine-year-old child.[94] And Clarence Young, a reserve defensive back playing for the Indiana University football team, was charged with the rape of a woman he met at a sports bar.[95]

Mike Tyson was once again at the centre of a sex abuse case when he faced new allegations of rape in September - only a few weeks after he had been cleared of the same accusation involving a 50-year-old waitress in California.[96] Las Vegas police spent six hours searching Tyson's home for evidence relating to this accusation. At the time of writing, however, no charges had been filed.

Assault and grievous bodily harm: in August 2001, Doug Wolford, a linebacker playing for Vanderbilt, faced a felony assault charge following a fight with a Northwestern player who was visiting the Commodore's campus.[97] Then Arizona Diamonbacks catcher Mike DiFelice was arrested outside a nightclub after punching a woman, putting a lighter in the buttocks of another, and attacking a valet.[98] However, O.J Simpson was cleared of the "road rage" charge brought against him after a motorist had accused him of snatching his glasses and scratching his face.[99]

Other offences. In September 2001, Danny Almonte, the star of the children's Little League (baseball), faced extradition from the US, and his father possible criminal charges for having falsified his papers.[100] The boy, who emigrated with his family to the US from the Dominican Republic, was thought to have been 12 years of age when he appeared for his championship-winning team, but on closer scrutiny was found to be 14, thus making him ineligible to play. Earlier, Oregon tailback Onterrio Smith was arrested and charged with drunken driving.[101]

CORRUPTION IN SPORT

Cricket corruption scandal - an update

Condon unit continues to probe

In spite of the setbacks which it has from time to time experienced, as reported in the previous issue of this column,[102] Lord Condon's Anti-Corruption Unit (ACU) has continued its painstaking efforts to investigate and root out the cancer of corruption which has sullied the good name of this most noble of sports. Thus in early October 2001, the International Cricket Council (ICC) revealed that, on the basis of ACU investigations, it had been established that around £170 million are bet on every one-day international and a similar amount for each Test Match. The ICC made this announcement at the launch of its new five-year strategic plan. Chief Executive Malcolm Speed underlined the significance of these figures by pointing out that, in spite of the ACU's best endeavours to stamp out corruption, it was realistic to expect betting on cricket fixtures to continue. This would mean that the same bookmakers and gamblers who had corrupted cricketers in the past would remain operational.[103]

At around the same time, Lord Condon launched a new investigation into claims that broadcasters paid bribes in order to acquire television rights relating to international cricket fixtures.[104] For this purpose he demanded to see copies of all related correspondence between broadcasters, including those in Britain, cricketing bodies around the globe, and the ICC. More particularly Lord Condon's investigation is expected to focus on the worldwide rights for the broadcasting of the 1996 World Cup,

which took place in India, and of that which took place in 1999 in England. Both tournaments were screened in Britain.

ICC makes far-reaching proposals to combat corruption

Measures aimed at preventing corruption understandably featured prominently among a set of proposals made by the ICC seeking to improve security. These proposals have been provisionally supported by the England and Wales Cricket Board (EWCB) and are expected to be adopted by all cricketing nations. This does not, however, mean that they are free from all controversy, or that they will be meekly accepted by the players concerned. They include:[105]

- the use of cameras in dressing rooms and hotel foyers in order to monitor the players' interaction with persons not associated with the team
- a ban on all mobile telephones in dressing rooms, except for the team manager's
- all telephone calls to players to be monitored, and players and managers to be accommodated on the same hotel floor
- security guards to be stationed at team hotels, and no-one to be allowed near dressing rooms without accreditation
- all visitors to be required to sign in on arriving and leaving hotels
- increased security measures at neutral venues such as Sharjah
- five security officers to be appointed and contracted to the ICC, each covering two Test countries

The reason for the measures involving telephones is that the latter were at the centre of the corruption scandal since April last year, when Indian police made public transcripts of mobile telephone calls made by disgraced South African captain Hansie Cronje (see below) to an Indian bookmaker.[106]

However, these proposals were not universally greeted with enthusiasm, particularly from the players. David Graveney, the former Gloucestershire player who is currently Chief Executive of the English Professional Cricketers' Association, expressed considerable concern about the use of spy cameras in the dressing rooms. His main worry is that these draconian measures could restrict players' freedom and privacy in what is regarded as cricket's "inner sanctum". Former England captain Graham Gooch was not against the idea in principle, but doubted whether it would be effective.[107] At the time of writing, however, it would appear that the ICC's enthusiasm for this proposal has also lessened.[108]

Later, news broke of another proposal tabled by the ICC in its anti-corruption drive, to wit a requirement on the part of international players to take a lie detector test every six months. Once again, considerable reservations were expressed by players and their representatives.[109] Thus former Australian spinner Tim May, currently Chief Executive of the Federation of International Cricketers' Associations, indicated that, although he and those he represented were keen to put into place reasonable procedures aimed at ensuring the eradication of match-fixing, the general feeling was that the regular use of lie detectors was on the unreasonable side.

However, it is not only the players who appear to be opposed to this scheme. England's representative on the ICC Board, EWCB Chairman Lord MacLaurin, is known to be unenthusiastic about the idea. He had already expressed doubts about the restrictions on players' use of mobile telephones and the introduction of security managers to accompany teams on tour.[110]

Cronje loses appeal over ban - and may yet face criminal prosecution

If the reports featured in the previous issue on the Hansie Cronje affair seemed to indicate that the former South African skipper had grounds for optimism in having his lifetime ban from playing cricket overturned on appeal,[111] such hopes were dashed in no uncertain fashion when the Pretoria High Court upheld the ban.

Right up to the eve of the hearing, however, Cronje could have been forgiven his expectations of a successful outcome to the appeal. Both his lawyers and the United Cricket Board (UCB), South Africa's governing body of cricket, engaged in protracted attempts at avoiding the costs of the three-day hearing, and at a certain stage the 16 points of disagreement between the two sides had been

reduced to two. Surprisingly, during these negotiations Cronje appeared to be ready to accept the terms of his cricket ban and to be henceforth restricted to junior and school coaching. However, his greatest concern remained the refusal by the UCB to provide him with media accreditation enabling him to work as a columnist and television commentator.[112]

However, the court hearing did eventually take place. The final day reserved yet another twist in the saga, since contrary to earlier indications, Cronje intimated that he actually wished to return to the game rather than simply restrict himself to coaching and commentating.[113] His lawyer justified this stance by informing the Court that charity matches and single wicket competitions played in order to raise funds for charitable causes were becoming increasingly popular, and that the UCB ban would prevent Cronje from participating in any such event.

The outlook for Cronje started to deteriorate when, just prior to the judge issuing his ruling, the UCB announced that if the appeal was awarded, they would re-issue the ban, but this time observing the correct legal procedures, the absence of which had constituted one of the main arguments deployed by the Cronje team.[114] In the event, this threat was superfluous since Judge Frank Kirk-Cohen upheld the ban - subject to the reservation that the UCB should desist from interfering with Cronje's efforts to coach and commentate on the game. However, this merely means that the ECB may only prevent him from coaching in schools not affiliated to the UCB, which will leave him with very few openings in this field.[115] The judge ruled that not only was the ban lawful and constitutional, but also that it had been correctly and legally applied. Cronje's assertion that he had been denied the right to a hearing prior to the ban being imposed was also rejected by the judge, who held that the former cricketer's sworn testimony to the King Commission (the body set up to investigate the match-fixing scandal) and the seven-day period he was given to respond to the notice served by the UCB that it intended to ban him were more than adequate for this purpose.[116]

Following the verdict, Cronje recognised that he would never be allowed to work in the game again.[117] However, he may not be at the end of his legal travails in this affair, since it is not yet known whether he will face a criminal prosecution arising from the corrupt practices referred to above. At the time of writing, it looked as if Cronje still had several months to wait before knowing whether or not he would be offered immunity from prosecution, pending the completion of the forensic audit into his personal finances.[118] The Western Province Director of Public Prosecutions, Frank Kahn, suggested on national television that he would request auditors Deloitte and Touche to complete the forensic audit, its unfinished existence having been revealed by a British Sunday newspaper in early August 2001.[119] The King Commission had originally ordered the audit, but it was left to gather dust and incomplete when the Commission was suddenly and unexpectedly closed some months earlier. The auditors will be able to question Cronje on the nature of various cash and cheque deposits made into more than 19 bank accounts during his time as captain of the national side.

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

Pakistan defeats in 1999 World Cup come under investigation

In late August 2001, the Pakistan Government launched an inquiry into allegations of match-fixing which is said to have taken place during two matches involving Pakistan during the 1999 World Cup. Justice Karamat Nazir Bhandari, a Pakistan High Court judge, was appointed to head the investigation after the Pakistan Cricket Board requested an inquiry into the national side's World Cup defeats by Bangladesh and India, neither of which affected its qualification for the semi-final.[120] Majid Khan, the former Chief Executive of the PCB, later informed the inquiry, held in Lahore, of his belief that some Pakistan players had been involved in match-fixing.[121] The players under suspicion are captain Waqar Younis, Inzamam-ul-Haq, Moin Khan and Saeed Anwar, who have all protested their innocence.[122]

The investigation would also examine the performance of Pakistani umpire Javed Akhtar during England's series-winning Test Match against South Africa in 1998.[123] Akhtar came under suspicion when eight South African batsmen were given out lbw in the side's second innings (one of these victims, ironically, being none other than Hansie Cronje).

EWCB "failed to act" over Chris Lewis revelations, claims major study

For some time, there has been some suspicion in overseas cricketing circles that the English

cricketing authorities have been less than zealous in the manner in which they approached some aspects of the current match-fixing scandal. Such speculation is bound to increase with the publication of the first major comprehensive study of this crisis.[124] More particularly the author's comments on the Chris Lewis affair will cause something of a stir in this regard.[125]

Two years ago, Chris Lewis, whose Test-playing career was already a thing of the past, informed the England and Wales Cricket Board (EWCB) that he had turned down an approach made to him by two bookmakers, Aushim Ketrapal and Jagdish Sodha, inviting him to act as a mediator in enlisting the support of some home players in order to fix the Third Test against New Zealand in 1999. He also disclosed the names of three England colleagues of whom he was assured that they had accepted bribes in the past. Even though these players were later cleared, the author alleges that there is no evidence that the EWCB made any effort to conduct even the most elementary investigation into the players identified by Lewis. In fact, it is also alleged that the Board did not even report his allegations to the police, despite the generous advance warning given, until after the Test match in question. He also proceeds to criticise the Board for failing to publish any report relating to any allegations of English impropriety - not even those pursued against Alec Stewart over such a long period.[126] The suspicion is that national pride and embarrassment stood in the way of a more collaborative and co-ordinated approach.

Other developments

India: For a while, the former India all-rounder Kapil Dev had come under some suspicion of having been a party to match-fixing operations. In a Test Match against New Zealand, played in 1999, India surprisingly failed to enforce the follow-on when 275 runs ahead on the first innings, deciding to bat on thus enabling New Zealand to play out a draw. As this was an unexpected development capable of constituting a financial boon to many a bookmaker, there was some suspicion that Kapil Dev, who was India's coach at the time, and captain Sachin Tendulkar may have tipped them off. However, a report produced by K. Madhavan for India's cricketing authorities completely exonerates coach and skipper. It appears that the decision not to enforce the follow-on was only taken after the New Zealand innings had ended, and was motivated by the tiredness felt by the bowlers in the overpowering heat.[127]

South Africa: In late October 2001, the Lord Condon's ACU studied a videotape of a one-day international which had just taken place in Port Elizabeth and in which India were surprisingly beaten by outsiders Kenya. The fixture was part of a triangular tournament which also involved the host nation. Kenya had lost the first two matches but turned in a confident performance by beating India by a margin of 70 runs. Before the investigators left South Africa, they also spoke to the match referee, Judge Ahmed Ebrahim, who adhered to the contents of his match report in which he states that, in his opinion, India had fielded an under-strength side.[128]

Top football agent sues Football Association over financial irregularities claim (UK)[129]

For some time now, there has been disquiet in official footballing circles concerning the increasingly prominent role played by players' agents. More particularly the fear has been expressed that this role may at times involve certain financial irregularities. Thus in November 2001, the Football Association charged agent Dennis Roach with seeking or obtaining considerable payments of an irregular nature on the occasion of the transfers of Paolo Wanchope from West Ham United to Manchester City for £3.65 million, and of Duncan Ferguson from Newcastle United to Everton. More particularly the FA charged Roach with five infringements of the regulations applicable to agents. These are thought to involve a demand of £350,000 from Newcastle even after Duncan Ferguson's move to Everton had already been settled, and one for £250,000 in respect of the Wanchope transfer.

The FA acted against Roach on the basis of complaints lodged by the respective managers Bobby Robson and Joe Royle, and charged Roach with breach of Rule 22, which bans agents from receiving monies from persons other than their principal. If found guilty of such practices, Roach could face a lengthy ban.

However, Roache has strenuously denied any involvement in double commissions, undeclared fees or misappropriation of money in relation to the aforementioned deals, and claims to have been the victim of a witchhunt mounted by FA Chief Executive Adam Crozier. In fact, the accused agent seemed

to turn the tables on the FA by seeking a High Court ruling that it is only the world governing body FIFA, and not the FA, which is entitled to try, convict or penalise him for his alleged misdemeanours. In a 12-page submission to the Court, he argues that it is only FIFA which has the power to discipline him because he was a FIFA-registered agent at the time of the Wanchope and Ferguson transfers. He is seeking a ruling that the FA has no jurisdiction to initiate or conduct disciplinary proceedings against him, and that only FIFA is entitled to do so.

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

(On the controversy of the role played by agents in transfers generally, see below, p.48.)

Officers of national skiing federation found guilty of illegal conflict of interest and abuse of trust. French court decision[130]

When the Chairman of the French Skiing Federation (*Fédération nationale de ski*), being a public corporation having certain public powers, accepted a paid post with a firm of financial brokers who was in charge of negotiating insurance contracts on the Federation's behalf, this was considered by the Chambéry Court of Appeal to be an unlawful conflict of interests. The accused President, when working for this broker, was responsible for monitoring and assessing the operations engaged in by the firm, and the fact that the Chairman in question received no direct payment for this, or that there was no contract between the Federation and the firm was irrelevant in this regard, in that the accused was being paid by the insurance companies which were concluding contracts with the Federation.

In addition, both the said President and the financial director of the Federation received payments in respect of advertising contracts concluded by athletes whilst occupying a position involving financial management. This the Court held to represent an abuse of trust, since the amounts in question were not used for the exclusive benefit of the Federation.

Inquest into black market ticket sales allegations during Lions tour (UK)[131]

The British Lions' Rugby union tour of Australia in the summer of 2001 risks being remembered for all the wrong reasons. To the accusations of unacceptably violent play and the unfortunate forays into journalism by some members of the visiting party, there could now be added allegations of financial corruption. On the eve of the England v. Australia international at Twickenham in November, it was announced that a report drawn up by the Australian Rugby Union containing allegations of mass trading in black market tickets by at least one of the official travel firms appointed by the Lions for the tour was to be discussed by the Lions Committee at their forthcoming meeting in Dublin.

Four official tour companies paid £100,000 for the right to organise travel packages for the tour with official blessing, but in the terms to the agreement undertook to refrain from engaging in black-market ticket sales. One of the firms involved, Gullivers Sports Travel, was the subject-matter of a damning report by the South African Rugby Union following the 1995 World Cup, in which it was claimed that hundreds of tickets found their way onto the black market. In spite of this, it was allowed to play such an integral part in the next World Cup that it handled no fewer than 18,000 tickets for the Final alone. The company has admitted that it is currently being investigated by the Inland Revenue.

Rugby Union hit by match-fix claims (UK)[132]

Although the problem does not yet appear to have assumed the scale which it has in the world of cricket, some disquieting noises about match-fixing are beginning to emanate from certain Rugby Union quarters. Thus in late August 2001, Welsh international Allan Bateman revealed that he was offered £5,000 to ensure that the side lost the Five Nations Championship match with Ireland in Dublin in 1990. The allegations appear in Bateman's autobiography *There and Back Again*, which has been published recently. More particularly he claims to have been approached by a well-known Welsh rugby personality, who informed him that he would receive the money if the "wooden spoon" decider was won by Ireland.

If this was the only allegation to have been made in this regard, this incident could plausibly be dismissed as a blip in an otherwise extremely honourable sport which at the time was governed by

amateur status. However, two years previously, Bateman's team mate in the game against Ireland, Mark Ring, claimed that he had been offered £30,000 - once again by an unidentified person - in order to "throw" the fixture. Ring had also rejected the offer. The Welsh Rugby Union Board investigated these claims, but concluded that no specific accusation had been made, and that therefore its hands were tied.

At around the same time when Ring made his allegations, the International Rugby Board announced a ban on betting after Neil Boobyer, the Wales centre, admitted that he had placed a bet on France to beat Wales in Cardiff in a match in which he was not involved. Boobyer did not actually infringe any rules, but his gamble prompted action on the part of the Board. Of particular concern to the officials was the "handicap betting" system, which gives one of the teams an addition number of points to start with, thus making it possible for a player to bet on the opposing side without his team having to lose, and without imperilling his winnings.

The Board stated that, in its view, the bookmakers were not making the game corrupt at the international level, but admitted that its regulations have been too lax, particularly since the transition to professionalism.

US court dismisses Salt Lake Games bribery allegations[133]

Just before this issue going to press, a Federal judge in Salt Lake City dismissed all the remaining charges arising from the bribery scandal which has cast a shadow over the forthcoming Winter Olympics, which are to take place in that city. Judge David Sam rejected ten fraud accusations as well as a conspiracy charge which Federal prosecutors had brought against Tim Welch and David Johnson, who led the bid made by the Utah capital. In July 2000, they had been charged with using the sum of $1,000,000 in order to induce officials from the International Olympic Committee (IOC) to favour Salt Lake City's bid for the Winter Games. The alleged inducements included college scholarships for relatives of IOC members.

Inquiry launched into allegations of corruption made against Ghana footballers[134]

Ghanaian football officials have launched a full inquiry into claims that members of Ghana's international squad received cash from Nigerian officials following the match which guaranteed Nigeria a place in next year's World Cup finals. The Chairman of the Ghana Football Association, Ben Koufie, claims that players and officials received a total of $25,000 after losing the match 3-0. However, a Nigerian diplomat commented that this was nothing unusual or irregular, and that it merely amounted to a "personal gift" from the State Governor, freely given and freely received. Apparently he had done the same for other teams.

Allegations of dubious financial practices made by Belgian footballer[135]

Belgian football could well come in for some uncomfortable scrutiny following certain allegations made by a Belgian footballer currently playing in The Netherlands. The former Beveren FC attacker Bart Van den Eede has recently alleged that many managers of clubs in the Belgian Football League field foreign players who have been cheaply obtained in the first team, in order enhance their value artificially, ensure that they are rapidly transferred, and share in the profit made. He claimed that this was occurring not only at his former club, but in many other reaches of the Belgian league, thus depriving local youngsters of the opportunity to play. He claims to be making these revelations in the hope that they will galvanize the national footballing authorities into action.

According to the Secretary-General of the Royal Belgian Football Association (*Koninklijke Belgische Voetbalbond - KBVB*), however, these practices are not strictly speaking against the rules. For a manager to receive a fee arising from the transfer of a player is, according to Mr. Courtois, as unexceptionable as the practice whereby an estate agent receives a commission for the sale of a house. However, he did acknowledge that the world of football intermediaries requires a good deal more transparency than is the case at present.

These allegations come hard on the heels of a report submitted by the Industrial Inspectorate of

Flanders on malpractices related to the employment of foreign footballers in Belgium.[136] This document concludes that, whilst most clubs are showing some evidence of taking this problem much more seriously than has been the case in the recent past, certain irregularities remain, such as the practice of making foreign players available to other clubs on loan. It also highlighted cases of foreign footballers who were playing in Belgium without a work permit, and of football agents who do not have the required authorisation.

HOOLIGANISM AND RELATED ISSUES

Italian legislation introduces stadium bans and similar penalties for hooliganism

In August 2001, the Italian Government, using its powers to introduce emergency legislation, adopted a *decreto-legge* (legislative decree) on measures to be taken in order to counter violence in sporting arenas.[137] It amended the general legislation on public action in sporting matters by introducing stadium bans and related measures. Article 6 of the new legislation disposes that those who have been accused or convicted of violence in sporting grounds may be banned by the *Questore* (police commissioner) from appearing at certain stadiums. The *Questore* may also require such persons to report to the local police station at certain times on days when fixtures in the sport in question take place.

This legislation also makes provision for specific penalties for those who throw missiles or other objects during competitions, and those who cross the official boundaries separating the spectators from the field of play.

Football hooliganism - general issues

Fears expressed over new computer game. Christmas gifts seem to be reaching ever greater heights - or plumbing ever-lower depths - in relation to their originality. One such innovation to hit the shelves this winter is a computer game celebrating football hooliganism, which challenges participants to engage in pitched battles with the police. The game, called *Hooligans - Storm over Europe* also has the object of achieving media notoriety by killing and maiming opposition teams of hooligans whilst travelling around Europe's football grounds. The loyalty of the virtual gang is maintained by players plying their team with a mixture of drugs, alcohol and violence. They can also even arm their gangs with Molotov cocktails and use sex clubs in order to refresh tired hooligans.[138]

Reactions to this new game have been mixed. A spokesman for the Home Office warned that the latter condemned anything which seeks to glorify hooliganism, which it was working very hard to eliminate - anyone who encouraged this activity was therefore acting extremely irresponsibly. However, a spokesman for the National Criminal Intelligence Service, which is responsible for monitoring hooliganism, claimed that this game posed no threat.

No link between beer and hooliganism, claims South Korean official. One of the top officials on the committee in charge of South Korea's World Cup games in 2002 recently announced that he was supporting the sale of beer at the relevant stadia during the tournament. He did not believe that there was a link between beer-drinking and hooliganism. Joint hosts Japan, however, is still considering a ban on alcohol in all grounds used for the tournament.[139]

World Cup hooligans face five years in jail, warn Japanese authorities. The recent success enjoyed by the English national team has ensured its qualification for the World Cup finals in 2002. Whilst Japanese football fans have welcomed this development as an opportunity to witness the skills of David Beckham and Michael Owen, it also has its dark side in the unwanted support which the team inevitably attracts from the more violent of its followers. Whilst hoping that some of the preventative measures introduced since the troubles of the 2000 European Championships will stop a number of troublemakers from travelling to Japan, the latter's authorities have made it quite plain that anyone who steps out of line faces a lengthy jail sentence. In addition, stringent security measures are already in place as an extra precaution.[140]

Courts are too soft on hooligans, states Lord Chancellor. According to Lord Irvine, the Lord Chancellor, the courts must adopt a tougher approach towards football hooligans during the run-up to next year's World Cup. Addressing magistrates at their annual conference in London in late October 2001, he

commented that magistrates had been "inconsistent and sparing" in the manner in which they had used the new powers conferred on them to prevent hooligans from travelling abroad. Of 448 cases handled by the courts during the previous football season, only 155 banning orders had been imposed.[141]

Nationwide League - a hooligans' paradise? Fears are growing amongst security chiefs that the English Nationwide League, which breaks down into three divisions, is becoming a paradise for the nastier-minded followers of football. The number and intensity of violent incidents this season have been a source of considerable dismay to the police and raised concerns that the menace continues to fester in the lower divisions.[142] (See also next section.)

Incidents involving football hooligans at home...

Coventry, September 2001. Nationwide League side Coventry City announced a major review of security at Highfield Road after a series of ugly clashes which took place during a home game with Portsmouth. At half time, fighting broke out, stewards being powerless to prevent 200 supporters clashing as the segregation policy was defeated by two groups intent on causing trouble. Witnesses reported that the mayhem started when fans started hurling coins and hot drinks at each other over a 15-yard stretch of seating which had been left vacant in an attempt to avoid such trouble. Seats were ripped out and thrown about, and soon fans were seen charging over the wire mesh partition, brushed the stewards aside and savagely exchanged punches. This caused the start of the second half to be delayed by over ten minutes.[143]

London, October 2001. In a series of violent clashes between supporters of Millwall and Nottingham Forest, a police officer sustained a shoulder injury and four fans were arrested for assault. Fights broke out around the New Den after 150 hooligans were thought to have travelled with the Forest fans. Fighting broke out behind one stand during the game, and a coach carrying Forest supporters had a window smashed.[144]

Nottingham, October 2001. The Nationwide League fixture between Nottingham Forest and Manchester City kicked off at 6.15 pm in order to fit in with television schedules. This had the disadvantage of increasing the probability that rival fans would engage in heavy drinking prior to the match. At approximately 4.30 pm fighting broke out in a pub near the City Ground. Rival fans hurled glasses at each other, with one Manchester City supporter losing three pints of blood from a neck wound.[145]

Swansea, November 2001. Three Swansea football fans were jailed at Swansea Crown Court for their part in the violent clashes which took place in the city the previous year. Lee Howells, 22, received 12 months, whereas Mark Davies, 24, and Steven Wilkie, 26, received nine months.[146]

... and abroad

Munich (Germany) September 2001. The World Cup qualifying match between Germany and England was always going to cause concern about the possibility of hooliganism, and the Munich authorities had already taken the precaution of making available 200 police cells in the event of any trouble.[147] Tensions ran particularly high as it was learned that a number of neo-Nazi German football hooligans planned to organise attacks on England fans in an attempt to create mayhem. With some of England's notorious thugs being expected as well, fears grew that violence would mar the occasion.[148] This was in spite of the fact that British police had issued a record 537 banning orders under the Football Disorder Act in order to prevent the worst potential troublemakers from travelling to Germany.[149] In addition, 11 suspected hooligans were arrested at Stansted Airport - also under the special powers conferred by the Act - before they could board aeroplanes bound for Germany.[150]

Following the match, there were several incidents involving England fans, casting a shadow over their team's remarkable 1-5 victory. Rival fans fought whilst police struggled to keep them apart in clashes which were reportedly more severe than those which took place in Charleroi when the two teams met during the Euro 2000 tournament. Munich police reported that they had made 47 arrests, 35 of them Britons, over the weekend, with another 135, including 43 Britons and 90 Germans, being taken into preventative detention and released after the match.[151]

Breda (The Netherlands) September 2001. The First Division local derby between NAC Breda and

Willem II was abandoned after 20 minutes after fans threw missiles, including golf balls and mobile telephones, at the players. Supporters of struggling home team NAC seem to have started the trouble as their side conceded the opening goal after eight minutes. The referee decided that he could no longer guarantee the safety of the players, and therefore abandoned the game.[152]

Paris (France) October 2001. France v. Algeria may not be a fixture to send the pulses of the world's football followers racing, but its significance transcends the world of soccer. In 1962, Algeria became independent from France after several years of protracted and bloody struggle which spilled over into mainland France. In the wake of the 11 September attacks in New York, there were fears that Algerian Islamic extremists could use mount a terrorist attack on this fixture - particularly as this was the first-ever international between the two countries. Tensions were accordingly high in anticipation of this fixture, with security having been considerably reinforced to the point of deploying 640 police officers and 1,000 security staff.

In the event, the match, played at the *Stade de France* which hosted the 1998 World Cup Final, was interrupted 15 minutes from the end, when dozens of Algerians invaded the pitch as France led 4-1. The referee, Paulo Manuel Gomes Costa, sent the players back to the dressing rooms as riot police surrounded the pitch, whilst fans threw bottles, seating and wood onto the pitch. Minutes later the game was abandoned. Police afterwards said 17 people remained in custody after the incident.[153]

Teheran (Iran), October 2001. When Iran were due to play Iraq in the Asian Group A of the World Cup qualifying stages, the tensions were also palpable in view of the history of rivalry and even warfare between the two nations. In the event it was Iran who won the game 2-1 before 100,000 fans in the Tehran Azadi stadium. However, following the match, victory celebrations were marred by riots which broke out when fans clashed with the police in the east of the city.[154] This was not the only occasion on which trouble attended Iran's World Cup qualifying fixtures. On 30/10/2001, a Teheran court jailed 80 football supporters for vandalism and inciting violence following a World Cup win against the United Arab Emirates the previous week.[155]

Ten days earlier, hundreds of Iranian youths clashed with police and the volunteer *basij* militia in Teheran after the national football team lost a key World Cup qualifying match to Bahrain by 3-1, forcing it into a play-off. Fans were reported to have been angered by rumours that pressure might have been exerted on the team to lose the game deliberately in a bid to stop a repeat of the euphoric scenes which followed the match against Iraq referred to above.[156]

More case law on the "Battle of Beverwijk"

As the attentive reader will doubtless recall, one of the most notorious of incidents involving football hooliganism in The Netherlands took place in 1997 in the small town of Beverwijk, which was the unwitting (and unwilling) scene for a pitched battle between fans of arch-rivals Ajax (Amsterdam) and Feijenoord (Rotterdam) in which a supporter was killed.[157] This column has also followed some of the initial reactions by the leading authors to the court decisions taken in this regard.[158] More particularly the manner in which the Netherlands Supreme Court (*Hoge Raad*) has interpreted the notion of "participation in the offence" has given rise to a good deal of controversy and commentary.

Since the last issue went to press, there have been further developments in this field. A further series of indictments against individuals who took part in the incident reached the Supreme Court. These individuals had been accused on three counts: (a) for having formed an organisation for the purpose of committing offences, as prohibited by Article 140 of the Criminal Code) (b) for having taken part in an assault in public (*openlijke geweldpleging*) (as prohibited by Article 141 thereof) and (c) for having participated in fighting (*deelneming in vechterij*) as prohibited by Article 306 thereof. The Amsterdam Court of Appeal had found them not guilty on all counts. The Public Prosecution Service (*Openbaar Ministerie*) had applied for review of this decision before the Supreme Court, which upheld the Court of Appeal's rulings.[159]

On the first count, the Court of Appeal had dismissed the accusation on the grounds that constituting an organisation for the purpose of committing offences requires a certain degree of structured co-operation (*gestructureerd samenwerkingsverband*), which in this case was absent. The clashes in question had started on the initiative of certain individuals not operating in this way. The Public Prosecutor had challenged this on the grounds that the fact that the group in question had regularly provoked clashes indicated some such structured co-operation. The Supreme Court dismissed this

challenge, on the grounds that there was no evidence of an organisation in which those taking part had not acted each for himself, but on the basis of some mutual understanding.

The author S.A.M. Stolwijk,[160] writing in an authoritative journal of criminal law, expresses his agreement with this view. He observes that the emphasis on a durable form of co-operation as a criterion for the applicability of the relevant penalties constitutes a necessary bulwark against an overzealous application of Article 140 of the Criminal Code.

The charge of having taken part in an assault committed in public was also dismissed by the Court. The basis for this accusation had been the fact that the accused had gone with a group which was intent on a clash. A recent change in the provision of the Criminal Code in question had sought to remove the notion that for it to be applicable, the accused must also have taken part in the actual fighting. Henceforth it was sufficient for him to have made a substantial contribution towards the fight. The accused had to be found not guilty if they had accompanied the group in question, but had stood still at some distance from the place of confrontation or had left it. It is no longer sufficient that the assault took place after the time at which they stood still or left.

The accusation of participation in fighting was also dismissed by the Court. It stressed that the accused in this case were different from those who had been convicted in the Supreme Court decision of 18/11/2000, referred to earlier in this section. We were dealing here with people who had at a certain point stood still and did not proceed to take part in the affray. In fact, the Public Prosecutor had not appealed against this part of the Court of Appeal decision.

New rules on cricket hooliganism unnecessary, claims review group...

The ugly scenes which marred international cricket matches in England during the summer of 2001 constitute one of the less treasurable moments of the season.[161] As a result, the Cricket Disorder Review Group, consisting of senior officials from the England and Wales Cricket Board (EWCB) and the Home Office, conducted a four-month investigation into these disturbances.[162] The outcome of its findings was that new legislation to combat crowd violence at cricket matches was unnecessary because it was a relatively minor problem. It considered that currently applicable laws were adequate for the purpose and that football-style legislation was not required.

However, its findings also include the recommendation that the authorities should keep the situation constantly under review and make people aware of the penalties which they face for pitch invasions and public disorder offences. It also recommends that senior police officers and the Home Office should discuss security arrangements for matches at which trouble could flare.[163]

Sports Minister Richard Caborn described these measures as "sensible and proportionate".[164] Others may disagree and accuse the authorities of complacency. This view is given some credibility by the fact that the steward injured in the Headingley fracas, Stephen Speight,[165] has complained that neither Yorkshire Cricket Club nor the police have taken any steps to identify and arrest those responsible for the incident.[166]

.... in spite of some suggestions from Academia

The disturbances at cricket grounds referred to in the previous section have already attracted the interest of academic writers on the subject. In a recent professional journal, Neil Parpworth, a well-known figure in the world of sports law, enters this particular fray with a number of proposals which are at least worth consideration by the relevant authorities.[167]

On the one hand, the author proposes the relatively straightforward measure of making it a criminal offence to encroach upon the playing area in the course of a game. However, he also devotes some attention to an aspect of public disorder in sports grounds which is less obvious but nonetheless important - i.e. ticket touting. This is the practice whereby unauthorised persons sell tickets to sporting events outside the ground at vastly inflated prices. In football, this practice is currently penalised under the Criminal Justice and Public Order Act 1994. It was Lord Justice Taylor, in his now-famous report on the Hillsborough disaster[168] who had identified two ways in which public safety was capable of being disturbed by touting. By selling tickets to any spectator regardless of his/her team allegiance, efforts at segregating rival fans could be undermined. Secondly, the availability of such

tickets encourages people who have not been able to secure tickets to top events to travel to the ground anyway - if there are more prospective buyers than available tickets, the disappointed fan might turn his thoughts towards violence. It is thought that both these considerations played a part in the cricket violence last summer.

Current legislation on touting only covers football; however, the author points out that the legislation in question empowers the Secretary of State to extend the relevant provisions to other sports. He suggests that serious consideration be given to this possibility.

British Euro 2000 fan loses appeal to Belgian Supreme Court[169]

Mark Forrester, the sole English football fan to have been found guilty of hooliganism during the Euro 2000 tournament,[170] lost his application to the Belgian Supreme Court (*Cour de Cassation*) in September 2001. The Court upheld his conviction for having assaulted the police during the riots which occurred on 16/6/2000 in Charleroi on the eve of England's fixture with Germany. He served one month of a 12-month jail sentence.

Other sports affected by hooliganism

Snooker. In October 2001, Welsh player Matthew Stevens incurred a cut to his head requiring six stitches following an incident involving two snooker fans in a Newcastle nightclub shortly after losing a tie to Joe Perry. He decided not to press charges.[171]

Speedway. The speedway season usually ends with a fireworks display, but in November 2001 the pyrotechnics on offer at King's Lynn, Norfolk, were of a slightly less attractive, if equally incendiary, kind. The fixture, held on the last day of the season, was marred by an incident between Ipswich rider Scott Nicholls and an abusive King's Lynn supporter. Nicholls became involved as his father Tommy, a member of his pit crew, was left nursing a bloody nose following a clash with the fan in question. Nicholls defended his action by the need to defend his relative. Whether any action would be taken against him or not was not known at the time of writing.[172]

3. CONTRACTS

GENERAL ISSUES

Leading law firms advise in sporting deals

The following leading law firms have recently been advising in a number of important sports-related deals:

- Over the summer, the sports law team at James Chapman & Co advised Manchester United on the £28.1 million signing of Juan Sebastian Veron from Italian club Lazio. This was the second record signing on which the firm had advised, following the £19 million move by Ruud van Nistelrooy from PSV Eindhoven to Manchester United earlier this year. Maurice Watkins, senior partner and head of the sports law team (not to mention a prominent BASL member!) led the team;[173]
- Over the same period, Olswang advised sports betting firm Ladbrokes on two deals aimed at enhancing the latter's on-line gaming prestige. The first was for an alliance seeking to challenge the Swedish Government to allow Ladbrokes to enter the Swedish betting market, which at present is subject to a statutory monopoly. The second was for the creation of an on-line casino operated by Ladbrokes and marketed by Playboy under the latter's brand name, with interactive Playboy "betting bunnies". (Playboys was advised in-house.);[174]
- London firm Clifford Chance advised new client Video Networks on the acquisition of exclusive UK video-on-demand rights to FA Premier League football for the next three years. Denton Wilde Sapte acted on behalf of the Premier League.[175]

PFA acquired Lowry painting from genuine seller, concludes investigation (UK)[176]

An investigation by Sotheby's the famous auctioneers, into the disputed previous ownership of L.S.

Lowrys' renowned painting *Going to the Match* has revealed that the footballers' Trade Union, the Professional Footballers' Association, did acquire the painting, valued at £1.92 million, from a genuine vendor. This investigation followed claims made by certain sports historians that the most famous crowd scene in football had been stolen from the Football Association (FA) before becoming the property of the PFA, whose ownership of the canvas has frequently been referred to during the current media rights dispute with the Premiership (see below, p.37 et seq.).

More particularly the Association of Sports Historians (ASH) had claimed that there was no evidence of the Lowry picture having changed ownership, prior to it being purchased at an auction in December 1999, ever since it won the first prize in a 1953 painting of football grounds competition, and had been loaned by the FA to a football museum in Hitchin. However, Sotheby's, who had first declined to reveal any information on the Lowry painting because of strict confidentiality clauses, have now confirmed that *Going to the Match* was purchased by art collector Harvey Rhodes for £200 in 1953 shortly after it won the FA competition referred to earlier. Lowry's lifelong agents, being the Le Fevre gallery in West London, had given the FA the first option to buy the picture, as was stipulated by the competition rules. However, the FA declined this offer, even though the price represented only a fraction of the £3,000 first prize in the said competition. The picture was returned to Lowry's agents in 1974, and the latter sold it on to another private collector. This process was to be repeated twice more before the PFA became its owners.

Skilift operator held liable in French court decision[177]

In February 2001, a French court of appeal ruled that a skilift operator was contractually liable where he classified as falling within the "blue" category a piste which contained a particularly dangerous section. Describing the piste in these terms, made it accessible to average skiers, and no effort had been made to indicate the danger represented by a very steep gradient which occurred at a point where the piste was very narrow and by the imminence of a very steep ravine. Moreover, no equipment capable of ensuring the skiers' safety had been put into place. The operator therefore had to be held liable for an accident involving a skier who had gone into a slide and subsequently fallen into the ravine.

Karate association held contractually liable for personal injury incurred by pupil. Italian court decision[178]

An association which organises sporting lessons is under the obligation to safeguard the physical safety of pupils and must supervise both the instructors and the manner in which the lessons are conducted. This is necessary in order to ensure that the normal risks involved in a particular sport are not exceeded. In the case under review, the organisers were held contractually liable for the personal injuries incurred by a pupil who had been invited to take part in a fight with a black-belt karate practitioner.

Ex-Chester owner's misrepresentation suit rejected by court[179]

The rather fanciful claim for £6.7 million instituted by the former owner of Football League club Chester City, Terry Smith, against both the Football Association and the Football League, on the grounds that he was allowed to take charge of the club - which has since dropped out of the League - under false pretences was dismissed by Chester County Court in early November 2001. Nicholas Craig, the first in-house lawyer to be appointed by the Football League (see our previous issue[180]), represented his employers in this dispute.

Sponsoring on the agenda of AGM of Netherlands sports law group[181]

The Association for Sport and the Law (*Vereniging voor Sport en Recht*) of The Netherlands held its Annual General Meeting on 9/11/2001 in Zeist. The main topic on the agenda was an item entitled "Sponsoring, the media and sport". With the increasing professionalisation of sport, the later has assumed a growing economic importance, One of the main reasons for this is the fact that companies are using the world of sport in order to enhance their profile through the medium of sponsoring or sports-related advertising. Because of the growing attention which sport is receiving on the part of

the media, there arises a continuous tension between, on the one hand, the firms which are seeking to achieve maximum levels of exposure in consideration for the amounts which they have invested in sponsoring, and, on the other hand, the restrictions which arise from the applicable legislation (more particularly the Netherlands Law on the Media - *Mediawet*).

It is this field of tension which constituted the subject-matter of two exposés, one by H. Ottenhof, legal affairs manager with the Commisariat for the Media and member of the Advertising and Sport working group, and the other by B. Geersing, who is currently Chairman of the Netherlands Association for Motor Vehicle Sports (*Nederlandse Autosportvereniging*).

Feature on sponsoring in Swedish professional journal[182]

Sponsoring has also captured the imagination of law firms as a means of enhancing their "brand" and of obtaining new customers. Some instances of this have already been featured in previous issues of this journal.[183] Sweden is also a country where lawyers have become increasingly aware of this dimension, judging by a recent feature in a leading professional journal. Following an introduction explaining the essence of this practice, a number of examples are given of lawyers whose business has thrived on sponsoring. This shows that it is not necessarily the large firms which derive benefits from sponsoring. Thus Åke Broné, who operates a one-man firm in Stockholm and also chairs his local speedway team Bysarna, has been sponsoring the latter to the tune of SK 5,000 per year, for which he receives a half-page advertisement which is distributed to the spectators on match days. He claims that this investment has been extremely rewarding in terms of the new clients he obtains through this particular medium.

Landlord unreasonably withheld consent to sublet nightclub to fitness club. English court decision[184]

In the case under review, the claimant tenant held a lease of premises, obtained in 1996, at an initial rent of £35,000, for a period of 20 years. Before this lease was granted, the defendant landlord had operated the premises as a nightclub. Whilst the premises were closed for refurbishment, they were spot listed as buildings of special historic and architectural interest. This prompted the claimant to conclude that, because of their listed status, the buildings would no longer be suitable for use as a nightclub. Accordingly, he sought the landlord's consent to change its use and to sublet the premises to a gym/health operator at an initial basic rent of £65,000.

The defendant refused consent on the basis he had failed to receive satisfactory proposals to compensate him for the £300,000 loss in reversionary value which he would incur if the premises were to be used as a fitness centre rather than a nightclub. In this assessment, the landlord had relied upon the advice which he had received from his valuer, who had assessed the reduction in value in question by first valuing the premises as a nightclub, then applying the number of years elapsed since the purchase to the average net profit obtained immediately prior to leasing the premises to the tenant, and subsequently deducting the value of the premises when used as a fitness centre by capitalising the rental value for such use. He had also substantially discounted fitness centres, being of the opinion that such uses were "fads" which would not last. The claimant, on the other hand, argued that the landlord had unreasonably withheld consent to subletting the premises and to changing their use, and claimed damages. The defendant made a counterclaim for compensation on the grounds of alleged breaches of covenant on the part of the tenant.

The Chancery Division of the High Court allowed the tenant's action and dismissed the landlord's counterclaim. It held that the landlord had unreasonably withheld consent to both the change of us of the premises and the subletting. The valuer's method of valuing the business as a nightclub was improper as a way of measuring the value of the premises to the landlord, and involved a hopeless mismatch with that which was being compared. The valuer was also mistaken in dismissing the fitness club as a mere "fad" which would not last, and had failed to research the latest information on this subject. His approach was wrong-headed, ill-informed and unreasonable. The valuations made by the tenant's valuer, on the other hand, were reasonable. On a balance of probabilities, the use of the premises as a fitness club would slightly enhance the value of the reversionary interest. The advice tendered by the landlord's valuer was so flawed in its approach, and so wide of the mark as to its substance, that it was unreasonable advice which rendered the decision of the landlord to withhold consent unreasonable. Even though the claimant was in breach of the lease in failing to keep the

nightclub operational, the landlord had failed to mitigate his loss by unreasonably withholding consent to the change of use.

One contract penalty held to cover various infringements of penalty clause in fitness training contract. German Supreme Court decision[185]

In February 1995, the defendant in the case under review, a fitness club, undertook in an agreement with the claimant, a non-profit making organisation, to refrain from using twelve specified clauses in the general terms and conditions (*allgemeine Geschäftsbedingungen*) of the fitness training contracts which it concluded with its customers. This was subject to a penalty clause which provided that for each infringement of this clause, the club would pay the claimant or another charitable institution the sum of DM 2,000, up to a possible maximum of DM 12,000. However, a few months later one of the defendant's branches inserted six of the prohibited clauses in its fitness training contracts. For this infringement of the penalty clause, the District Court (*Landesgericht*) of Nürnberg-Fürth, in a "judgment by confession" (*Anerkenntnisurteil*) had ordered the defendant to pay the maximum amount provided for - i.e. DM 12,000.

However, several months following this judgment, a different subsidiary of the defendant once again inserted five of the prohibited clauses in the general terms and conditions of its application forms for fitness training contracts, which led to the actual conclusion of contracts over the next few years. The claimant considered that these further infringements once again warranted the forfeiture of contract penalties, and demanded payment accordingly. The defendant, on the other hand, argued that it only had to pay a contract penalty in relation to the last contract, which was concluded in 1997. No contract penalty was payable for the three other contracts on the grounds that these infringements were a mere continuation of those which led to the District Court judgment. This was because they had been made on the basis of application forms issued prior to this court decision - in fact, the defendant claimed that he had immediately ordered his subsidiaries to change the wording on these forms. The District Court of Bamberg upheld this argument and ordered the defendant to pay DM 10,000 by way of contract penalty for the infringement contained in the 1997 contract. The Court of Appeal (*Oberlandesgericht*) of Bamberg upheld this decision. The claimant applied for review of the latter decision by the Supreme Court (*Bundesgerichtshof*).

The Supreme Court held first of all that the courts should, on the question of the forfeiture of contract penalties, adopt on this issue a position which was, on the one hand, sufficiently flexible to take account of the individual nature of the contracts in question, but which, on the other hand, was sufficiently consistent by abiding by the same principles. Because of the flexibility requirement, it rejected the claimant's argument that contract penalties had to be treated in the same way as administrative fines for contempt of court (Ordnungsgeld) as regulated by Article 890 of the Code of Civil Procedure (*Zivilprozessordnung - ZPO*) - the claimant having argued that these fines admit of no flexibility whatsoever. For the sake of legal certainty, however, the issue had to be decided on the basis of consistent principles - in this case, the general principles to be found in the Civil Code (*Bürgerliche Gesetzbuch*) which lays considerable emphasis on interpreting a contract in a purposive manner, i.e. in accordance with the presumed wishes of the parties, as well as the manner in which the contract had been made - particularly in cases such as the one under review, the wording of which contained a certain degree of ambiguity.

Against this background, the Court decided that the Court of Appeal decision was correct and therefore dismissed the application for review.

Skilift operator not held liable for injuries caused by bad state of repair. Italian court decision[186]

In February 2001, the Italian Supreme Court (*Corte di Cassazione*) decided that the contract between a skier and a skilift operator was a "special contract of transport" (*contratto di trasporto atipico*), the object of which was not the carriage in itself, but one which was linked to the objective of skiing on safe pistes; however, the operator did not have the obligation to keep the skilift in a good state of repair. Accordingly, where a skier suffers an accident because of the bad state of repair of that skilift, he had no action in contract against the operator; nor did he have an action in tort against him.

Lewis and ex-promoter Eliades once more locked in court battle (US)[187]

That boxing champion Lennox Lewis's former promoter Panos Eliades is no stranger to the courtroom is something which was very much in evidence in our previous issue.[188] Mr. Eliades's latest courtroom battle, which takes place in New York, this time has pitched him against his former employer, claiming from him $800 million in compensation following their contractual split. Lewis, however, is counter-suing Eliades for $200 million. The outcome was not yet known at the time of writing.

Ryder Cup postponement brings legal headaches[189]

One of the sporting victims of the attacks of 11 September was this year's Ryder Cup golf tournament between the US and Britain & Europe. This appears to have caused certain legal difficulties, as witness the flood of legal complaints over refunds for hospitality packages - in spite of offers of 70 per cent refunds for those not wishing to retain their booking until next September.

On customer who booked a £26,000 table for ten people over the three postponed days has decided to sue official agents Global Corporate Events for the return of his entire, sizeable, investment, commenting that the Ryder Cup Committee should "hang their heads in shame" at their refusal to contemplate a full refund.

Sinclair agents in contractual dispute (UK)[190]

Footballer Trevor Sinclair is not a settled man these days. Having moved from Queen's Park Ranger to West Ham, he is now attempting to shake the dust of Upton Park off his feet in his search for pastures new. His latest attempted move is running parallel to an acrimonious dispute between his former and current agents.

First Artists, the firm which negotiated Sinclair's transfer to West Ham from QPR, have made a complaint to the Football Association (FA) about the manner in which agent Neil Fewings left the company to join rival SFX, taking Sinclair with him. First Artists stated that they were delaying taking legal proceedings until such time as the FA findings are known. SFX, on the other hand, also claim to have a legal case against First Artists for having attempted to induce one of its agents to join them. Whether any concrete litigation emerges from this remains to be seen.

International show jumper loses legal battle over lame mare (UK)[191]

In September 2001, an international show jumper lost a court battle over a prize-winning mare whom he sold to a fellow-member of the British team, and now faces a bill of £500,000 in compensation and court costs. In 1997, Pebble Beach, a nine-year-old who had over £60,000 in prize money to her credit, was sold by Rob Hoekstra for £350,000 to his friend Lynne Van Heyningen. However, the High Court, sitting in Liverpool, learned that the mare was subsequently found to be suffering from arthritis and therefore no longer capable of competing successfully. This led Ms. Van Heyningen and her husband, who operate stables in Kent, to sue Hoekstra, alleging that he had known about the ailment at the time of sale.

The judge awarded the case to the claimant. Justice Elizabeth Steele held that the defendant had made a fraudulent misrepresentation when selling the horse. He was ordered to pay the sum of £320,000 by way of compensation, to which were added costs of £179,000.

MEDIA RIGHTS AGREEMENTS

Dispute over TV rights nearly causes first players' strike in English football

Unless the reader has been taking a sabbatical in one of the less accessible areas of the Gobi desert, he/she will be aware that some differences of opinion have arisen between the top professional footballers of this country and the authorities who invigilate them on the manner in which the spoils of the television rights negotiated with the relevant media should be allocated. So acute did the

dispute become, in fact, that it nearly caused the first all-out strike action to be called by England's paid soccer players.

Professional footballers are in principle entitled to a share in the money generated by the visual broadcasting of both live fixtures and match highlights. Since 1955, they have also received a share in television fees in order to finance increasing Trade Union costs.[192] This year, although the Premier League and the Football (Nationwide) league had negotiated a £1 billion increase with the relevant television companies, they were only prepared to offer the players' trade union, i.e. the Professional Footballers' Association (PFA), less than the joint payment of £8.85 million the previous year. It was obvious that this would prompt some reaction from the players and their representatives.

The first rumblings of discontent on this issue were noticed in mid-September when Gordon Taylor, Chief Executive of the players' Trade Union, being the Professional Footballers' Association (PFA), indicated that his members had been made what he described an insulting offer.[193] The PFA also announced that it would ballot its members for strike action if the Leagues in question failed to meet its demands for a larger share.[194] However, the Premier League authorities responded by indicating that the PFA would face a court challenge if it pressed ahead with those plans.[195] The claims made by the PFA that it faced bankruptcy if the offer was not improved was dismissed by the Premier League, who pointed out that the PFA had assets amounting to £20 million. In response to the union's claims that the extra money was needed mainly in order to boost its ability to care for its less fortunate members, they also highlighted the fact that, of the £8.4 million which the PFA had paid into its benevolent fund over the past three years, only £4.7 million had actually been spent.[196]

To this, Gordon Taylor replied that his organisation would fight "to the bitter end" for a fairer deal.[197] They were looking for the threshold five per cent which had been the norm for the past 46 years.[198] Taylor was also incensed by the Premiership's proposal that, whilst a total of £10 million may be available, this could only be realised if the £5.2 million which they were offering from television income was topped up by taking money from the proportion of the transfer levy which the PFA received. The players' union gets five per cent of every transfer fee, which is used in order to pay premiums for the Players' Cash Benefits Fund payable to players who retire at 35 or are compelled to withdraw from the game because of injury. If the levy exceeds the premiums required, the excess is returned to the clubs. The Premier league suggested that this surplus could be allocated to the PFA.[199]

A few days later, it emerged that the Premier League, represented by its Chief Executive Richard Scudamore, and the PFA, represented by Taylor, had agreed to meet in an effort to resolve the dispute.[200] Far from bridging the gap, however, this meeting, which took place on 28 September, appears only to have widened it, ending as it did in an atmosphere of bitter confrontation with Taylor challenging the Premier League to take the PFA to the High Court.[201] He added that the union would definitely be going ahead with the players' ballot for strike action. The two met again at the PFA headquarters in Manchester a few days later,[202] but this meeting to ended with the union rejecting a slightly revised offer.[203] After this latest confrontation, Taylor requested Football Association (FA) Chief Executive Adam Crozier to mediate in the dispute.[204]

On 11 October, the Premier League Chairmen met in London, after which Scudamore wrote to Taylor with an offer of £30 million over three years, which he described as adequate" to cover the real needs of the union - particularly as the previous year the PFA had only spent £766,000 looking after former players.[205] (Chelsea Chairman Ken Bates was to make similar allegations in his match programme column, which may yet earn him a libel action - see below, p.55). Scudamore added that this offer was not negotiable. This proposal was also rejected by the PFA Chief Executive, who claimed that this was not a new offer at all. Ballot papers on strike action were issued the next day,[206] with Taylor claiming that the proposed industrial action enjoyed the support of no lesser figure than Manchester United manager Sir Alex Ferguson.[207] As the ballot papers were being sent to the players, Taylor issued a 14-page memorandum setting out the union's case, in which he accused the Premier League of spreading "disinformation".

Over two weeks later, the Premier League came up with a new offer of £12.4 million for the next three years.[208] However, in the meantime the players had cast their votes in the ballot on the proposed strike, the result of which showed an overwhelming majority in favour of industrial action.[209] It was not exactly clear how many matches would be affected, with Taylor talking about a number of options which were available - from blanket coverage to a number of individual games. He once again stressed that the extra cash sought by the players was intended mainly for the welfare of players at the less wealthy end of the spectrum.[210] Some Premiership chairmen, however, suggested that some of the

wealthier players could contribute more of their millions towards this goal rather than rely on television money.[211]

Days later, the feasibility of the proposed strike was called into question when Parul Patel, a leading sports lawyer working for employment law specialists Hammond Suddards Edge, warned that the planned industrial action was illegal and that those players who took part in it could be sued.[212] She added that

> *"the legality of industrial strike action also hinges on whether this constitutes a trade dispute. The issue of television money is not strictly speaking a trade dispute and doesn't affect the terms and conditions under which players are employed. Whilst it does concern players - in respect of their education and future once they quit the game - it is not a "trade dispute", so the Football League and Premier League might consider taking out an injunction on the basis that this is not a lawful strike."*[213]

Ms. Patel added that players also risked being sued by their clubs if they went on strike, since the only immunity granted to striking employees - provided that they have negotiated all the normal procedures and the action concerns a trade dispute - was from dismissal. In the meantime, the downgrading of the role of Richard Scudamore in the negotiations[214] and the diplomatic skills of Adam Crozier appeared to be having the effect of calming the initial ardour for strike action.[215] The club chairmen had already increased their offer to £16.6 million per year, which they now insisted was the final offer.[216] This led to a temporary breakdown in relations with Taylor storming out of negotiations on 20 November.[217]

Two days later, however, cracks seemed to appear in the iron resolve hitherto displayed by the PFA members as some leading players demanded a second ballot prior to proceeding to a boycott of matches. This news came as it was announced that the PFA had been offered a guaranteed share of television money amounting to £166 million over 10 years.[218] Finally, the PFA called off the strike after a face-saving compromise was reached on 23 November.[219] The deal finally negotiated was that the PFA would receive £52.2 million over the three years of the Leagues' current television contract, which works out at £17.4 million per year and represents 2.5 per cent of the current television deal. This is obviously well short of the five per cent which Taylor had stipulated as a minimum requirement. The PFA has also negotiated the right to total discretion in the manner in which it spends its funds.[220]

In addition, in a concerted effort to avoid similar disagreements in the future, the two sides also agreed to two fixed percentages for the time when the next television deal will be, depending on whether the revenue has risen or fallen. Scudamore hailed this as a mechanism which would ensure a smooth passage the next time.[221] Whether such optimism is justified remains to be seen.

World Cup TV rights battle ends in deal enabling British viewers to witness the games free of charge (UK)

In view of the recent proliferation in satellite and digital channels, the right to broadcast the matches taking place during the 2002 World Cup was always going to involve a considerable tussle between the media companies concerned. The previous issue of this column gave a foretaste of this epic struggle by recording the court battle between the Danish station TVD and the British Independent Television Commission, which ended in victory for the latter.[222] The period which has elapsed since has witnessed the *dénouement* of this battle, which has culminated in a considerable victory for the less wealthy armchair viewer.

The main protagonist in this struggle for World Cup broadcasting rights has been Kirch Sport, a Germany company which - as has been reported in a previous issue[223] - purchased the rights to the 2002 and 2006 World Cup finals from FIFA for $2,240 million whilst claiming that it was immune from British legislation under which all World Cup fixtures should be broadcast live on free-to-air channels. Over the next six months, there occurred a stand-off between the BBC and ITV on the one hand, and representatives of Kirch Sport on the other, with the two British channels refusing to negotiate separately.[224] This deadlock was of some concern to World Cup sponsors such as Coca Cola and McDonalds, particularly as similar situations applied in France and Italy. The aforementioned TVD decision by the House of Lords did not cause Kirch to change its stance, since, as will be recalled from the previous issue, they argued that they had acquired the rights in question prior to the

legislation on which this decision was based - i.e. the 1996 Broadcasting Act.[225] Kirch was demanding the sum of £170,000 million of the two British broadcasters for these rights, an amount which was described by FA Chief Executive Adam Crozier as "obscene". BBC and ITV, for their part, were unwilling to exceed their offer of £55 million.[226]

At a certain point, there was some speculation that FIFA would renegotiate its contract with Kirch, which would enable the latter to drop the sum it demanded from the UK television broadcasters. However, FIFA soon made it clear enough that the deal with Kirch constituted a watertight agreement which neither would nor could be changed.[227] The first move away from deadlock came in mid-October when following what Kirch described as a "constructive meeting" further talks were planned for the forthcoming few weeks, holding out the prospect of an agreement centred round a compromise figure not unadjacent to £120 million.[228] In the meantime, it was also revealed that if Adam Crozier's description of the £170 million demanded by Kirch as "obscene" was appropriate, the FA's own arrangements with Sky TV and the BBC was even more revolting. The Kirch asking price would work out at £3.03 million per match, whereas the FA receives £3.91 million from Sky and the BBC for each of the 34 matches to be screened during the 2001-2002 season, whilst the Premier League deal with Sky valued the 66 live games to be screened at £5.6 million each - almost double the Kirch asking price.[229]

Negotiations between the two sides resumed on 10 October, and ended a week later with a stunning result for the terrestrial channels. Under the agreement reached, BBC and ITV were to pay £160 million for the rights not only to the 2002 World Cup, but also to the 2006 tournament.[230] This will ensure that viewers will be able to see every match during the two tournaments free of charge. Although described as "daylight robbery" by some commentators, this sum was still a large increase on the £5.4 million paid for the UK rights to the 1998 tournament in France. Sources at Kirch admitted that British legislation compelled them to accept this deal, but insisted that they would continue with their complaint to the Office of Fair Trading (OFT) and continue to lobby the EU against the Government's listed events system.[231] Previously, Kirch had taken the matter up with the European Commission, which monitors such listing agreements in the light of Community competition law, but the latter had refused to act.[232] The British Government welcomed this deal, with Sports Minister Richard Caborn hailing this as a vindiction of the Government's firm stance on the need to keep World Cup viewing free to the public.[233]

This deal may have settled the matter as far as the British viewer was concerned, but elsewhere the wrangling continued. Thus in late September, a senior FIFA official in the West Indies threatened to disrupt a major tournament if he was not given lucrative World Cup television rights.[234] Jack Warner, FIFA vice-president and the most powerful man in Trinidadian football, threatened to discontinue running the Under-17 World Championships in Trinidad. He was in a position to do so, as he chaired the committee staging the tournament and presides over CONCACAF, the regional soccer federation.

Warner has enjoyed Caribbean television rights to the World Cup and other top FIFA events ever since 1990, and sells them to regional television companies. He is an ex-teacher who claims to have made a £30 million fortune since becoming a senior FIFA official in the early 1990s. When FIFA appointed the Swiss marketing company ISL to handle sales of television rights, the latter sold rights to the 2002 tournament to Trinidad businessman Selby Browne and his Caribbean Sports network for $2.5 million.[235] Since then, ISL has gone bankrupt, as reported and commented on in the previous issue of this organ.[236] At the time, FIFA assured all the broadcasters who had entered into contracts with ISL that these would be taken over by the Kirsch group (see above). This was obviously not to Warner's liking, and he protested to FIFA President, the hapless Sepp Blatter, but without effect.

Warner's war-like noises did not constitute an empty threat. When Blatter's hold on power seemed extremely tenuous because of mounting criticism of his style of management (or the absence of it),[237] Warner was able to deliver the 35 votes held by the Concacaf federation in support of him; should he decide to withdraw such support, Blatter's position could become hopeless. In addition, the Trinidad government had underwritten the Under-17 championships to the amount of almost £50 million. Warner contributes generously towards the funding of the ruling party, and if he withheld such support, the tournament could have collapsed, thus causing Blatter more embarrassment.[238]

However, since then Blatter appears to have turned the tables on Warner. A few days after the latter issued his threats, the FIFA president announced that he was to investigate allegations of a conflict of interest surrounding Warner's acquisition of lucrative television rights tournaments - including the Under-17 tournament, which was duly completed in spite of Warner's blood-curdling threats.[239]

In Europe, the turmoil caused by the Kirch Group's monopoly of television rights continued in such countries as Spain, Poland and the Scandinavian countries, even after the BBC/ITV deal had been concluded.[240] At the time of writing, little progress appears to have been made in resolving these problems.

Now British racing jockeys seek their share of the media spoils

Perhaps inspired by the example set by their footballing colleagues, British racing jockeys are increasingly demanding what they regard as a fair share in the fruits of their labours - which nowadays very much include the proceeds of media rights. At the Annual General Meeting of the Jockeys' Association, held in York over the summer, those present instructed General Secretary Michael Caulfield to prepare their case for participation in the $80 million marketing budget allocated to the media deal recently secured by the British Horseracing Board.[241] Apparently the mood in the jockey's room continues to fall a long way short from outright militancy, but is increasingly inclined to challenge the somewhat patronising approach which even now the racing authorities appear to entertain towards them.[242]

Caulfield has maintained the pressure ever since, particularly as he feels that the jockeys have an "even stronger" case for a fairer share-out of media rights proceeds than is the case with their colleagues in the professional football leagues.[243]

Unity is the key to securing best media deal for international rugby, argues RFU Chief Executive[244]

Disagreements over the allocation of media rights proceeds are nothing new to Rugby Union's Five Nations Championship. Now that the Five have become Six with the addition of Italy, the arguments over who gets what seem to have entered a new and hazardous stage. It is true that France, who hitherto have traditionally negotiated their own deals for Championship matches played in Paris, have now agreed to join the common pool when new contracts are awarded for the 2002-3 season onwards. However, if the amount which they bring to the negotiating table turns out to be less than expected, and the proceeds have to be shared six ways because of Italy's presence, relations may once again become as fractious as ever.

One of the portents of the shape of things to come arose in 1995, when England decided to conclude a unilateral satellite television deal with Sky. This led to the acrimonious, albeit brief, expulsion of England from the Championship, which was only revoked after independent valuers were called in to assess exactly what percentage of income was generated by the England side with its large television audience. It is with this precedent in mind that Francis Baron, Chief Executive of the Rugby Football Union, has appealed to all those concerned to adopt a unified approach in order to realise the most lucrative financial returns. The first requirement, according to Baron, is to reach agreement on the precise form which will be assumed by the tender to be put out to the market place. He was under no illusions as to how difficult it would be to obtain such unity, because the Italians were not covered by existing agreements, and therefore a satisfactory formula would need to be worked out in order to allocate a fair share of the revenue to them.

EMPLOYMENT LAW

Leading Northern law firm advises in Rugby League salary cap appeal (UK)[245]

It will be recalled from the previous issue[246] that Wakefield Wildcats had four points deducted for breaching the Rugby League salary cap, and that the club intended to appeal against this ruling. In this appeal, leading Northern firm Addleshaw, Booth & Co acted for the Rugby League and an appeal committee led by Judge Peter Charlesworth in this high-profile appeal, which ended in the original ruling being upheld. Greg McCallum, the League's Director of Rugby, later commented that the Rugby League's judiciary had been subjected to an intense investigation and came through "with flying colours".

Newport seek compensation as Springbok walks out

When South African Joost Van der Westhuyzen almost single-handedly - or single-footedly - won the

quarter final World Cup fixture against England in 1999, his fame was assured and he became a prized signing for any club which secured his services. Thus when he took up employment with Welsh club Newport RFC, the latter had cause for celebration, even though his period in Welsh rugby was restricted to one year, after which he was to return to his native land in order to stake his claim for a place in the South African squad for the 2003 World Cup. However, he was subsequently informed that if he followed this plan, he would be barred from ever donning a Springbok jersey again, which is why he decided to remain with his club Blue Bulls in order to pursue his Currie Cup career.[247]

The Newport authorities were understandably extremely displeased at this development, and, although they did not intend to compel the Springbok to honour his contract, immediately started to press for compensation, in spite of the Blue Bulls' announcement that they would repay the transfer fee which they received for him. Newport Chief Executive Keith Grainger called Van der Westhuyzen's behaviour "shameful", and said the claim for compensation was justified because of all the extra costs which the South African's transfer had occasioned.[248]

However, the South African Rugby Union claimed that at the time of signing the contract with Newport, Van der Westhuyzen was still contractually a Springbok, and that it was therefore Newport which had acted improperly.[249]

No settlement had yet been reached in this matter at the time of writing.

PFA intervene in Swansea dismissals (UK)[250]

In October 2001, the professional Footballers Association (PFA), the English footballers' Trade union, intervened as the new Chairman of Swansea City, Tony Petty, attempted to dismiss seven players as well as compelling a further eight to accept greatly reduced terms. In violation of Football League regulations, Petty had informed the seven players in question that their contracts were being terminated because the club could no longer afford to pay their wages, and that they would not be receiving any wages at the end of the month.

He was once again in infringement of the rules when he offered the eight others deals which were less lucrative, warning them that their contracts would be terminated if they failed to sign. Petty also dismissed two of the club's coaches. Brendan Batson, Deputy Chief Executive of the PFA, informed Petty that his methods were inadmissible.

Bankruptcy and winding-up of basketball club do not necessarily entail termination of employment contract. French Supreme Court decision[251]

When a French basketball club went into receivership, and the winding-up process began, one of its professional players, who was playing for the side in question under a three-year contract, demanded compensation in respect of the remainder of the duration of his contract. As is invariably the case in France, the matter was referred by the liquidator to the Salaries Guarantee Insurance (*Assurance Garantie Salaire - AGS*) agency. The latter, in order to limit the amount payable to the player, argued that the contract under which the player was employed with the club should be requalified as an indefinite contract, thus making him subject to the system of termination of employment for such contracts - which would have meant a lower amount being payable to him.

The Court of Appeal had dismissed this attempt by the AGS agency. The latter had argued that the player could not be employed on a short-term contract (*contrat à durée déterminée*) because in order to be qualified as being employed under such a contract, the player needed to be engaged in professional sport within the meaning of Article D 121.2 of the Industrial Code (*Code du travail*). In other words, the player may have been employed by the club under a contract of employment, but that did not necessarily mean that he was operating at the level of professional sport. This meant that there was some doubt as to the exact status of the club.

The Court of Appeal had dismissed this argument, and so did the Supreme Court. It did not for this purpose refer to the status given to the club, or the league in which it played, but ruled that the club which employed him

"operated at a competitive level where basketball is played on professional terms. On the other

hand, the employee was working exclusively as a player and received a salary for this activity. Therefore, this Court rules that the terms of employment in which he operated were those of professional sport, in which it is custom and practice not to use indefinite contracts because of the nature of the activity in question and the necessarily temporary nature of the positions in question, and that there is no reason to requalify the employment relationship as being indefinite. Therefore, this ground cannot be upheld."[252]

The Court of Appeal had decided that, since it had ruled that the employment was temporary, the AGS agency was liable to pay compensation equal to the remainder of the duration of the player's contract. It has in so doing held that AGS could not argue against this that the liquidator had not officially pronounced the contract terminated. However, this ruling was not accepted by the Supreme Court. It held that the winding-up of the club did not necessarily entail the termination of its contracts of employment. This, together with the circumstance that winding up does not automatically entail termination of the employment contract, meant that the player could not be paid the compensation applied for, since AGS was not bound to guarantee a debt which was not due. The Court therefore set aside this part of the Court of Appeal's decision.

This decision is subjected to a critical analysis by author Jean Mouly.[253] On the first ground, he comments that in the past the Supreme Court had, in order to determine whether a sport was being played at the professional level or not for industrial law purposes, referred to the qualification given to the sport by the relevant governing body. However, in this case it was not clear exactly how the French basketball authorities did qualify the level at which this club was playing - in fact, one of the complaints made by AGS against the first decision was that the court had failed to conduct an adequate investigation to that effect. The Supreme Court accordingly based its judgment on what it perceived as the reality of the situation rather than any qualification provided by the relevant federation. The author applauds this move, as he had doubts about the practice of a public judicial authority relying on the qualification given by what was essentially a private organisation.

However, the author is a good deal less laudatory about the Supreme Court's ruling on the second ground - i.e. that where it denies the player the compensation applied for because the termination of contract was neither automatically brought about by the winding up nor expressly demanded by the liquidator. He admits that the winding up of a company - or indeed any other type of financial difficulties - do not constitute a case of *force majeure* justifying the termination of a contract. However, he adds that in employment law, the employee has the right to attribute the termination of the contract to the employer where the latter has made it impossible for the former to perform his obligations under the contract (i.e. the French equivalent of "constructive dismissal"). Also, if the contract was not terminated, surely that means that the employee has the right to continue to receive his salary - which amounts to the same thing as obtaining compensation in respect of the remainder of the duration of the contract.

Jockey Club security chief dismissal confirmed (UK)

In the previous issue,[254] it was reported that Roger Buffham, Head of Security with the Jockey Club, was dismissed from his post following investigations into claims of sexual harassment. It was recently learned that Buffham lost his appeal against this dismissal when the Club issued a statement that Buffham would not be returning to employment with the organisation.[255]

Leading Welsh rugby union players put on strike alert[256]

Following a recent disagreement between the Welsh Rugby Union (WRU) and its top clubs over funding, the nation's leading players have been put on strike alert. Leighton Samuel, owner of Bridgend, warned that players could be withdrawn from Wales's series of internationals in November 2001, which included a fixture against World Champions Australia, unless the WRU agreed to modified the manner in which it allocates cash to clubs. The previous season, the latter had been paid between £10,000 and £35,000 by the WRU for each international player they provided for the national side. The clubs are seeking to replace this system - which expired in June 2001 - with one which would enable them to pool the money and distribute it amongst themselves.

In the event, the clubs concerned failed to carry out their threat - whether they will find alternative means of pressurising the WRU remains to be seen.

Crawley gears up for court battle with Lancashire CC (UK)[257]

Although batsman John Crawley has scored over 10,000 runs for Lancashire since joining them in 1990, his career has experienced a few highs and lows over the past few years, and has shown increasing signs of discomfort in the Lancashire dressing room. He was effectively dismissed as captain at the end of the previous season when the club committee failed to ask him to reapply for the post. Shortly before going to press, he announced that he was signing a three-year contract with Hampshire, and that he was prepared to take Lancashire to court for constructive dismissal should they refuse to release him from the remaining three years of his contract with them.

Consignia fail to reinstate worker accused of violence before UEFA cup final (UK)[258]

In the previous issue,[259] it was reported that Londoner Tom Doherty, seen kicking a Galatasaray fan during the disturbances in Copenhagen on the occasion of the 2000 Uefa Cup Final, won his case for unfair dismissal against postal group Consignia. However, in spite of this award, it was learned that Consignia have refused to reinstate him. He will have to settle for compensation instead.

Joe Royle to sue Manchester City for unfair dismissal (UK)

One of the victims of Manchester City's relegation from the Premiership to the Nationwide League last season was the manager who presided over this deterioration, i.e. former Everton and England player Joe Royle. Shortly after the season ended, he was given a pay-off amounting to £200,000 following his dismissal. Royle, however, lost no time in employing a firm of Manchester solicitors in preparation for a court battle on this issue, arguing that the figure paid should have been in the region of £700,000. It is understood that City calculated Royle's pay-off as though he was already a First division manager, implying a pay cut of 65 per cent. Royle, on the other hand, maintains that he was still technically a Premiership manager at the time when he was dismissed.[260]

Later, Maine Road chairman David Bernstein informed Royle that City were prepared to go "all the way" in a High Court battle over his compensation claim. He claimed that there was a moral issue as well as a legal one at stake, after Royle served a writ on the club.[261] This column will obviously follow this legal battle with interest.

Managers' Association chief condemns rate of dismissals (UK)[262]

The domestic football season may already have been a memorable one on the football field, but matters appear to be of a slightly murkier hue behind the scenes - as witness the extraordinary rate at which managers are being dismissed, earning this season the label of the "Year of the Sacking". This has naturally aroused the concerns of the coaches' Trade Union, which is the League Managers' Association (LMA). Already as early as October, John Barnwell, its Chief Executive, warned that if the rate of dismissals continued at this rate, two thirds of managers currently in post would no longer be in position. Whereas at the time of this statement already 11 managers had been shown the door, at the same stage four years ago only four coaches had departed. Barnwell considered it significant that out of these four, three were operating in the Premiership; of the 16 to leave (either through dismissal or of their own volition) this year, only three were from the top grade - the remainder coming from the lower grades.

Barnwell believes that the high rate of departures in the lower divisions is caused by a lack of agreement over settlement payments. There were no rules in place aimed at encouraging Football League clubs to agree settlements in the same way as there were in the Premiership. He also considers that in fact those clubs which have given their managers a chance have actually benefited, as the case of Ipswich under George Burley clearly shows.

Dismissed commercial manager of football league club sues for unfair dismissal (UK)

Brawls on the pitch have not infrequently led to their protagonists being shown the door by their

clubs. However, in Helen Coverdale's case, it was an off-pitch fight which earned her the letter of notice. Amazed football fans, no shrinking violets at the best of times, looked on as Ms. Coverdale, commercial manager of Nationwide League club Darlington, became involved in an unseemly battle with director's wife Michelle Metcalfe. The latter had allegedly grabbed Ms. Coverdale by the hair and told her to stay away from her husband, after which it is claimed she (Ms. Metcalfe) hit her.[263]

Ms. Coverdale was dismissed following this incident. However, she took her former employer to an industrial tribunal claiming unfair dismissal. Luke Raine, the club's public relations director, claimed that Ms. Coverdale had been dismissed because her relationship with Mr. Metcalfe was detrimental to the club's family image, and that he had warned her that her conduct was unacceptable. In addition, he alleged that she was rude, ungracious and of no commercial value to the club, as well as finding it difficult to take instructions. He denied a claim by Ms. Coverdale that she had been replaced in her post by Victoria Reynolds, the Chairman's teenage daughter. The club also denied that Ms. Coverdale was owed thousands of pounds in commission from its profit-related pay scheme.[264]

The industrial tribunal had not yet issued its ruling at the time of writing.

Top football clubs seek compensation to pay absent internationals

The leading sides in football, as in most other sports, frequently have to dispense with their top player's services where the latter are away on international duty. This not only causes certain risks for them, as the players concerned may sustain injuries during international fixtures which may cause their temporary withdrawal from the game, but also makes them incur financial loss, as they are paying the players' wages whilst the latter are effectively working for a different employer. This has prompted the influential G-14 Group, which includes the likes of Manchester United, Real Madrid and Bayern Munich, to request world governing body FIFA to consider the possibility of organising compensation for clubs which are affected in this way. More particularly they believe that national associations should contribute towards players' salaries for those periods when they are playing for their countries. Most associations, however, are thought likely to oppose this plan, given that players can be absent on international duty for up to six weeks during such events as the World Cup Finals.[265]

This proposal has caused alarm amongst some of the national sides, such as Wales, whose resources are modest. David Collins, Secretary General of the Welsh FA, said that as a result, Wales would face the prospect of a bill of thousands of pounds per year on insurance premiums. In addition, if it continued to field Manchester United's Ryan Giggs and the latter sustained injury keeping him out of the United squad, his £40,000 per week wages would bankrupt the Association.[266]

LEGAL ISSUES ARISING FROM TRANSFER DEALS

Contractual dispute over London Bronco Moran looms (UK)[267]

Rugby League club London Broncos seem to be heading towards a serious contractual dispute with club South Sydney Rabbitohs over the future of Australian scrum half Dennis Moran. In early November 2001, Nic Cartwright, Chief Executive of the Broncos, reacted strongly to speculation that Moran would be released to move to the New South Wales club halfway through his two-year contract. He described as "unethical" the claims made by the Rabbitohs that Broncos coach Tony Rea had agreed to release Moran unconditionally, adding that his club would be seeking a minimum payment of £25,000 for the remainder of the Australian player's contract.

The dispute had not yet been resolved at the time of writing

Stam transfer gives rise to controversy

Defender Jaap Stam's recent transfer to Lazio Roma was a controversial enough affair in purely footballing reasons. However, there are other aspects to this deal which have also given cause for concern. In the first instance, it appeared that the £16.4 million deal in question had proved lucrative not only for the reigning English champions, but also for their manager's son, Jason Ferguson.[268] The latter is a director of Elite Sports Group, a Manchester-based consortium which also has on its board Francis Martin, a FIFA-registered agent, and David Gardner, a close friend of United stars Ryan Giggs

and David Beckham. The Elite Group co-operates closely with Monaco-based agent Mike Morris, and together they were involved in arranging the Stam transfer deal in late August 2001.[269] It also stands to earn a healthy commission from a deal which took everyone in the sport by surprise - not least the player himself.[270]

The Elite Group have also been involved in other Manchester united deals recently. Francis Martin represented Roy Carroll for the purpose of his £2.5 million move from Wigan to Old Trafford over the summer of 2001, and was also believed to have played a part in the move of Laurent Blanc to United. In addition, Jason Ferguson negotiated his father's five-year consultancy deal which commences as he retires as manager at the end of the current season. Whilst there has not been any evidence of any wrongdoing, Jason Ferguson's continued involvement has given rise to some concern - even at the Manchester club itself. This is particularly the case in view of the rise in the number of managers and club executives who have close relatives directly involved in the transfer business (e.g. Darren Dein, son of David, works for Jerome Anderson Consulting and is believed to have approached current Liverpool goalkeeper Jerzy Dudek on Arsenal's behalf.) The chief concern appears to be the possibility of a conflict of interest, whilst officials from the Professional Footballers' Association (PFA) are concerned that this may prevent some of their members of obtaining a fair deal.[271]

Reports that Jaap Stam himself was dissatisfied with the deal and that he was planning to sue Manchester united on account of this were emphatically denied by the Dutch international himself, who stated that at no time had he approached any lawyer about this matter.[272]

FIFA and the PFA involved in "secret" deal over transfers?

Transfer deals as a general issue have made the legal headlines ever since the *Bosman* decision[273] burst on the scene. Although there have been various claims that the legal system now governing transfers and the free movement of players has been settled once and for all,[274] there remain plenty of grey areas in this field. However, it was a reasonable expectation that a minimum of consultation and transparency would surround any new development which may arise in this connection. It was therefore with outrage and disbelief that English football officials reacted to the news that secret changes were being plotted to the new "system" which could result in top players walking out on their clubs without needing to fear any serious adverse repercussions. The cause of all this commotion was a copy of a letter, obtained by a leading Sunday newspaper in the UK,[275] from FIFA General Secretary Michel Zen Ruffinen to the international players' Trade Union, FIFPRO, headed by Britain's Gordon Taylor, and circulated to all Europe's major leagues.

The letter in question reveals totally unexpected changes to the new "system" which was apparently agreed by all parties - although FIFPRO would hotly dispute this contention - earlier this year and which entered into effect on 1 September following a protracted period of at times agonising negotiations with the European Union. The latter had previously threatened to apply the full rigour of EU law on the free movement of persons unless a compromise was achieved giving players adequate freedom. However, the amendments which have apparently been worked out in secret between world governing body FIFA and the players' union, which have involved no direct contact with either the clubs or the leagues, would give players signed after 1 September a virtual licence to break their contracts without being subjected to any minimum penalty.

The FIFA letter was dated 23/8/2001 - i.e. barely one week before the new transfer system was to enter into operation. It was followed by a 21-page circular outlining the deal. This provides documentary evidence that no player covered by the new transfer rules risks being banned for more than four months (six in exceptional circumstances) should he decide to leave his club. In addition, he could theoretically break his contract again during that very same season, and once the initial two or three "protected" years of his contract are over, no penalties would apply at all. As a result, even if the transfer "windows", which are fiercely opposed by the FA and the Premier League, came to be introduced into English football, a player could still technically leave one club in July and join another in time for the start of the subsequent season, thus removing any disincentive against breach of contract. Also, no compensation would be paid to clubs who lose players aged under 23 at the termination of their contracts.

Equally likely to strike fear in the hearts of club and league officials is the revelation in Zen Ruffinen's letter that the players will have the dominant say whenever individual contractual disputes are referred to arbitration. FIFPRO have apparently been requested to nominate no fewer than 15

representatives to the new FIFA disputes panel, whilst the clubs do not seem to have been given any representation whatsoever.

The reaction by most of the leading clubs and officials was predictably fierce, with Peter Ridsdale of Leeds United hinting that his club may abandon its five-year contract system if these proposals were adopted.

Leeds Rugby Union club at loggerheads with South African body over Springboks move[276]

When Leeds RFC announced in late August 2001 that two Cape Town-based internationals, to wit Braam van Straaten and Cobus Visagie, had signed two-year contracts at Headingley, this was regarded as a major coup for the Yorkshire side. However, some of the gloss of this achievement was removed as Anthony Mackaiser, a member of the management team of the South African Rugby Football Union (SARFU), claimed that these contracts were "null and void" and threatened to report the matter to the International Rugby Board unless Leeds terminated negotiations forthwith.

SARFU queried the van Straaten deal on procedural grounds, although it accepted privately that he would eventually join Leeds from Westerm Province once the Currie Cup, South Africa's domestic competition, ended in November. The deal involving Visagie, however, was regarded by SARFU as totally off-limits. The prop had not been awarded a central SARFU contract at the beginning of the Southern Hemisphere season, but Mackaiser insisted that he was under contract with Western Province until 2003. Thus must presumably have come as a surprise to both Visagie and Leeds, since the player in question had repeatedly maintained that he was not under contract with anyone.

Are football agents out of control? Articles in UK newspapers

As was highlighted in our feature on this topic in the previous issue,[277] football agents have become as integral part of the soccer scene as shirt logos and Mexican waves, yet very little appears to have been done hitherto to regulate their existence, even though they are subject to certain licensing requirements and have to operate within certain codes of conduct. This has been a source of increasing concern to the game's commentators, of whom Simon Hughes is one of the more thoughtful and articulate. In an important article in a leading British daily,[278] he charts the rise of these football intermediaries and has some harsh words for those who have allowed their activities to spin very nearly out of control.

It is particularly in relation to transfer fees that their dubious presence and influence has been felt in the game, according to Hughes. There are an average of 25 transfer deals per week involving English clubs. Many of these are initiated by agents who sniff a commission or lump-sum payment to be made from the deal. Apparently there has been an increase in the type of scenario whereby a player, encouraged by an unscrupulous agent, makes an enemy of his manager, whose plans for the season are thrown into disarray; the team gradually loses its focus and is ultimately relegated, after which the manager is dismissed.

There are currently 87 licensed players' agents in England, which is more than in any other country (Spain being next with 52). There is simply not enough work to go round and yet, following a spate of applications, a further 80 were given authorisation to ply their trade in early October 2001, having weathered a brief FIFA-accredited examination. This opens the way for more player manipulation and more upheaval. Whereas some are competent and honest professionals, others operate as the second-hand car salesman of the game. They are very difficult to police, and dubious deals are difficult to prove. Celtic were once caught using an unlicensed agent and were fined, but such punishments are rare. The requirements to become an agent are not very taxing: the candidates are interviewed and must deposit a sizeable bond, but the FIFA accredited examination is a multiple choice affair involving such difficult questions as "What does FIFA stand for?". The regulations governing agents also admit of a certain degree of ambiguity.

Since the managers appear to be one of the most likely victims of their malign influence, they are calling for an independent monitoring body ensuring that agents remain subject to certain restrictions. The FA is supposed to be such a body in this country, but many doubt whether it has the time or the teeth to perform this role adequately.

Vivek Chaudhury, of *The Guardian*, is another columnist who worries about this phenomenon.[279] He points to roughly the same difficulties and problems as Hughes, and highlights the case of Dennis Roach, one of the few agents to have been brought to book for his dubious practices. Roach is Glen Hoddle's agent, and has been charged by the FA with five infringements of its regulations on the subject. More particularly he was accused of irregularities arising from the transfer of Duncan Ferguson from Newcastle to Everton, and Paolo Wanchope from Derby to West Ham United (see also above, p.27).

Spurs and Southampton feud over Hoddle, Gorman and Richards moves (UK)

One of the consequences of George Graham's departure from White Hart Lane - apart from the acrimonious employment law implications referred to in our previous issue[280] - was his replacement as Spurs manager by their former player, England international and reincarnation enthusiast Glen Hoddle. However, this involved the unseemly business of luring both him and his assistant, John Gorman, away from Southampton even as the latter were engaged in their annual struggle for survival in the Premiership.[281]

Relationships between the two clubs appeared to be on the mend as the news broke that both sides had agreed a final compensation bill of £910,000 - which if added to the cost of compensating George Graham brings the total cost of the switch to approximately £2 million. However, the two clubs were once again at loggerheads shortly after the start of the 2001-2 football season, when it was learned that Spurs were interested in Southampton's centre half Dean Richards. Southampton chairman Rupert Lowe not only rejected an offer for £4 million for Richards, but also reported Tottenham to the Premier League authorities for the manner in which they had attempted to prise Richards away, claiming it contravened entirely the spirit and wording of protocol on this subject to which the clubs agreed at a Premier League meeting in June.[282]

Since then, Spurs have stated that they have withdrawn their interest in the acquisition of Richards.

4. TORTS AND INSURANCE

SPORTING INJURIES

Jockey Peter Caldwell loses appeal over action for damages. Comments on decision in professional journal (UK)

In a previous issue,[283] attention was drawn to the recent court decision in which Peter Caldwell, a former jump jockey, lost his action for damages against two leading riders for negligence in connection with a fall leaving him with severe head and spinal injuries and effectively terminating his career. This report also featured some of the initial comments to this decision, some of which emanated from the racing press and were therefore predictably favourable, whereas some of the more detached commentators were rather less enraptured with the High Court's findings.

In that issue, it was also reported that Peter Caldwell intended to appeal against this ruling. The outcome of this appeal, however, was unsuccessful for the former jockey. Let us recall the case history of this affair. As a result of the injuries referred to above, Caldwell brought an action against two jockeys in the same race. The two defendants at a certain point were neck and neck with another jockey, Byrne, with Caldwell close behind. On approaching a left hand bend, the two defendants moved slightly ahead of Byrne, taking a course which left no room for him on the inside, whereupon the latter's mount, disconcerted by the closing gap, swung across the course into Caldwell's path, thus bringing about his fall.

Following a stewards' inquiry, the two defendants were found guilty of careless riding by failing to leave sufficient space for Byrne to come round the inside rail. The High Court found against Caldwell. Although the two defendants had been guilty of lapses of care when riding, this did not amount to a breach of their duty of care towards Caldwell. This incident reflected the cut and thrust of serious horseracing, in theory avoidable, but in practice something that was bound to occur from time to time. Injury was part of the life which he chose and enjoyed - what was unusual and untoward was its seriousness.

Before the Court of Appeal, both parties agreed that those taking part in competitive sport owed each other a duty of care. The main ground for appeal on Caldwell's part was that, in his explanation of the applicable standard of care, the judge had set the standard of care at too low a level by requiring evidence of a deliberate or reckless disregard for safety.

The Court rejected the appeal.[284] It held that the first judge was correct in adopting the approach displayed by the Court of Appeal in *Smoldon*,[285] which was to rule, as was held in the seminal *Condon* decision,[286] that the defendant has to exercise such a duty of care as was appropriate in the circumstances. More particularly,

> *"there will be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. Something more serious is required."*

The court therefore accepted that negligence in sport is something which is dependent on the game being played and the risks involved in practising it. Reckless disregard was an expression of the degree of evidence required rather than a new standard of care. The level of care required is that which is appropriate in the circumstances.

This decision has already attracted the interest of certain commentators, such as Mark James and Fiona Deeley of Manchester Metropolitan University.[287] Their general assessment is a favourable one. They welcome what they see as a clear indication of what should be taken into account when assessing what the relevant circumstances mentioned above are and whether an act was sufficiently careless to be considered negligent.

The present author, however, continues to experience difficulties with this approach, particularly when it is considered that in this case, the defendant riders had been found guilty of careless riding by the subsequent stewards' inquiry. Surely a Jockey Club finding is the best possible indication of what standard is required in the "relevant circumstances"? If such findings are not taken into account, surely this is a recipe for confusion and arbitrariness?

No doubt this debate will continue to rage for some time to come.

Irish court awards damages for diving accident[288]

In June 1998, the infant claimant in this case, who was nine years old at the time, was attempting to dive into the pool at Ballyfermot swimming pool when he cut his foot on a broken tile. The claimant made a good recovery without incurring lasting damage. The Dublin Circuit Court awarded general damages of £7,500.

Amateur golfer held non-liable for poor shot which caused injury[289]

In the case under review, the claimant was playing in an amateur golf tournament at Ardrass Golf Club, Northern Ireland. He was playing against the defendant Teague, both being members of the club. At the sixth hole, the defendant drove off from the tee and the ball hit the claimant on the leg, causing him injury. Five yards in front of the tee there were two large stones painted green, which marked the teeing points for non-competition golfers - the ball must presumably have hit one of the stones and rebounded onto the claimant's leg. The defendant was a low-handicap player, and there was no evidence on his part in the manner in which he struck the ball. However, the claimant pleaded negligence in that the defendant teed up in line with one of the green stones. A professional golfer called by the defendant gave evidence that had the stones been situated two yards in front, he would have stopped the defendant from teeing off, but not when the stones were five yards ahead.

The High Court held that the defendant owed the claimant a duty of care to the claimant and indeed to all nearby players who were present on the course. However, he did not breach that duty of care. Any golfer, however accomplished, could occasionally play a poor shot without negligence on the latter's part. As was the case in all ball games, pure accidents could happen.

(For the procedural issues arising from this case, see below under Section 11.)

Michael Watson will have to accept lower compensation sum

The sad case of boxer Michael Watson, who suffered irreparable brain damage during a fight with Chris Eubank in 1991, is well documented in these columns.[290] The High Court ruled that the British Boxing Board of Control (BBBC) was negligent in failing to provide adequate ringside medical care and safety measures, and this decision was later upheld by the Court of Appeal. The initial sum awarded to Watson was £2.5 million; however, it now seems unlikely that Watson will receive anything but a fraction of that sum, since the BBBC's assets are inadequate for the purpose of meeting this sum. As a result, he is now more likely to end up with no more than £400,000.[291] This settlement was reached in he High Court in November 2001 as the BBBC abandoned its attempts, reported in the previous issue,[292] of appealing to the House of Lords.

This will probably mean that the BBBC will need to sell its premises and move elsewhere - possibly to Wales.[293]

Comments on French decision re liability for rugby tackle

The previous issue contained reports on a set of recent cases which decided on the liability incurred in respect of injuries sustained by school pupils taking part in games of rugby.[294] More particularly the contrast was outlined between the approach of the English courts, which held the schools liable, and the French Supreme Court, which absolved the school from any liability. The latter decision has been the subject-matter of some recent comment in the French academic press.

It will be recalled that in the decision in question,[295] the pupil in question suffered an eye injury as a result of an incautious rugby tackle. The Court upheld the decision of the Orléans Court of Appeal (*Cour d'appel*) where it held that no tort liability (*responsabilité civile*) could be vested in the school, because the game in question took place during a school break and was not a supervised activity, and because it was not possible to eliminate every risk of injury from the sport of rugby.

The Court, however, did overturn that part of the Court of Appeal's decision which had dismissed an alternative plea by the pupil against his opponent's parents, since for vicarious liability to apply, it was necessary to examine the potential liability of the person on whose behalf the liability was being assumed. The Appeal Court had concluded that there was nothing to indicate that the pupil concerned had broken the rules of the game, and that the victim had willingly taken part in the game and therefore voluntarily subjected himself to the risks which were inherent in it. Viewed in this light, the pupil could not be held liable; therefore neither could his parents. The Supreme Court held that such an interpretation of the relevant provisions of the Civil Code, i.e. Articles 1384(4) and (7), was incorrect and therefore set aside the original ruling.

In an annotation to this decision by Jean Mouly,[296] a specialist in French sports law, it is particularly the second issue which has attracted the author's interest. He criticises this decision unreservedly, because it is inconsistent with its previous case law, more particularly (a) that which had set the standard of negligence for sporting injuries at a high level in order not to inhibit the freedom of action of athletes, and (b) that which had recently seen the Court adopt a more restrictive stance on allowing the vicarious liability of parents. He states that the Court seems to have gone from one extreme to another: from an excessively subjective approach to an exaggeratedly objective stance.

Rugby federation has no duty of care towards players. Australian High Court decision and commentary.

The reader need only consider the contents of the previous section to confirm that the world of Rugby Union has been a major source of litigation in relation to the tort liability for sporting injuries. A recent judgment by the Australian High Court[297] may prove yet another seminal decision, having repercussions well beyond the world of rugby.

The case involved Luke Hyde and Peter Worsley, two players whose rugby careers came to an end in 1986 and 1987 respectively when they were rendered quadraplegic in scrumming accidents. Both were hookers and became injured when the opposing forward packs engaged in scrum formation before their own packs were set in position. The only difference between the two lawsuits was that Hyde claimed that he incurred his injury when the forwards of the opposing team charged his pack,

in breach of the laws of rugby, whereas Worsley did not allege any infringement of the game's rules. They both claimed compensation from the opposing clubs, the match referees, the referees' association as well as various Australian bodies responsible for the administration of the game, the latter being sued for alleged negligence in conducting that particular fixture, or in giving their approval to the rules under which it had been played. (Both players suffered their injuries before the rules of the game were changed to enable a more orderly procedure when scrumming down.) They also attempted to join the International Rugby Football Board (IRFB), responsible for drafting and amending the rules of the game, fearing that otherwise, the local administrators of the game cited as defendants would merely plead that they were bound to play and referee the game in accordance with the rules as promulgated by the IRFB. The IRFB could not itself be sued, since it was an unincorporated association and therefore did not constitute a legal entity. The claimants thereupon sought to join the IRFB Member Unions, as well as the individual representatives of these Member Unions on the Board.

At first instance, the New South Wales Supreme Court dismissed the action because (a) there was no foundational duty of care between the individual IRFB representatives and the claimants owing to a lack of proximity between the parties, and (b) there was no precedent recognising a cause of action by an injured person alleging breach of a duty of care on the part of a voluntary association arising from exercising or failing to exercise rule-making powers.

The NSW Court of Appeal unanimously upheld an appeal against this decision. It did not express a view as to whether the IRFB defendants owed a duty of care towards respondents in terms of formulating and altering the rules of the game, but ruled that the matter should go to trial so that the court could thoroughly examine the issues involved, rather than taking a decision at the interlocutory stage when the legal issues had hardly been touched upon. Having done so, the judges found that Hyde and Worsley had a good arguable case that the IRFB owed a duty of care on various grounds, such as (a) the fact that referees had been successfully sued for failing to enforce the rules of the games (see *Smoldon!*); (b) trustees of a school had lost court actions for failing to coach or instruct a pupil in proper tackling techniques, (c) the boundaries of liability for sports injuries had been expanding over the years, and (d) a duty of care could not be denied merely because participation in the sport was voluntary.

The High Court, for its part, upheld the appeal made by the IRFB members. However, in rejecting that the latter had a duty of care in this case, the Court relied, not on some general test or formula such as proximity, but on a series of policy and consequential factors. These are broken down by the authors Jeremy Kirk and Anton Trichardt[298] as follows:

Novelty. Although this was not in itself a bar towards an action succeeding, the absence of precedent to this effect made it highly likely that no such duty of care existed

Distinction between act of commission and act of omission. The plaintiffs were alleging an act of omission, i.e. their failure to change the rules of rugby. Here, the judges held that the Board no more owed a duty to amend the laws of the game than Parliamentarians owed a duty of care to factory workers to amend factories legislation.

Control, proximity and indeterminate liability. The perceived lack of control exercised by the Board was a crucial element counting against acknowledging a duty of care. The games of rugby during which the accidents occurred were not injured by the Board; there were many intervening levels of administrative decision-making between the Board and those who did organise the fixture, and in any case there was no requirement that anyone playing rugby had to choose to follow the Board's version of the rules. It was considered significant in this regard that the claimants were not subject to a legal power of direction, in contrast to the position of employees Naturally even employees could leave a post which exposes them to danger, but an unstated, valid premise here is that employees are subject to a degree of economic duress or necessity in performing these tasks in order to provide income for themselves, which could not be said of amateur sportsmen.

Voluntariness, risk, autonomy and consent. The High Court held that danger and risk are inherent in any sport such as rugby - indeed for many players and spectators this is part of the attraction of the game. By volunteering to take part, players freely consented to accept these risks. These facts were held to count against recognition of a duty of care to amend the rules in order to avoid unnecessary risk.

Voluntary participation in sports administration. The fact that the IRFB members managed the sport of

rugby on a voluntary basis was also held to count against acknowledging a duty of care, the implicit argument being that, in the same way that rescuers should not be deterred by the ready imposition of high duties of care, so volunteers in socially beneficial activities such as sport should also be discouraged.

Content and effect of the duty of care. From this point of view, the Court identified three difficulties. First, tort law applies to individuals, yet the defendant members of the Board could not have individually changed the rules of the game. Secondly, there would arise a practical difficulty in delimiting "serious" injuries, and the Court considered that there was no reason in principle why any duty should be so limited. Thirdly, how could a court judge what alternative rule should be adopted, or whether some proffered alternative was available?

The authors referred to above, Kirk and Trichardt,[299] subject this decision to a thorough critical analysis. They highlight first of all that this decision has far-reaching implications for the law of torts in general. Particularly the fact that the element of proximity was not taken into account shows that this concept has fallen out of favour with the Australian judiciary. Rather than apply such a general test or principle, the Court applied factorial, policy-driven approach. This approach comes at a cost, which is that of a reduction in legal certainty - even though the demands of seeking justice and seeking certainty may be at odds with each other in this area. The approach also has the merit of enabling a nuanced analysis in which the particular features of different situations can be given due weight.

Overall, the authors agree with the decision. They admit to a number of difficulties with the Court's approach, but state that, nevertheless, the Court's conclusions were, on the whole, well founded. More particularly, state the authors,

> *"the High Court ultimately was right to take account of the low level of control exercised by members of the IRFB over the conduct of the games in which the plaintiffs were injured. There was a notable absence of proximity, in the sense of nearness and closeness, between the alleged acts/omissions of the IRBF defendants and the harm suffered by the plaintiffs. Moreover, it was valid to take account of the voluntary nature of the plaintiffs' participation in the dangerous game of rugby, even if there is some doubt as to the degree to which the particular risks were understood at the time. Most importantly, no formulation of the claimed duty was or could be supplied which would avoid taking the courts into purely subjective questions of preference and priority."*

The authors also examine the ramifications which this decision may have for sporting administrators. They highlight the fact that the waters here are muddied by the fact that the IRFB is an unincorporated body and therefore could not be sued as a legal entity, which left as the only possible defendants its individual members. What we cannot know is how the High Court would have ruled had the IRFB been an incorporated body. The authors here point to a Canadian case, which involved an injury caused to a player as a result of the mismatch in size between the plaintiff and the players on either side of the scrum.[300] Crucially, all parties in this case accepted that the British Columbia Rugby Union (BCRU), under whose auspices the game was played, had a direct duty of care towards the plaintiff regarding Union's organisation, conduct and control of the game.

The author's general conclusion is therefore that there remains some room for argument that sporting administrators will be liable in negligence in relation to the nature and conduct of their sport. That liability may arise for failing to fulfil a duty to warn in situations in which controllers become aware of new information pointing to a higher level of risk than was generally appreciated.

These comments are not likely to constitute the last word, either on the subject of liability for rugby injuries in general or the court decision under review in particular. This column will follow this debate with the keenest of interest.

LIBEL AND DEFAMATION ISSUES

AXA apology over "unprofessional" jibe averts court action (UK)[301]

Relations between the Football Association and its cup sponsors, insurance giant AXA, are distinctly cool following a disagreement over sponsorship scheduling which nearly ended in a libel action. AXA had described the FA's organisation as "unprofessional" in the manner in which it had relayed

information to AXA about its new drive for having five rather than 10 sponsorship partners. Following threats of legal action for libel from the FA over these remarks, AXA issued a public apology - albeit a somewhat half-hearted one, referring as it did to a "mutual breakdown in communication - which was just adequate to avert court action.

BHB Chairman issues writ against prominent daily newspaper (UK)[302]

In September 2001, the Chairman of the British Horseracing Board (BHB), Peter Savill, who featured very prominently in the battle between the BHB and Go Racing for appropriate media rights,[303] and who has been attacked in some quarters for his allegedly abrasive attitude, issued a writ for libel against *The Daily Telegraph*. The latter had reported that Paul Greeves and Teresa Cash, two senior BHB executives, had tendered their resignation, and that manager Chris Reynolds was working out his 12-month contract, causing unprecedented turmoil. The newspaper had alleged that the main cause for this disruption was Savill's abrasive approach towards leadership.

The outcome of this litigation was not yet known at the time of writing. (See also under Heading 16 below, p.107.)

Defamation claim over EU investigation into FIA dismissed by English Court of Appeal[304]

In a previous issue,[305] it was reported that the European Commission had discontinued its investigation into the practices of the world governing body of motor racing, the Fédération Internationale de l'Automobile (FIA) under EU competition law, following a compromise between the two sides. This does not mean, however, that all the legal issues arising from this affair had disappeared, judging by a recent decision by the English Court of Appeal. In June 2001, it decided to uphold a decision to dismiss a claim for defamation brought under section 8 of the Defamation Act 1996, thus confirming that a defendant may use this procedure immediately after proceedings have been issued - more particularly prior to disclosure - and that the decision may be made on the basis of information available to the court at that time.

The litigation in question arose from the publication in a German magazine of an interview which, according to the claimants, suggested that the latter had spent considerable sums of money in order to destroy the EU Competition Commissioner in the course of his investigation into the marketing practices in Formula One motor racing. In the High Court, the trial judge had awarded an application to dismiss the action. This award was upheld by the Court of Appeal. Section 8 of the Defamation Act 1996 authorises the court to dispose summarily of an action where either the plaintiff's claim or the defendant's defence has no realistic prospect of succeeding and there is no reason why it should be tried.

The magazine in question had a large circulation (around 900,000) with a total readership estimated at around 6 million. The article complained of was a full-page interview with the Competition Commissioner. In an interview headed "Once I needed police protection", and in reply to a question "Were any threats made against you personally?" the response included the following words:

> *"On one occasion, when a Belgian steelworks had closed down as a result of one of our decisions, I enjoyed police protection. But the worst case was the proceedings over the marketing of Formula One. It was very clear that certain people were spending a great deal of money to destroy me. Fortunately, they did not succeed."*

The claimants alleged that, although the extract set out above did not mention them by name, it referred to them, implied that they had threatened the Commissioner and had attempted to destroy him, and that these claims were false and defamatory to them. Even though the claimant in a defamation action does not need to be named in the article complained of, it is necessary for the words to identify. Where he/she is not named, the claimant may rely on material which is extrinsic to the article and known to its readers, who would thus be able to identify him as the person referred to. However, that person must be identified in the pleadings, unless the extrinsic facts were so notorious that the specific publishee was capable of being inferred. In the case under review, the claimants failed to name any individual publishees. They explained to the Court of Appeal that at that early stage prior to disclosure, they did not have access to the defendant's own subscription list which

would have yielded details of at least some of those who had read the periodical in question in the UK. In order to understand on what basis the claimants considered that they were the parties referred to, it was necessary to go into detail.

The FIA, being the world governing body for motor racing, also controls the Formula One World Championship, and is chaired by Max Mosley. Before the interview took place, the FIA had been under investigation by the Directorate General for Competition, and at the material time this department was controlled by the Commissioner interviewed. In the course of the investigation, the FIA had taken the Commission to the European Court of Justice (ECJ) for improper disclosure of confidential FIA material to the press. These proceedings had been settled after the Commissioner in question had issued a public statement expressing regret.

The claimants maintained that this information was known by at least a considerable number of the magazine's readers, who would accordingly have understood that the words complained of referred to the claimants. The defendants, for their part, applied for summary dismissal of the action under Section 8 immediately after the proceedings had been served. The trial judge in the High Court had held the crucial question in this regard to be whether the claimants had no realistic prospect of establishing that some reasonably-minded readers would take the "certain people" referred to in the contentious article to refer to the claimants. Mr. Justice Morland concluded that they did not.

The judge acknowledged that a person who had read those articles which had appeared in the UK, had retained that information, and had subsequently read the magazine article complained of (in German), he could reasonably have reached the conclusion that certain people, including Mr. Mosley, were the subject-matter of the defamatory inference. He went on to state that the existence of such a person was "fanciful and not realistic". Such a person would have to be a German first language speaker, living and/or working in the UK, who would have read the UK articles, retained that information, read the magazine article in German, and then have understood the words "certain people" to mean the claimants. This scenario he held to be so far-fetched as to be fanciful. The Court of Appeal upheld this view, and failed to accept the claimant's argument that the Court at that early stage should also have regard to evidence which could reasonably be expected to be available at the trial. The claimants had alleged that the failure of the High Court to do so meant that its decision was premature. The Court, however, did not accept that, particularly in view of the fact that no application for disclosure of the documents had been made.

According to Amber Melville-Browne, writing in the *Law Society's Gazette*,[306] this case highlights the importance of swift action on both sides. Whereas a defendant may apply immediately after proceedings have been served for their dismissal, a claimant seeking to identify specific publishers may make an early application for disclosure of information which would assist with their identification - such as in this case the defendant's subscription list of the contentious magazine. Clients almost invariably expect their solicitors to be crystal ball gazers. The latter are conscious of the overriding objective within the Civil Procedure rules, and are increasingly focusing their attention on the importance of such "front-loading" litigation.

The present author, however, cannot help entertaining some doubts about both Courts' reasoning. Was the scenario dismissed by the Justice Morland as fanciful as he made it out to be? It was established that *Focus* sold about 700 copies in Britain. The vast majority of these will be Germans working in Britain, many of whom have a lively interest in Formula One racing because of the success of the Schumachers. Is it really that "far-fetched" to suppose that at least some of them could link that interview with the news they ingested by virtue of living and working in the UK, which included the fact that the FIA were being investigated by the Commission?

Lennox Lewis obtain gagging order against former manager Frank Maloney (UK)

It will be recalled from the previous issue[307] that Frank Maloney, former manager of boxer Lennox Lewis, is no stranger to the courtroom. However, just before this edition going to press, it was learned that Maloney was himself on the receiving end of litigious proceedings when his former

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employer succeeded in obtaining a gagging order against Maloney in order to prevent him from speaking out about life with Lewis, just before the latter's world heavyweight title rematch with Hasim Rahman.[308]

Snooker officials "should face legal action" over unsuccessful libel cases[309]

According to a recent report on the management of the world of snooker between 1996 and 1999, two former officials of the World Professional Billiards and Snooker Association (WPBSA), the world governing body in this particular sport, should face legal action over a number of costly and unsuccessful libel actions which they brought against their critics. The officials in question are Chairman Rex Williams and former World Champion Ray Reardon.

The report, compiled by sports lawyer Mark Gay, contends that the libel actions had been brought for political reasons against critics of the Williams/Reardon regime and could have left the WPBSA facing a total bill of over £2 million. It recommends legal action against these two officials for breach of duty, and claims that the costs which they incurred in bringing seven libel actions during their term of office were unjustified. The report paints a damning picture of cronyism and mismanagement within the Association, where critics were threatened with court cases and supporters given remunerated posts. The author concludes that supporters of the former Chairman Williams and of his vice-chairman, Reardon, included former players, including former World Champion Joe "Eyebrows" Johnson, who were recruited as coaching advisers on salaries of £7,500 per year, even though none of these posts was ever advertised.

The report also states that a coaching committee set up by Williams only comprised members who voted for him and that, with one exception, none of them had previously shown any interest in coaching.

PFA chief starts legal action over financial malpractices and mismanagement claims (UK)[310]

The bitter struggle between the English footballers' Trade Union, the Professional Footballers' Association (PFA), and the Premier League over media rights, of which a blow-by-blow account is given elsewhere in this column (see above, p.37), has had legal implications beyond the contractual. In October 2001, the Chief Executive of the PFA, Gordon Taylor, started a series of court actions against his critics, including the Chelsea chairman, the ubiquitous Ken Bates. On the one hand, he has started proceedings against the *Sunday Mirror* and trade magazine *Accountancy Age* for alleging financial malpractice by the PFA - more particularly that it had £1.5 million of funds unaccounted for (*Sunday Mirror*) and that the PFA had £20 million in hidden assets (*Accountancy Age*).

He also plans to sue Ken Bates for remarks made in his match programme column that the players' union spent £3.5 million on administration and only £700,000 on hardship cases (see above, p.38).

INSURANCE ISSUES

West Ham claim £1 million over injury to goalkeeper James (UK)[311]

One of the first international fixtures of the current football season in England was the friendly against the Netherlands at White Hart Lane in August. During the game, England goalkeeper David "Calamity" James sustained a knee injury, which was likely to keep him out of the game for some time. James's club, West Ham United, put in a claim for £1 million against the Football Association (FA) to compensate the East London side for their first-choice goalkeeper's salary during this period of inactivity. This sum was expected to be met by the insurance scheme contracted by the FA for this purpose.

England cricketers express amazement at being insured for "only" £200,000 each for India tour (UK)[312]

Because of the tensions generated in the Indian subcontinent over the recent terrorist attacks on the

US, England's forthcoming cricketing tour of India was always going to be a controversial and potentially dangerous adventure - to the point of causing bowlers Andy Caddick and Robert Croft to withdraw from the tour party (see below, p.105). It therefore came as something of a shock to them to discover that their lives have been insured for only £200,000 by the England and Wales Cricket Board (EWCB). This is in sharp contract to the millions which safeguard the dependants of England's footballers. Nevertheless the ECWB announced in early November 2001 that there were no plans to increase the amount of cover when the existing policy expired at the end of that month, in spite of deepening concerns over the party's security.

Lions tour exacts high price from insurers (UK)[313]

The 2001 Rugby Union tour of Australia by the British Lions not only ended in defeat for the British side, but also exacted a heavy toll in injuries to some of its leading players. In this regard it is the insurance companies which have been the main losers, since they have been required to pay over £300,000 in compensation for knee injuries sustained by back-row forward Laurence Dallaglio and hooker Phil Greening. It is the former, however, who will account for most of this sum, since Dallaglio's injury required expensive reconstruction surgery and is keeping him out of club and international rugby until at least the New Year.

It is interesting to note that this injury was originally incurred during a championship match for Dallaglio's club side, Wasps, against Bath in May 2001. The medical opinion available to the London club was that it would be preferable for the player to forego the tour in order to receive immediate rehabilitation treatment. However, the Lions' medical team gave him a clean bill of health for the tour, and in fact Dallaglio did recover sufficiently to be able to play in two fixtures immediately prior to the first Test against the Wallabies. It was during the second of these games, against the New South Wales Waratahs, that he sustained another injury and had to withdraw from the remainder of the tour.

Chris Wright, the Wasps' owner, initially threatened to sue if any dispute arose over the compensation claim. However, Roger Pickering, secretary of the Four Unions under whose auspices the tour took place, ultimately stated that the latter were prepared to accept full liability.

Insurance deal for football World Cup endangered, then rescued

There can be hardly any walk of life which has not been affected by the tragic events of 11 September, and the world of sport is no exception (see, e.g., above p.37). One of sport's heaviest losers from this atrocity appeared at first to be the football World Cup, which requires a sound financial basis of which a secure insurance policy is an essential requirement. In mid-October, however, this cover seemed to be in terminal danger as the major insurance company AXA withdrew from its agreement to provide cover worth £617 million for the 2002 tournament, to take place in Japan and South Korea. AXA Colonia, the German branch of the insurance group stated that the Taliban's call for a holy war against the West had caused them to reconsider the contract, and a fax message rescinding the contract was accordingly despatched to FIFA's headquarters in Zürich (Switzerland).[314]

Although FIFA President Sepp Blatter issued a defiant statement that the World Cup would go ahead regardless, this claim lacked credibility, since the tournament would inevitably be postponed if no insurance cover could be found for the world's most expensive players. At first, it was thought that FIFA would have no option but to renegotiate a deal which would inevitably be less beneficial to it. Indeed, within days of the said fateful fax being despatched, an AXA spokesman announced that he expected a new agreement to be concluded very soon, although he admitted that the changed conditions could be reflected in the payment of higher premiums.[315] However, it soon became apparent that negotiations between the two sides were extremely laborious and nearing deadlock.[316]

As the month dragged on, it became increasingly clear that a deal between the two sides was becoming increasingly unlikely. The main reason for this appeared to be that AXA were demanding too high an increase in the relevant premium.[317] However, on 29/10/2001 the world governing body in football was able to announce a new insurance contract for the Finals - to be concluded with US insurance firm National Indemnity Company (NIC). Unlike the AXA agreement, this new deal does not allow the contract to be terminated by the insurer.[318]

Damages awarded for sexual abuse suffered as a boy when member of a boxing club (Canada)[319]

The increasing incidence of sexual abuse inflicted by those in charge of sporting associations on minors has been reported elsewhere as a topic of increasing concern to the public authorities (see above, p.17). Inevitably, such assaults may also have implications in tort, which was the case in a recent Canadian court decision.

The claimant in this case was a member of a boxing club for native boys organised by the Canadian Government and administered by the employee in question on its behalf. That employee was alleged by the claimant to have sexually abused him on three occasions. He therefore brought an action against both the employee and the Government. The Court allowed the action against the accused employee, finding that the latter did in fact sexually assault and batter the claimant. It also found that the emotional difficulties and alcohol abuse subsequently experienced by the latter were attributable to that abuse. The Court heard that the claimant had experienced an unhappy childhood in a broken home. However, it ruled that the abuse suffered constituted an extraordinary occurrence which severed the chain of causation which may have existed between the claimant's dysfunctional background and the damage which he ultimately experienced.

The Court also allowed the action brought against the Government to succeed. It was the Canadian Government which operated the boxing club and held it out to be a significant achievement in fulfilment of the goals set by the Department of Indian Affairs. The employee's propensity towards paedophilia was known at the time at which he became its servant; the Government had employed him without examining his state of emotional health and thereafter failed to provide any meaningful supervision of his behaviour in employment. Young persons who took part in the activities sponsored by the Canadian Government were exposed and subjected to the authority of the employee over facilities, as well as to his control and direction of boxing activities. The employee's opportunity to abuse his authority was enhanced further by the deficient management and supervisory structure on the part of the Canadian Government. Nor was there any evidence that the Government's ability to fulfil its legislated mandates would be adversely affected if it were found to be vicariously liable for the employee's misconduct.

The damages were awarded as follows:

Aggravated damages: The plaintiff was entitled to aggravated damages of $20,000 as against the employee and the Government for the "humiliation and indignation (sic)" incurred as a result of the employee's conduct. Aggravated damages were compensatory by nature and therefore also attached to the vicariously liable employer.

Punitive damages: As to punitive damages, $20,000 were awarded against employee alone, the Government's conduct having fallen short of the degree of complicity or recklessness required in order to justify an award of punitive damages against it.

Personal injury - pain and suffering: The Court ruled that the plaintiff was entitled to non-pecuniary damages of $60,000 as against the employee and the Government for emotional distress and psychological problems suffered as a result of the abuse inflicted by the employee.

Personal injury - special damages (pre-trial pecuniary loss): The claimant's erratic work record was found by the Court to be consistent with emotional difficulties experienced by him. But for the abuse committed by the employee and the resulting emotional and psychological problems, the claimant would, on the balance of probabilities, have been employed as a construction worker or agricultural labourer between 1978 and 1987 and could have obtained full-time employment repairing vehicles from 1987 to the present. The plaintiff was therefore entitled to damages of $91,213 against the employee and the Government for loss of past income-earning capacity.

Personal injury - prospective pecuniary loss: For loss of future earning capacity, the claimant was entitled to $179,190 against the employee and the Government.

Modahl loses appeal over drugs ban[320]

The Diane Modahl case, which involved a protracted battle in the courts over her quest for

compensation in respect of an unjustified doping ban, and which is well documented in these columns,[321] has ended in failure in the Court of Appeal. The High Court had already dismissed her claim for compensation from the now-defunct British Athletics Federation (BAF) in December 2000. However, Ms. Modahl vowed to fight on and to appeal, pleading bias on the part of the disciplinary committee which had imposed the four-year ban in 1994. The Court of Appeal, however, confirmed the original ruling.

Ms. Modahl afterwards stated that she would not attempt to take the matter to the Law Lords; instead, she intended to "concentrate on my other activities" - high on the list of which is presumably raising the money to pay the substantial legal costs which this litigation has cost her.

Spectator at Special Summer Olympics awarded compensation for injury caused by falling timber. Scottish court decision[322]

This decision arose from the European Special Summer Olympics of 1990, which were held in Celtic Park, Glasgow. The pursuer (claimant in Scottish court proceedings) was standing on the terracing when a 2-ft long piece of timber fell onto him from an overhanging canopy approximately 30 ft overhead. As a result, he suffered a painful and disabling permanent injury to his dominant wrist. Various operations, including bone grafts, were performed in order to improve his condition, which interfered considerably with the performance of his duties at work. There was little prospect of his condition ever improving..

The pursuer was awarded damages on the basis of the Occupiers' Liability (Scotland) Act 1960. The medical evidence seemed to indicate that, because of the damage caused to his wrist by the accident, it was unlikely that the pursuer would be able to continue in the employment he held at the time of the court case after he had reached the age of 55, after which he would presumably look for lighter work. Lord McCluskey, however, did not accept the inevitability of this prediction, claiming that this issue could not be assessed on the medical evidence alone. The victim had coped very well hitherto, and because of the highly-sophisticated medical arthrodesis procedure, further deterioration in terms of movement and pain were likely to be limited. He had shown the necessary character and adaptability to continue in his current post, so he expected the pursuer to continue in an employment in which he clearly had special and valuable skills. Thanks to various aids such as voice-activated computers, an automatic car, and retraining (the cost of which warranted a less than generous sum was added to the damages under the heading of loss of employability), he would be able to continue working. He therefore declined to award future loss of earnings. As the present writer's former colleague Robin White[323] observes, this comes close to penalising those who made the effort to mitigate their damages.

The total amount awarded to the pursuer was £85,155.

English Court of Appeal confirms award made to kickboxer as a result of a traffic accident[324]

The claimant in this case had incurred personal injury as a result of a road traffic accident for which the defendant was responsible. Before the accident, the claimant was employed as a bricklayer and had enjoyed an extremely successful career as a kickboxer, which culminated in his obtaining the title of World Light-Middleweight Champion in 1994, after which he became a professional kickboxer and won his sole professional bout before the accident. The High Court had essentially accepted the claimant's case, including the evidence given by a forensic accountant who calculated four alternative scenarios based on escalating success in the claimant's fighting career. For each of these alternative scenarios, the accountant calculated the extent to which the claimant's earnings would exceed what he described as the basic claim (i.e. assuming a competitive career until the age of 36, engaging in five fights per year, working for half of each year during that period as a bricklayer, and working full-time as a bricklayer thereafter). The High Court judge had assessed the chances in the four escalating scenarios respectively at 20, 40, 30 and 10 per cent. Arguing that the judge had overvalued the claimant's loss attributable to his prospective career as a kickboxer, the defendant appealed.

The Court of Appeal dismissed this appeal, although it did dispute some of the legal basis on which it had been made. The Court held that it was proper to make awards for each category of lost opportunities, but there was reason to doubt the logic of the actual evaluation, given the assessment

that the chance of achieving the second scenario (assessed at 40 per cent) could not be twice as great as the chance of achieving the first scenario (assessed at 20 per cent), since the second scenario by definition assumed the postulate for the first scenario. The Court would have substituted its own evaluation of the chance of each opportunity being realised, and would have made a reduction of 20 per cent by way of overall discount to reflect the many contingencies attendant on each scenario. However, since the overall effect would have been to produce a reduction of only 4.6 per cent less than the judge's award, the latter would not be changed.

Michigan Court of Appeals reverses award made to baseball spectator hurt by fragment of baseball bat[325]

In this case, Alyssia Benejam, a young girl, attended a Detroit Tigers baseball game with a friend and members of the friend's family; in so doing, she was seated quite close to the playing field along the third baseline. The ground was equipped with a net behind the home plate which extended part of the way down the first and third baselines. Although Alyssia was seated behind the net, she suffered injury when a player's bat broke and a fragment curved around the net. There was no evidence - and the claimants did not allege - that the fragment in question went through the net, that there was a hole in the net, or that the net was otherwise defective.

The plaintiffs sued the Tigers, claiming in the first instance that the net was insufficiently long and that warnings about the possibility of objects leaving the field were inadequate. (The plaintiffs also sued the makers of the bat, but settled that claim before trial.) The Tigers responded with motions before, during and after the trial contending that, as a matter of law, the plaintiffs could not or did not present any feasible legal claim. Those motions were all denied by the trial court. Alyssia had suffered crushed fingers as a result of the accident, and the jury awarded non-pecuniary damages (past and future) to a total of $917,000, lost earning capacity of $56,700 and $35,000 for past and future medical expenses.

The appellants argued that, although there was no Michigan law which was directly in point with this issue, other jurisdictions had balanced the benefit of providing safety by affixing a protective screen against the fact that such screens detract from the attraction of attending a live baseball game through the presence of an obstacle or insulation between spectators and the playing field. The rule that emerged in such cases was that a stadium owner could not be liable for spectator injuries if he has satisfied a "limited duty" - which is to erect a screen which is to protect the most dangerous area of the spectator stands, behind the home plate, and to provide a number of seats in this area sufficient to meet the ordinary demand for protected seating. There was no dispute over the fact that the Tigers did in fact erect such a screen, and the defendants argued that the first court had erred in failing to recognise the "limited duty" doctrine.

The Court of Appeals agreed with the appellants, concluding that the limited duty doctrine should be adopted as part of Michigan law, and that there was no evidence presented at the trial that the Tigers had failed to meet that duty. The Court also held that there was no duty to warn spectators at a baseball game of the well-known possibility that a bat or ball may leave the field. There was therefore no evidence to support the Tigers' liability, and therefore the Court of Appeals reversed the first court's verdict.

5. PUBLIC LAW

The Wembley fiasco continues .... and brings others in its wake (UK)

General developments

The last issue of this organ had provided the gloomy details of the continuing Wembley fiasco, with all its implications not only for football, but also for the world of athletics. However, it may be recalled that we ended on the hopeful note that a major Australian construction firm had offered to meet most of the construction costs of the planned new Wembley Stadium.[326] Even that crumb of comfort seems to have been dashed from the lips of the relevant policy makers, since nothing more has been heard of the project since. And matters have steadily deteriorated even from the trough reached when the last issue was published.

Indeed, the news headlines were strangely muted on this subject, since all those involved in the

project were waiting with bated breath for Patrick Carter, the businessman invited by the Government to examine whether in fact the stadium should be built at all,[327] to submit his report. This document was submitted to the relevant Government Ministers in early September 2001, but in the best of British traditions was kept as closely guarded a secret as the treasure of the Incas. There were only two copies - one despatched to Florida, where Tessa Jowell, the Minister for Culture, Media and Sport was on holiday (!), the other to Jack Straw, the Foreign Secretary. Equally in the time-honoured fashion, it was left to "highly placed sources" to allow details of the report to filter through.

Essentially, the Carter Report recommended that the new stadium should be at Wembley. It listed three options.[328] Option One was a Wembley without the grandiose office block and hotel planned by the former Wembley chairman, Ken Bates. This was regarded as the most practical scheme, and would cost just over £300 million. Option Two would still site the new stadium at Wembley, but start from scratch with a new design. Option Three was to consider bids from other cities should the first two options fail. However, this report failed to galvanize those responsible into any action.

Approximately one month later, two startling new proposals were tabled with the Government's advisers, both of which included plans to save the famous "Twin Towers".[329] The schemes to rebuild the stadium hinged on the use of two separate plots of land, a redundant railway cutting owned by Railtrack, and the 45-acre site which includes the Wembley Arena and the conference centre, which have been put up for sale by Wembley plc. However, the plans concerned emanated from the Genesis consortium, which produced the first detailed plans for the Wembley redevelopment, and Railtrack, the doomed railway company... which meant that the scheme could not go ahead, at least not under its original management team. In fact, gradually opinion at the Football Association (FA) was beginning to shift towards the possibility that the new Wembley may never be built at all - particularly in view of the slowdown in the economy since the 11 September attacks, and the problems encountered by sports marketing firm IMG over its deal to provide the FA with £30 million per year for 20 years in order to sell wealthy fans 15,000 of the 90,000 seats at a new Wembley.[330]

All were now waiting for Patrick Carter to submit his final report on the stadium's future (if any). However, Carter himself was coming under fire for the manner in which he had conducted his inquiry. More particularly, Mike Potter, managing director at the old Wembley, could not understand why Carter failed to interview him or Alan Coppin, Paul Sergeant or Jarvis Astaire, who were in charge before the FA takeover. Nevertheless, in mid-November Carter gave his seal of approval to the revised plans for a scaled-down version of the original scheme - ahead of rival applications from Birmingham and Coventry (see below, p.61).[331] However, there was a sting in the tail. In his final report, Carter concluded that even this slimmed-down version of Norman Foster's original plans could cost as much as £700 million - an assessment which was seen by many as the death knell of the project.[332] Yet the FA indicated they were prepared to go ahead with the project - because the alternative would be too expensive to contemplate.[333] It also appeared that the legal minefield which the FA would otherwise face over the repayment of the National Lottery grant of £120 million, which was spent buying the site (see below, p.61) was not a path down which it wished to tread.

This was the general situation at the time of writing. The next issue will report on further developments.

Do the players and fans actually want a new Wembley?

Up to this point, the reader may be wondering whatever happened to those people who would actually be the main focus of attention in any new stadium once it was built - i.e. the players and the fans. It soon became evident that enthusiasm for the New Wembley project was burning very low amongst England's internationals, particularly in view of the success which the new "roadshow" system of locating internationals seemed to enjoy. Prominent amongst those voicing their misgivings was Manchester United's Gary Neville, capped 46 times for England. Neville stated in no uncertain terms that he would be perfectly happy never to play at Wembley again. Describing Wembley as a "tired old stadium with a tired old atmosphere", he compared it unfavourably with the atmosphere which he and his fellow England internationals had experienced at such grounds as Villa Park, Old Trafford, Pride Park and White Hart Lane.

As the season progressed, it became increasingly clear that most of England's national representatives on the soccer field shared Neville's feelings.[334] The FA itself also had to admit that its deliberations over the desirability of a new stadium had been complicated by the great success of

England's sell-out tour of the Premiership grounds.[335] Not only did there seem to be more atmosphere at these grounds; the new system had made England fans feel more involved, and that it changed the perception of England as a southern-based team to a side representing all parts of the country, all ages and both genders.

Murky financial waters of the project

One of the many aspects to have bedevilled this project is the question of "who pays for what". Here too, confusion, recrimination and incompetence have reigned supreme. As usual, matters started on a highly optimistic note when Mark McCormack the leading sports agent, indicated that he was prepared to finance the project regardless of whether the Government backed it. In late September, the FA received an offer of a long-term £32 million per year from McCormack's sports marketing company IMG in return for all the rights to corporate seats, boxes and suites incorporated into the project.[336] However, just over a month later, IMG - as has already been mentioned earlier - ran into problems with this proposal,[337] which in the meantime has receded into the background.

The next financial problem to be encountered concerned the £120 million in National Lottery money which were already committed to the project. In late October, Tessa Jowell, the Culture, Media and Sport Secretary, was told by Sport England, who had dispensed the money, that the FA must build at Wembley if it was to keep its grant. Sport England Lottery Panel member Bridged Simmons even threatened that her organisation would be prepared to go to law in order to recover the money. As has been reported earlier, this added further complications to the FA's dilemma on the question of whether to keep faith with the project or not.[338] These threats of legal action were repeated in mid-November.[339] It should also be noted that, even if the FA go ahead with the Wembley project, they are still under an obligation to return the £20 million lottery money which they pledged themselves to return when athletics was removed from the design of the stadium (see below, p.62).[340]

In late October, an offer of financial assistance came from a surprising source when London Mayor Ken Livingstone pledged the sum of £17 million towards the FA's costs for developing transport and infrastructure around a reconstructed Wembley - a move which was seen as a pre-emptive strike against the bid made by Birmingham to host the new stadium (see below).[341] This decision was taken following weeks of negotiations between Livingstone, the Government, Brent Council and the London Development Authority. The London mayor justified this move by reference to its importance to regenerating the area, and by the consideration that the offer should remove any remaining obstacles to the project - a statement which owed more to wishful thinking than solid reality in view of the difficulties which were besetting the FA in taking a decision on the matter.

Any hope that the Government might after all be induced to finance the project disappeared in late October, when Minister Tessa Jowell firmly ruled out such a prospect before a House of Commons Select Committee.[342]

In early November, however, hopes of finding new financial backers for the project were revived when FA Chief Executive Adam Crozier announced that avenues were still being explored of setting up a deal for private investors to back the Wembley project, although he sounded a cautionary note in view of the "too many false starts" which the project had suffered hitherto.[343] That was the position at the time of writing.

The bids from the Midlands

The attentive reader will have noticed the odd reference above to the possibility, mooted in certain quarters, that consideration could be given to a bid from outside the nation's capital. Both Coventry and Birmingham had put in bids for the siting of the national stadium when Patrick Carter commenced his investigation (see above). Particularly the bid by the country's second-largest city seemed to possess a good deal of credibility, especially when, in late August 2001, a survey conducted by the Football Supporters' Association indicated that the majority of football fans wanted the new stadium built in Birmingham rather than in the capital.[344] Details of the survey were sent to Mr. Carter, who had yet to submit his initial report to the Government.

Its confidence growing by the day, the city Birmingham launched its campaign to become the home of English football on the very last day of August. This included the unveiling of a state-of-the-art 85,000-seat stadium proposed for a site adjacent to the National Exhibition Centre. The project was

supported by Birmingham and Solihull Councils, as well as the NEC group, which argued that the 190-acre site had unrivalled road and rail links to the rest of the country.[345] Its estimated cost was £324 million.[346] The saddle-shaped stadium would have uninterrupted sight lines. A transparent roof would maximise the sunlight and reduce shadow, whereas the design would maximise airflow on the pitch. (However, there were concerns over the environmental impact of this project on the green belt separating Birmingham from Coventry.[347]) Although Wembley remained the favourite in Whitehall, the mood in Government circles was swinging towards Birmingham, with several ministers now openly pleading the latter's cause. Another boost came in early November, when Newcastle United chairman Freddy Shepherd joined his counterpart at Aston Villa in urging FA support for the project.[348]

Shortly after the Birmingham project launch, Coventry started to promote its bid, with its municipal leadership stressing the advantages its proposal had over that of the Wembley project and that of its Midlands rival. The estimated cost would be £160 million - approximately half the cost of the Birmingham project - and would in addition be supported by European funding to the tune of £37 million. In addition, the stadium would be built on a "brownfield site" and already had the benefit of planning permission.[349]

The Picketts Lock and 2005 World Athletics Championship fiasco

It will be recalled from the previous issue[350] that, having given up the notion that the new Wembley would play host to major events in both football and athletics, the Government's eyes turned to the prospect of building a separate athletics stadium at nearby Picketts Lock. This would also be the perfect stage for Britain's bid to host the World Athletics Championships in 2005. It was also reported that the attractions of this project had also already begun to pall in Government circles.

This state of uncertainty intensified in mid-September when it emerged that Patrick Carter (see above), who had also been given the task of carrying out a review of the Picketts Lock project, had examined five other venues for the 2005 Championships - to wit, Manchester, Sheffield, Gateshead, Birmingham and Crystal Palace (London).[351] The principal advantage which these venues were thought to have over the Picketts Lock proposal was that they represented cheaper options. However, the International Association of Athletics Federations (IAAF) gave notice that it would reopen the bid for the 2005 Championships if the Government proposed a venue away from London.[352] In his confidential report on the Picketts Lock project, Carter estimated the cost at £100 million, 40 per cent of which would need to be raised privately, with Sport England having unofficially pledged £60 million of national lottery money.[353] This was almost double the original estimate made in 2000 when it was decided by Chris Smith, the Minister then in charge of sport, to move athletics from the "new" Wembley to a purpose-built stadium.[354] It was becoming clear that the Government "wanted out" of the project.

Following a further period of rumour, dithering, innuendo and speculation, Tessa Jowell, the relevant Minister, officially announced that the Government was withdrawing from the Picketts Lock proposal on 4/10/2001.[355] The Government, however, did not see fit even to inform UK Sport and the 2005 bid committee of this decision[356] Reactions from the world of athletics were mixed. Some condemned the decision as a complete farce (former Triple Jumper Jonathan Edwards) whereas others, such as former 5,000 metres champion David Moorcroft, were more guarded - mindful no doubtful of the £40 million which the Government pledged itself to pour into athletics as a price for supporting - or at least tolerating - this embarrassing climbdown.

This would naturally mean that Britain lost the right to stage the 2005 Championships. Or did it? In spite of the dire warnings issued by the IAAF to that effect (see above), Richard Caborn, who had succeeded the hapless Kate Hoey as Sports Minister,[357] clearly did not share this pessimism. He promptly put forward his home city of Sheffield as an alternative venue. In so doing, he ignored the Crystal Palace bid, which would at least have kept the event in London and thus stand a better chance of being approved by the IAAF.[358] This was immediately turned down by IAAF President Lamine Diack, who stated that the bidding would be reopened, and Sheffield would have to compete with the new contenders - given that these were likely to include many capital cities, the prospects for the South Yorkshire city looked distinctly bleak. Diack admitted to feeling profoundly let down by the British Government's actions.[359] As Sue Mott observes in the *Daily Telegraph*, this was the equivalent of proposing that the 2000 Sydney Olympics be switched to Wagga Wagga.[360]

Seemingly determined to cause even more damage to Britain's already battered reputation, Caborn announced the offer of a Downing Street reception and bursaries for African athletes at Sheffield's UK Sports institute, throwing in an offer to take partners of officials to Harrods shopping trips.[361] This was

seen as such an obvious ploy to curry favour with Mr. Diack, who hails from Senegal, and thus induce him to change the IAAF decision on the Sheffield proposal, that the latter reacted with a mixture of shock and contempt.[362]

This latest humiliation even led some parties to reconsider the idea of staging athletics at the new Wembley after all, which would enable the 2005 Championships bid to be salvaged. Caborn and Jowell, however, lost no time in pouring the proverbial chilled liquid on this proposal.[363] The Government's questionable commitment to host the Championships in London was thrown into even greater doubt when it transpired that Sheffield City Council was already preparing a bid long before the Government withdrew from the Picketts Lock project. The Chief Executive of the Sheffield bid, Steve Brailey, even accused Caborn of having known about this development all along.[364] The capital city's last opportunity to stage the 2005 Championships disappeared for good when Ron Sheard, the man in charge of the original redesign of Wembley, admitted to a House of Commons Select Committee that the stadium would not be ready by 2005 even if the Government decided to builds an athletics track there.[365]

Nor did it appear that the damage done by the Picketts Lock fiasco would be confined to the 2005 Championships, since International Olympic Committee (IOC) President Jacques Rogge indicated that it had also caused serious harm to London's proposed bid for the 2012 Olympics.[366]

The post-mortems

Inevitably, the post-mortems into the debacle started. Patrick Carter was summoned to present himself before the relevant House of Commons Select Committee. Even this task, however, seemed beyond the wit and wisdom of our policy makers.[367] The former Prison Service director gave very little away, whereas the assembled MPs, far from succeeding in "getting Carter", did not even ask the right questions. Nor did the Chairman of the inquiry, the normally forensic Gerald Kaufman, assist matters when he opened proceedings by stating that he agreed with Carter's conclusions on the Picketts Lock project. Ultimately, the Committee's questions amounted to little more than a polite inquiry into their interviewee's opinion concerning future Government strategy on sport.[368] Tessa Jowell and Richard Caborn also appeared before the Committee, without providing much more enlightenment.

Nevertheless, the Committee's report on the affair was a scathing condemnation of the manner in which the entire matter had been conducted. It denounced the Government's handling of the "sorry and convoluted" saga of the various twists and turns which the question of finding a site for the 2005 Championships experienced. More particularly the decision to remove athletics from Wembley was "taken in a hurry and on flimsy and subjective grounds".[369] Sport England came in for withering criticism for having awarded the FA £120 million in lottery money, which was described as a "cavalier and egregious" use of public funds. It was also particularly critical of former "Minister for Fun" Chris Smith for the manner in which he conducted a deal with Chelsea Chairman Ken Bates over the return of the £20 million of lottery cash once it was decided that Wembley would be used for football only (see above).[370] It demanded a total overhaul of the manner in which Britain bids for such championships in the future, and called for a special "events minister" to oversee this process.[371]

Who (or what) is to blame for this state of affairs?

In *The Devil's Disciple*, G.B. Shaw - the archetypal semi-outsider who often can judge a nation's weaknesses much better than the natives - attributed Britain's loss of 18th Century America to "jobbery and snobbery, incompetence and red tape". Doubtless the sardonic Irish playwright would have recognised the same national defects were he alive today to witness the Wembley fiasco.

It is not as though this is the first occasion for British red cheeks when it comes to organising this aspect of sport. The bid for the 2006 World Cup, although it was not as financially prodigal as the events described above, was similarly flawed. Going back further into history, the manner in which the Edinburgh Commonwealth Games of 1986 were organised (and financed) hardly stands as a monument to a nation's ability to organise anything more complex than the proverbial refreshment in a place of beer manufacture.

The Delphic structure of British sport has been often subjected to criticism, but that cannot provide the sole explanation. It is true that it provides some situations even more redolent of humour than the Wembley fiasco, such as that which recently saw the British rowing authorities compelled to organise

their national championships in Brussels. But the constant urge to involve people whose careers suggest a constant quest for self service rather than public service in these major projects must also be a major issue. Is it a coincidence that the Edinburgh 1986 games and the Wembley episode had in common the presence of two larger than life businessmen not noted hitherto for having the best interests of the public at heart - naming no names, except that their initials are Robert Maxwell and Ken Bates?

Sue Mott, the *Daily Telegraph*'s irreverent but well-informed and trenchant commentator on all matters sporting, also identifies another aspect, which is the woeful ignorance of sport amongst our Government ministers[372] - except when it comes to basking in the reflected glory of the success of "our" lads or ladettes. It is one thing to manage "nul points" in a sports quiz on radio having just been appointed Sports Minister; quite another matter when a Secretary of State can confess to never having heard of Picketts Lock at the time when the controversy was at its hottest - as happened to Foreign Office Minister Ben Bradshaw in early October. This point is also forcefully illustrated by the immortal statement made by a spokesperson for Tessa Jowell's department. Announcing the £40 million to be allocated to athletics as a sweetener for losing the 2005 Championships (see above) the gentleman delivered himself of the statement: *"Then hopefully they can train some people to win some medals in someone else's stadium."*[373]

Public measures countering foot-and-mouth disease and their effect on sport - an update

Now that the disease appears to have been brought under control throughout the country, the number of sporting fixtures affected by the measures taken to counter it is now relatively small. In addition, most racecourses are back to normal; in the course of October, racing was resumed at Towcester,[374] Carlisle[375] and Cheltenham.[376] Problems, however, remained at Hexham, Northumberland. Initially racing was to resume there on Friday, 5 October,[377] although it found itself in a restricted foot and mouth area. However, the next day the 5 October meeting was abandoned on a request by the Department of Environment, Food, and Rural Affairs.[378]

Also, the England Rugby Union's rescheduled Six Nations Tournament fixture against Ireland went ahead on October 20, following a relaxation of the Irish Government's hard-line stance on foot-and-mouth measures. Initially, the Irish Department of Agriculture had decreed that its ban on matches with British sides would be effective until 28 days had elapsed without any new cases of foot-and-mouth occurring in the UK. This ban was relaxed following negotiations between tournament organisers and the Irish Government.[379]

"Krauts" advertisement ruled not racist by advertising watchdog (UK)

The Advertising Standards Authority (ASA) is a British public body established in order to supervise the propriety of advertising of all types within the country. In the course of the autumn of 2001, it received a complaint about a leaflet advertising sanding discs made by a German power tool firm and marketed by the Manchester-based company Dronco Abrasives. Timed to coincide with the World Cup qualifying tie in Munich between Germany and England, it carried a portrait of German striker Carsten Jancker accompanied by the slogan "The Krauts are coming - with unbeatable quality".[380] The complaint received by the ASA was that the use of the word "kraut" may incite racial hatred.

Dismissing the complaint, the ASA stated that, although the word "krauts" did carry negative connotations, it would be "generally understood as a light-hearted reference to a national stereotype, and was unlikely to cause serious or widespread offence". One place where it certainly did cause offence was the German Embassy, which did not take kindly to this seal of approval of comparing their people to cabbage. There also appears to be a slight element of inconsistency in the ASA's policy in this regard, since last year it upbraided the former England rugby captain, Steve Smith, for referring to a French player as a "stroppy little frog".[381]

Government to intervene in stand-off between bookmakers and racing authorities over future funding of the sport

It will be recalled from the last issue that, with the abolition of betting tax and the proposed abolition

of the levy system, a major question mark hung over the manner in which racing was to be financed in the future.[382] Since 1962, the statutory levy has been collected by bookmakers from their customers' bets in order to finance the sport via the Levy Board. The British Horseracing Board (BHB) had proposed that the levy be replaced by a charge imposed on bookmakers for receiving television pictures and racing information. The bookmakers responded by threatening to pass on this cost to the punter, thus cancelling out the effect of the abolition of betting tax. Neither side seemed prepared to yield in this bitter struggle, which was the position as the last issue of this organ went to press.

The financial crisis enveloping racing deepened in November when negotiations between the BHB and the bookmakers broke down. In addition, it was learned that Tessa Jowell, the relevant Minister, was unlikely to come up with a figure for the 2002 levy until the spring, leaving the racing industry in financial limbo.[383] The situation was complicated further by an Office of Fair Trading investigation as well as an application by the bookmakers to the European Court of Justice which is to determine whether the BHB is entitled to charge for data rights without infringing EU competition law.

The deadlock surrounded the difference between what the bookmakers were offering to pay to the levy on behalf of the betting industry, and that which the BHB considers that they should provide. At a certain point the bookmakers made an offer of £85 million by way of levy contribution and £13 million for the data and picture service. Further suggestions offering compromise solutions still left the two sides around £30 million apart.[384]

A week after the deadlock seemed to have become permanent, the BHB went onto the attack by requesting the Government to repeat a turnover-based levy scheme for 2002-2003. This would ensure that the funding of racing is guaranteed until such time as a new deal could be negotiated with the bookmakers. With betting activity being estimated to have increased by 30 per cent, the proposed levy scheme would raise income from this source from £62 million to £90 million per year.[385]

No further developments have occurred up to the time of writing. Obviously this column will continue to monitor developments in this field very closely.

British Government accused of breaking pledge on sell-off of school playing fields

In the first issue of 2000, this organ featured a claim by the director of the National Playing Fields Association (NPFA) that Labour was reneging on its pledge to protect school playing fields.[386] Two years and an election manifesto later, the Government appear to have learnt nothing from that experience, if the latest developments are anything to go by.

The recent bout of accusations in this regard was sparked off by a threatened playing field in darkest Dorset, which has for seven years been considered a test case on this topic.[387] In mid-September 2001, Estelle Morris, the Education Secretary, reversed a decision by her predecessor, David Blunkett, who had ruled that the nine acres of football and cricket pitches should be saved. Instead, her department has decided that the fields will be sold for housing, in a move described by former Sports Minister Kate Hoey as "outrageous". This news came hard on the heels of a claim made by a leading Sunday newspaper that, despite the Government's pledge to discontinue the policy of allowing schools and local authorities to sell off their playing fields to property developers, the sales have continued. It emerged that the Department of Education had approved the sale of 161 out of 167 applications for the sale of children's playing fields over the past three years.[388]

This claim has been confirmed by NPFA director Elsa Davies, who stated that playing fields had been sold off faster over the past ten years, and that there was every indication that this trend would continue.[389] Two months later, the Government itself appeared to admit this fact, when a leaked official document in the shape of a confidential report for the Department of Culture, Media and Sport showed that 446 applications for building on sports fields were approved between April 2000 and March 2001, as compared to a mere 279 approvals for the previous 12 months.[390] Once again, Ms. Davies and Ms. Hoey protested vehemently. In fact, a few days later the latter devoted her now-weekly *Guardian* column to this subject.[391] In fact, she places this in the wider context of the figures relating to other types of playing fields and recreational land. Sport England may be a statutory consultee in these matters, but, according to Ms. Hoey, it fails to object in half the number of applications. She rues the fact that sports councils tend to see sporting facilities in terms of bricks and mortar and will

often fail to oppose a development provided that some of the cash generated is spent on another sports facility.[392]

Pressure groups and police protest at World Cup opening hours (UK)[393]

One of the safest bets in sport is that the amount of alcohol consumed during the period covered by the forthcoming Football World Cup will be slightly above the average for the remainder of the year. In recognition of this fact, the Government, in November 2001, has given the go-ahead for pubs to serve alcohol as from 6 am during that period, in order to accommodate the time difference between the East Asian and European time zones. Magistrates have been instructed by the Magistrates' Association to adopt a favourable attitude towards applications by pubs to avail themselves of these extended licensing hours. In addition, some 300 licensing committees have been told to allow landlords to open in good time for the England matches to begin. At least 30,000 of the country's 54,000 pubs are expected to take advantage of this facility.

Less enchantment with these arrangements was recorded by various pressure groups - and by the "long arm of the law". Thus Kevin Morris of the Superintendents' Association of England and Wales, anticipated that this could well give rise to a disorder problem at times of day when the police are not used to dealing with it. He states that the police should at least have been consulted over this move, and that everyone has an obligation, under the Crime and Disorder Act, to consider the impact of such decisions. Tony Dring, of the Campaign Against Drinking and Driving, also expressed his "unease" at this development.

The present author cannot help wondering why no-one on the European Continent goes into a panic about customers ordering a beer at 6 am.

US Congress members plan legislation to prevent reduction in Major League (Baseball)[394]

Three US Congressmen have announced that they are to introduce legislation in response to the Major league's plan to reduce its ranks by two teams. In early November 2001, the League voted by a 28-2 majority to remove the two, widely expected to be the Minneapolis Twins and the Montreal Expos.

Only time will tell whether initiative will be crowned with success.

Only 20 Albanian fans allowed into Britain because of asylum fears[395]

When the Albanian team arrived in England for their World Cup qualifying match at St. James's Park, Newcastle, they could hardly be cheered by the knowledge that they would be encouraged by one of the smallest contingents of travelling supporters ever seen in this country, i.e. a forlorn band of 20. The Home Office confirmed that 155 applications for visas to visit Britain for that fixture had been turned down, the majority having been rejected because of fears that they may claim asylum.

Written statement by Netherlands Minister of Justice on inquiry into sale of young footballers[396]

In a written statement to the Netherlands Parliament on 15/8/2001, the Minister of Justice announced that a recently established working party, consisting of representatives of various ministries including his own, conducted an investigation into the question whether the Netherlands legislation on the transfer of youthful footballing talent from outside the European Economic Area (EEA) is being observed, and whether any proposals to this effect have been made at the European level.

Power struggle among Greek authorities puts Athens Games at risk[397]

Many sports enthusiasts are looking forward to the year 2004, when the Olympic games will be "coming home" by being staged in Athens. However, there are some fears amongst top Olympic

officials that there may be no Olympic Games to celebrate if the power games amongst the various Greek authorities responsible for the project do not cease.

The head of the organising committee, Gianna Angelopoulos-Daskalaki, has become increasingly disenchanted with the Greek Government's leadership since a Cabinet reshuffle added six new Deputy Ministers appointed exclusively with a view to dealing with the faltering Olympic preparations. Since that reshuffle, it appears that these ministers have been making moves to strip Daskalaki of her key powers, particularly those concerning Greece's relations with the IOC. She has threatened to resign, and if she does so it is feared the entire organisation of the Games will collapse. She is the third person to head the local Olympic Committee since Athens won the bid in 1997.

MSP criticises Scottish "Old Firm" for making money out of sectarianism[398]

The rivalry between the Glaswegian football clubs of Celtic and Rangers is the stuff of legends, but at times it has donned ugly overtones of sectarianism and the resulting violence. In October 2001, Donald Gorrie, Liberal MSP who is preparing a Private Members' Bill on sectarianism, accused both clubs of making money out of the sectarianism which surrounds their sides and of failing to provide sufficient funds to stamp out religious hatred amongst their supporters.

The Bill in question seeks to ensure that offences motivated by religious hatred are treated more seriously by the courts. Mr. Gorrie's remarks came on the same day that Martin O'Neill, the Celtic manager, walked out of an event promoting the "Sense over Sectarianism" scheme in Glasgow, after he had been persistently asked what he would do to discontinue the infamous religious bigotry between the two major Glasgow sides.

Neighbours seek injunction over "noisy" hockey pitch[399]

The noises emanating from a hockey pitch at a mixed comprehensive in Wells, Somerset, have so upset some of the neighbours that they are seeking a High Court injunction to close it down. One neighbour explained that it was not so much the thwack of stick on ball, but the swearing and general noise made by players which upset them.

The neighbours in question believe that the noise in question breaks an ancient covenant which prevents the land from being used for any "noisy, noxious, offensive" behaviour. At the time of writing, an out of court settlement was expected.

To what extent are the decisions of sporting (and other) tribunals reviewable by the courts? Article in Australian professional journal[400]

Virtually every sport has a not only a code of discipline, but also a mechanism by which this is enforced. This mechanism often takes the form of a tribunal or some other form of adjudicating body. To what extent are these bodies required to uphold standards of procedural fairness, and to what extent may the ordinary courts interfere in the decisions of these bodies where these standards have been infringed? This is the subject-matter of a brief but compelling paper by Haydn Carmichael, a prominent member of the Victorian Bar (Australia).

Mr. Carmichael takes as his cue a recent decision of the Victorian Court of Appeal[401] involving an Australian Rules footballer, Greg Williams, who played for the Carlton Football Club under the Standard Playing Contract. One effect of this contract was that the player and his club should submit to the jurisdiction of the Australian Football League (AFL) Tribunal in matters relating to breaches of the game. At a certain point during a match between Carlton and Essendon, Williams unlawfully interfered with the umpire after the match had officially ended. This led to a charge against him before the said Tribunal, which imposed a nine-match ban on him.

Williams sought a review of this decision on grounds of breach of contract before the Victorian courts. On 29/5/1997, Hedigan J. declared that the decision of the Tribunal and the penalty imposed were of no force and effect, and ordered that the decision and penalty be removed from the defendant's record. The AFL appealed against this decision to the Victorian Court of Appeal. The majority verdict was to allow the appeal. One of the main issues at stake was whether a court of law

was entitled to challenge the penalties imposed by the AFL tribunal - and thus challenge the Tribunal's interpretation of the Association's own. Laws. Tadgell JA, who was one of the majority judges, stated that the AFL Tribunal has jurisdiction by agreement to hear and determine a charge and/or reportable offence and, if the offence was established, to fix a penalty. What is more, the tribunal had jurisdiction to do so to the exclusion of the courts. However, he did seem to leave the door open for possible challenges to such tribunal decisions, stating that there was no decision of a private or domestic tribunal with which the courts would refuse to interfere if interference was considered necessary in order to obtain justice. The author concludes from this decision that

> *"[w]hat is clear from the judgments in the Williams case is that the autonomy of some private tribunals deriving their authority from contract does not confer immunity from suit. Respect for autonomy does not mean in all cases condescension to illegality."*

In his dissenting judgment, Ashley AJA had pointed to the category differences which the courts have traditionally used in determining judicially reviewable "public" power, in contrast to the challenge of privately conferred non-statutory powers. Yet the author points out that this divide has already been overcome in certain cases - notably the English *Datafin* ruling.[402] This case involved a challenge to the Panel on Take-overs and Mergers, which had no statutory or any other official powers, and had no contractual relationship with the financial market or those dealing in it. Nevertheless, Sir John Donaldson MR had pronounced its decision reviewable, stating that it exercised *de facto* what could only be described as powers "in the nature of public powers". The author adds that the "public power" test has been subsequently modified by the courts, to make way for a "government interest" test. However, he concludes that this still leaves a number of questions unanswered on this subject.

All sports to sign up to "Childrens' Charter" (UK)[403]

In late October 2001, it was announced that every sport in the country was expected to sign up to and implement the procedures of the UK Child Protection in Sport Unit, if it wished to continue receiving National Lottery funding. The Child protection Unit is a partnership between Sport England and the National Society for the Prevention of Cruelty to Children (NSPCC) and will advise federations on the way in which they are to introduce child protection policies. It will also commission research into abuse within sport and help to raise the profile of child protection among governing bodies in sport.

(On the problem of child abuse in sport, see above, p.17.)

Sport banned on full moon days in Sri Lanka[404]

It is not often that Sri Lankan's cricketers are left in the dark about their sporting fate, but this is literally what is about to happen as a result of a measure introduced by their Government recently, which is to ban all sporting events on full-moon days. This amendment to the Holiday Act meant that at least two Test Matches were in doubt for the November/December period.

6. ADMINISTRATIVE LAW

PLANNING LAW

Inspector allows appeal against local council decision not to allow point-to-point enterprise to extend its facilities[405]

When an existing point-to-point horseracing enterprise sought planning permission from Forest of Dean District Council for permission to construct further jumps, fences and obstacles at Pauntley Court Farm, Gloucestershire, which would have involved changing agricultural land to equine use, the latter dismissed the application. The applicant appealed to the relevant Inspector to set aside this decision.

The main contentious issues were the following:

- *The effect of the proposed use on highway safety and the free flow of traffic on the surrounding network.* On this issue, the Inspector held that, whilst the proposed use for equine events would

generate significant additional traffic on the days in question, the events would have no serious adverse effect on the surrounding network - provided that the days in question were restricted to the maximum 10 days requested by the appellant and the access visibility improved;

- *Whether or not the proposed events course would conflict unacceptably with the public rights of way crossing the site and the safety of walkers using them.* Here, the Inspector's conclusion was that, with proper marshalling in order to control riders, there would be no conflict between the eventing course and walkers using the public rights of way across the site;
- *The impact of the proposals on the Cillinpark Wood Site of Special Scientific Interest (SSSI) and key Wildlife site.* On this topic, the Inspector held that, provided the north-west corner of Collinwood Park was excluded from the appeal site, the proposal would have no impact on the SSSI or the Key Wildlife Site;
- *The effect of the proposed use on countryside and residential amenities by reason of the noise and disturbance from the public address system.* Here, the Inspector conceded that the use of a loudspeaker system, even at a reduced level, would adversely affect the countryside and residential amenities by the noise and disturbance created;
- *Whether the further jumps, fences and obstacles had an adverse effect on the surrounding area.* Because the additional jumps and fences were well-spaced out, and the water jump was the only obstacle to have been constructed (and even this amenity was performing a dual function as a water tank), the Inspector held that these further jumps, fences and obstacles had no such adverse effect;
- *The effect on the settings of listed buildings.* The Inspector found that, because of changes in the site area in question, the relevant group of listed buildings would now be divorced from these listed buildings. Their rural setting would thus be preserved, so that this objection was not relevant.

The Inspector therefore allowed the appeal against the District Council's decision, and granted the planning permission applied for. He did, however, make this authorisation subject to a number of conditions, such as restricting the cross-country events in question to 10 Sundays between 1 October and 31 March, the submission of certain schemes which (a) set out details of the fencing and hedges disposed along the sight-lines, and (b) provided details of traffic management of the vehicular and pedestrian traffic entering and leaving the site.

Refusal by local council to grant approval of reserved matters as condition for planning permission for leisure site, golf course and golf-related houses overturned by Inspector (UK)[406]

In the case under review, the Caradon District Council had granted planning permission for a leisure site, which included (a) a new by-pass for the village of St. Mellion, (b) a luxury hotel, conference and leisure complex, (c) a new village green, village hall and two children's play areas, (d) two golf courses, one 18-hole and the other 9-hole, and (e) a total of 199 dwellings including 127 high quality golf-related dwellings. However, it made such planning permission subject to the approval by the local planning authority of a number of reserved matters, which included details of (a) siting, design and external appearance, (b) means of access to the site, (c) design, heights, constructional materials and finished appearance of all enclosures, (d) landscaping for the site, and (e) layout of the land. The appellants applied for approval of these reserved matters in December 1998, but refused by the planning authority in February 2000. The unsuccessful applicants appealed against this decision to the relevant Inspector.

The main points at issue were (a) whether the appeal proposals would provide high quality golf-related dwellings appropriate to their rural setting, and (b) whether the appeal scheme would provide for safe vehicular and pedestrian access within the proposed development and onto Dunstan Lane. On the first issue, the Inspector held that there was no evidence to challenge the appellants' contention that the detailed designs submitted were to a high quality in terms of both the appearance of the dwellings and the materials to be used, and went into considerable detail to justify this viewpoint. On the second point, the Inspector ruled that the proposals submitted would not connect directly to any defined Primary or Secondary route and would not be major generators of traffic, so that apart from general safety concerns it could not be related to the development plan which concerned these Primary and Secondary routes, and on which the refusal by the planning authority was partially based. The scheme in question would therefore provide for satisfactory and safe vehicular and pedestrian access within the proposed development plan onto Dunstan Lane.

The Inspector therefore allowed the appeal, and therefore granted permission for these reserved matters, although he did attach a number of conditions to this authorisation.

Australian court overturns refusal by local council of plan for demolition and redevelopment of bowling club[407]

In this case, the Berowra RSL Community and Bowling Club appealed against the deemed refusal of its development application by Hornsby Shire Council. The development application in question sought approval for the demolition of existing development and construction of a bowling club and community club on a certain site. A preliminary point of law arose concerning the question whether or not the proposed development, characterised as a "registered club", was prohibited by the provisions of the Hornsby Local Environmental Plan (LEP) 1994. That question had received an affirmative reply in a previous case between the two contending parties. However, in the instant case the applicant claimed that it had the benefit of existing use rights, and claimed that the proposed development involved a rebuilding and an enlargement, expansion or intensification of the existing use. The Council denied that the applicant had this benefit of existing use rights, but claimed in any event that development consent in respect of the proposed development should be refused on grounds of merit.

The Land and Environmental Court of New South Wales allowed the appeal. It found that the use of the site which commenced in 1961 and continued to the present day was that of a recreational bowling club. Its was zoned under the County of Cumberland Planning Scheme Ordinance (CCPSO) 1951 as a county open space, and Clause 11 thereof allowed the erection of a building incidental to the purpose for which the site was reserved. The use of the site of as a recreational bowling club was prohibited under the Planning Scheme Ordinance (PSO) of 1977, and continued to be under the Hornsby LEP. However, the Court also established that section 97 of that PSO preserved the continuation of any right accrued under the CCPSO. Accordingly, the use of the site for the purpose of a recreational bowling club was an existing use and could continue under Section 107 of the Environmental Planning and Assessment Act 1979. The applicant's proposed development constituted a change of use, a rebuilding and enlargement, expansion or intensification of the use, all of which were permissible with development consent under the Act. There were no merit grounds to refuse development consent; more particularly matters of car parking, traffic generation and noise did not constitute unacceptable impacts of the proposed development.

Accordingly, the Court decided to award development consent to the applicant.

Planning inquiry into Newcastle RFC development application in limbo (UK)[408]

In October 2001, a planning inquiry into proposal by the Newcastle rugby club to develop their Kingston Park ground, at a cost of £8 million, was postponed when the relevant inspector was taken ill. A new date was set for 4 December, the outcome of which was not known at the time of writing. Newcastle are hoping to turn their ground into a 10,000-capacity stadium and to develop a centre of excellence.

Carragher's building ambitions frustrated by local council (UK)[409]

Jamie Carragher, the Liverpool and England defender, recently spent £400,000 in order to buy a modern detached house, only to demolish it and replace it with a £1 million mock-Tudor mansion. The house in question would have seven bedrooms and a games room. However, this project has run into obloquy from the local planning authority, which considers that it would be out of character with the Victorian former merchants' homes of the conservation area. The local council have therefore requested the Liverpool star to come up with a "more sympathetic" plan.

Proposed new home for Harrogate RFC blocked by planners (UK)[410]

Harrogate rugby club have recently been looking towards a new home. However, these plans were disrupted in November 2001, when the proposed new ground was blocked by the local planning authority. At the time of writing, Harrogate were considering an appeal against this decision. Although the Division Two side has already agreed the sale of the existing Claro Road ground, they have yet to find a suitable site, having already had two applications rejected.

Arsenal FC face difficulties regarding plans for new stadium (UK)[411]

The ambitions held by North London football club Arsenal to move from its present ground at

Highbury to a new stadium in Ashburton Grove were dealt a blow recently when local businesses presented eight detailed papers arguing against the plan to the Islington Borough Council. In addition, the Islington Stadium Communities Alliance (ISCA) have stated their intention to take the club to a governmental public inquiry, and even plead the Human Rights Act, to halt the £250 million proposal.

However, the manner in which the "Gunners" have responded does not appear to be designed to win friends and influence people. Their surveyors, Anthony Green and Spencer, countered these moves by threatening the local businesses concerned with Compulsory Purchase orders (CPOs) if they failed to take up the club's offer. This turned out to be pure bluff since, as ISCA spokeswoman Alison Carmichael was quick to point out, CPOs cannot be used for the benefit of private companies, but only for projects such as hospitals, schools and roads. There are over 80 businesses in Ashburton Grove with 2,500 employees, 1,100 of whom are Council employees.

Ms. Carmichael added that she believed the Government should take this matter to a public inquiry, and vowed if necessary to invoke the Human Rights Act, Protocol One of which enshrines the protection of property.

However, an Arsenal spokesman claimed that 70 per cent of Islington residents supported the new stadium and that a majority backed the move to Ashburton Grove, even in the streets surrounding the new site. He refused to reveal how many of the local businesses had accepted the club's offer but alleged that Arsenal were dealing with 30 leaseholders and freeholder rather than the 80 businesses quoted by the ISCA.

The decision on the new stadium was due to be taken by the Islington council on 26 November, but a public inquiry looked a certainty regardless of the result.

Conservationists pledge to "fight on" despite Greek court's decision to allow Olympic rowing centre at Marathon[412]

The struggle which the Greek Olympic authorities have experienced with the courts over their construction plans for the 2004 Games, to be held in Athens, have already been featured in previous issues of this organ.[413] In August, yet another bout of litigation seemed to have reached its conclusion when the Supreme Administrative Court dismissed an application to suspend the Government's assessment that plans to construct the Olympic rowing centre in the historic area of Marathon would not be detrimental to the environment. The Court held that construction could not be discontinued merely on the basis of the possibility that important antiquities may be found.

The litigation revolves around the historic and environmental importance of the area in which the Battle of Marathon was fought in 490 BC, when the invading Persian army was defeated by a much smaller Athenian army.[414] The Court found there to be no indication that the ancient remains existed on the 300-acre area allocated for the rowing centre, and observed that this particular expanse had at no time been listed as an archaeological site. It added that, when a 5th century BC cemetery was discovered on the site's Northern borders in June 2001, it had been kept intact.

Archaeologists challenging the decision had claimed that this discovery indicated the presence of a classical settlement and the possibility of a ruined temple in that area. However, the Minister for Culture had responded by stating that the rural settlement of Trycorithos, to which the cemetery belongs, was located on Marathon's northern hills. It also claimed that the famous battle did not take place at the site chosen for the rowing centre.

The Court concluded by ruling that the building of the rowing centre was in the national interest, given the importance of the Games and the limited period remaining until the event. However, the conservationist lobby refused to admit defeat by this decision, a spokesman for the Hellenic Society for the Protection of Nature, as well as four other groups fighting the plan, maintained that the Supreme Administrative Court remained due to give a ruling on some outstanding legal issues relating to the planned rowing centre.

Plan to use "Twickers" as concert venue thwarted by High Court (UK)[415]

The Rugby Football Union has recently been frustrated in its attempts to use the stadium at its

headquarters, i.e. Twickenham, as a concert venue, and to that effect applied for a certificate of lawfulness of proposed use to the local planning authority, in accordance with Section 192 of the Town and Country Planning Act 1990. However, the authority in question failed to determine the application within the period stipulated, which caused the claimant to appeal to the relevant Government Minister.

It was common ground that the current use of the stadium i.e. for the sport of rugby, fell within Class D2(e) of the Town and Country Planning (Use Classes) Order 1987 (the UCO), to wit the use as a swimming bath, skating rink, gymnasium or area for other indoor or outdoor sports or recreations. Paragraph 3(1) of the UCO laid down that where land is used for a purpose of any class specified in the Schedule, the use of that land for any other purpose of the same class shall not be taken to involve development of the land. However, the Inspector ruled that the proposed use for an outdoor concert venue did not come within the terms of the Class D2(b) "use as a concert hall" because the ground in question was not enclosed. He found that using the stadium as a concert hall could take place only in a location having the characteristics of a hall.

The Inspector had also ruled that the proposed use could not fall within the scope of "other recreations" in Class D2(e). He ruled that the scope of this class extended only to recreations involving active participation in some kind of physical activity. Accordingly, the certificate was refused. The claimant challenged that decision under Section 288 of the Town and Country Planning Act 1990. The main issue was whether the proposed use fell within Class D2(b) and Class D2(e).

In the High Court, Ousely J. dismissed the application. He found that the requirements of the UCO were only satisfied if the stadium was a concert hall, i.e. an enclosed building, whilst the concerts were being held there. It was important to bear in mind that the purpose of the UCO was to allow changes of use between different uses where no material planning harm would arise, meaning that the need for express planning permission was therefore removed. The UCO and Class 2D were not to be construed so as to ensure that all the uses were interchangeable. In order to take advantage of the change of use from D2(e) to D2(b), it was necessary for the essential physical characteristics of a concert hall i.e. a roof, were present.

Class D2(e), on the other hand, focused on sport or physical recreation. Were it to be construed in such a way as to include hobbies and pastimes of an artistic nature, it would become so broad as to render the remainder of Class D2 otiose. The words had to be seen as relating to the group of activities to which it extended in D2(e) rather than D2 as a whole. The presence of spectators was irrelevant to D2(e) and the stadium fell within that class simply because rugby was being played there. The concert performers contemplated for the proposed use were professional musicians and, although engaging in recreation, they were not involved in physical recreation.

High Court refusal to register sports and recreation grounds as town green confirmed on appeal[416]

The reader may recall from a previous issue[417] the case of an application for judicial review of a decision made by the licensing committee of Sunderland City Council not to register a piece of land historically used for sporting and recreational purposes by local residents - known as the Sports Arena - as a town green. In so deciding, the council had conceded that the evidence showed that the Sports Arena had been used for lawful sports and pastimes by the inhabitants of Washington for a period of at least 20 years. However, the council was satisfied that an implied licence would be sufficient evidence to support the existence of a licence. The council considered that there was evidence of an implied licence since the site was publicly owned land, specifically laid out as an arena with seating, which was adjacent to Princess Anne Park and which had been maintained by the council and the Washington Development Corporation. It was difficult to conceive that anyone could have imagined that the area in question was anything other than a recreational area provided for use by the public for recreation. The applicant had applied for judicial review of this decision, but the High Court supported the Council's view that the use made by the residents of the land had not been as of right but had rather been enjoyed by implied licence from the landowner.

The applicant appealed to the Court of Appeal. The same issues as those which arose before the High Court were once again adumbrated, to wit (a) is it possible for an implied permission to use land defeat a claim to the use of a town or village green for lawful sports and pastimes as of right, and (b) if this was the case, should the aforementioned council decision be set aside on the basis that it was

legally flawed in that the Committee had taken into account irrelevant factors, being (i) the fact that the site was publicly owned, and (ii) that it was adjacent to Princess Anne Park, Washington. The appellant added a further factor which the Council had taken into account and which, in his opinion, was irrelevant, which was that it was difficult to conceive of anyone imagining that that this was anything other than a recreational area provided for use by the public for recreation.

The Court of Appeal dismissed the appeal. It held first of all that the law drew a distinction between an owner's acquiescence in or toleration of the use of his land by others for lawful sports or pastimes on the one hand, and his giving licence or permission for such use on the other hand. In some contexts, it could be that there was little or no difference in meaning between these two notions, but in the context of prescription (i.e. acquisition or loss of interest in land by the lapsing of time) the difference was fundamental, since use which was merely acquiesced in by the owner was *prima facie* as of right, although it could be defeated if the owner could demonstrate, *inter alia*, that he permitted it. The difference between these two concepts was that permission involved some positive act or acts on the part of the owner, whereas passive toleration was all that was required for acquiescence. The positive act or acts could assume several forms. The granting of oral or written consent was the clearest and most obvious expression of permission, but there was no reason in principle why the grant or permission should be restricted to such cases. Permission could also be inferred from an owner's acts. It may be that there would not be many cases where, in the absence of express oral or written permission, it would be possible to infer permission from an owner's positive acts. Most instances where nothing was said or written would properly be classified as cases of mere acquiescence. If cricket and football pitches had been laid out and a sports pavilion built at the Sports Arena and the facilities had been maintained by the authorities who owned the site but none of these authorities issued any statement or passed any resolution expressly permitting inhabitants in the locality to use the site for the purposes of sports and pastimes, why should it not be inferred from such facts that the authorities permitted such use of the site. On such facts, the owners of the site would be showing by their overt behaviour that they were actively encouraging, and thereby permitting, the use of the site for those purposes. In principle, the position would be no different if there had been an express moral or (more likely) written granting of permission. There was no reason in principle why an implied permission would not defeat a claim to use as of right. Such permission could only be inferred from overt and contemporaneous acts of the landowner. The line of authority relied on by the appellant did not support the proposition that permission could not be inferred from the facts. Therefore, the High Court judge was correct to decide the first issue in the way she did.

As regards the alleged irrelevance of the fact that the land was in public ownership, the Court disagreed with the appellant. The public ownership of the area was part of the relevant background. It would indeed have been artificial to require the Court to ignore this fact. It was because the land had been owned by successive public authorities that, on the facts of the case, the question as to whether implied permission had been given for lawful sports and pastimes had arisen at all. The Court did, however, accept that on its own, this was a factor of little consequence. There was no reason to suppose that it was regarded as an important factor by the council. It had not been identified as a relevant factor in the report which had been prepared for the relevant meeting. The same could be said of the fact that the site was adjacent to Princess Anne Park. This had not been referred to in the Report as a relevant factor. If the relevant Council Committee had been instructed not to take into account the fact that the land was in public ownership and was adjacent to the Park, its decision would not have been any different.

The reality was that the Council Committee had been advised that the implied licence argument was a strong one because of the presence of perimeter seating and the fact that the grass was kept cut, and because no-one could have imagined that this was any other than a recreational area provided for use by the public for recreation. The strength of the argument was based on objectively verifiable facts on which the Committee could reasonably rely in order to arrive at the conclusion that this was a case of use by implied permission. The Committee did not take into account the subjective beliefs of the users. Even if the Committee did take these into account, it was unlikely that, had they been told

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Articles should be forwarded to
R. Farrell, Hon. Secretary, British Association for Sport and Law,
The Manchester Metropolitan University, School of Law, Hathersage Road, Manchester M13 0JA.

that they could not take these beliefs into account, they would have arrived at a different conclusion on the issue of implied permission.

The Court of Appeal therefore dismissed the appeal.

Noise levels from site which includes sports facilities should be assessed collectively rather than individually. German administrative court decision[418]

In a recent dispute concerning noise levels between a resident of a special housing area and a leisure site which included facilities such as gymnasium, the Supreme Administrative Court (*Bundesverwaltungsgericht*) of Germany ruled that, where such facilities constitute a conceptual unit, it is permissible to make a collective assessment of the noise levels emanating from that site when judging whether or not the permissible noise levels have been exceeded.

In addition, infrequent events which take place at these facilities and for which noise levels exceeding the benchmark levels set by law are allowed, may not automatically be allowed to take place cumulatively. Any decision which determines the number of such special events must be based on the individual circumstances of each case, taking into account the assessment made by both contending parties.

OTHER ISSUES

Bookmaker prohibited from operating fixed-odds betting without official authorisation. German court decision[419]

In the case under review, the claimant was a bookmaker operating in the horseracing sector. At a certain point she also wished to operate fixed-odds sports betting, and informed the relevant authority that she intended to extend the scope of her operation accordingly. The authority in question, however, ruled that a mere notification did not suffice in order to operate betting based on games of chance, and pointed out to the claimant that if necessary, it would set in motion a police inquiry. The claimant appealed against this decision before the local administrative court and the Administrative Appeals Court (*Verwaltungsgerichthof*). Both confirmed the original decision. The claimant applied to the Supreme Administrative Court (*Bundesverwaltungsgericht*) for review of the latter court's ruling.

The Supreme Court dismissed the application. It ruled that the organisation and operation of fixed-odds betting was prohibited under federal law unless official authorisation to that effect had been obtained. The claimant had argued that fixed-odds betting was not a pure game of chance, and therefore constituted an activity similar to the horseracing betting which she operated, which would enable her to extend her operation to fixed-odds betting without such permission. The Court, however, ruled that fixed-odds betting fully came within the scope of betting based on games of chance as covered by the relevant provision in the Criminal Code (*Strafgeseztbuch*), in the sense that its outcome depended purely on luck and did not involve any element of skill.

The claimant had also objected that, because the legislation of the *Land* of Bavaria did not make any provision for such authorisation, there were no grounds for making the operation of fixed-odds betting dependent on official authorisation. The Court dismissed this argument, holding that the absence of such regional legislation did not make the prohibition in question contrary to federal law. Nor did the Bavarian legislation prohibiting the organisation and operation of fixed-odds sports betting by private operators contravene the German Constitution.

7. PROPERTY LAW

LAND LAW

Golfers at historic club stand to lose home to US corporation (UK)[420]

In August 2001, the 550 golfers of the Home Park Golf Club, London, were given four weeks' notice to make way for a US corporation. Although they have taken legal advice, they fear that they will receive

little compensation for the £2 million which they have invested into the new course and its facilities over the past ten years. In addition, if they wish to join the new American-run club, they will be required to pay an annual subscription of £927 as well as an enrolment fee of £1,057.

The eviction in question was ordered by Historic Royal Palaces, a trust which also controls the Tower of London. When it became a registered charity three years ago, and ceased to receive Government funding, a decision was taken to put its commercial activities - including the golf club - out to tender.

INTELLECTUAL PROPERTY LAW

Affidavit claims America's Cup design was offered for sale at $1 million[421]

According to an affidavit sworn by David Barnes, General Manager of Great Britain's challenge for the world's most prestigious sailing event, a price tag of $1 million was put on revealing the design secrets of one America's Cup syndicate to another. More particularly Barnes claims that a disgruntled ex-employee of Craig McCaw's Seattle-based One World operation offered not only design drawings of the boats being designed by the former Team New Zealand (TNZ) designer Laurie Davidson, but also those of the four previous TNZ boats which won the Cup in 1995 and defended it five years later.

Barnes alleges that Sean Reeves, a New Zealand lawyer who had for many years worked with TNZ, but subsequently recruited many Kiwis to McCaw's team, called him in June 2001 at the GBR Challenge offices in Cowes, Isle of Wight. He states that he immediately informed Reeves that what he was engaged in was unlawful as well as being wrong in moral and ethical terms. Reeves had left McCaw's before the alleged telephone call took place. However, it was not before late October that he made a deposition to lawyers in Cowes, assisted by Julia Harrison, the syndicate's lawyer and daughter of its financial backer Peter Harrison. This was communicated to Davis Rice, Tremaine, lawyers to One World, who have brought legal proceedings against Reeves.

The San Fransisco-based Oracle Racing syndicate had reported a similar offer, but a telephone call to that effect made to Chris Dickson, another ex-TNZ Kiwi, was dismissed by Reeves as being attributable to family gossip. Oracle has also been co-operating with lawyers acting for One World.

The Battle for the WWF initials - an update

In the previous issue,[422] it was reported that the dispute between the World Wildlife Fund and the World Wrestling Federation over the use of the WWF brand had been settled by the High Court in favour of the former, ruling that it was the wrestling organisation which had breached the terms of the 1994 agreement which was intended to eliminate confusion over the use of those famous initials.

It now appears that this will not after all be the last word on the subject, since in October 2001 the Federation was given leave to appeal against this ruling. The dispute has already cost £800,000 in legal fees.[423]

Is the bar on using the name REDSKINS compatible with the First Amendment? Article in US academic journal[424]

The article under review is a student note which examines the constitutional issues arising from Section 2(a) of the Lanham Act, which prevents registration of scandalous matter or matter which could disparage persons, institutions, beliefs or bring them into contempt or disrepute. The writer's analysis is based on the recent opinion reached by the Trademark Trials and Appeals Board (TTAB) in *Harjo v. Pro-Football Inc.*, which was featured in a previous edition of this column.[425] It will be recalled that the TTAB had found that the trademarks THE WASHINGTON REDSKINS, REDSKINS and REDSKINETTES had indeed been disparaging within the meaning of Section 2(a), and that they were accordingly incapable of being registered. The Board also ruled, in accordance with Federal Circuit precedent, that it did not have the authority to decide whether or not Section 2(a) was excessively broad, vague or otherwise unconstitutional, and therefore failed to consider the trademark owner's arguments against cancellation.

Having set out the substance of the TTAB ruling, the author engages in an analysis of its constitutional

implications. In the first place he examines the way in which Supreme Court precedent has evolved on the question of conformity with the Constitution of restrictions on commercial speech. He documents the way in which commercial speech doctrine has evolved towards the "intermediate scrutiny" framework which the US courts currently use in order to assess the constitutional validity of restrictions on commercial speech, to wit (a) whether the speech concerns lawful activity and is not misleading, (b) whether the public interest served by restricting commercial speech is substantial, and (c) whether the regulation is more extensive than is required for the purpose of serving that interest. The author then proceeds to apply the commercial speech doctrine to Section 2(a), claiming that denial or cancellation of a trademark registration constitutes a restriction on speech protected by the constitution. He also highlights, and reconciles, an inconsistency which he claims to exist between commercial speech precedent and First Amendment precedent which requires a determination whether the restriction of speech is content based or viewpoint based.

The writer then proceeds to apply commercial speech doctrine to the specific decision to cancel registration of the REDSKINS trademarks in the light of the tests mentioned above. He contends that, in the present state of commercial speech doctrine, the cancellation of the REDSKINS marks is unconstitutional, holding that cancellation definitely fails the second part if the test as no substantial public interest is thereby served.

The author also sets out an alternative constitutional analysis which disregards traditional commercial speech doctrine. His argument is that trademarks such as REDSKINS are used primarily in the "affiliatory" sense, defined by the author as a use, such as licensing, which mainly serves to protect a revenue stream, as opposed to a trademark which serves the traditional trademark function of source identification. Therefore, these marks should not be classified as commercial speech for First Amendment purposes since they bear little or no informational content. He further argues that conveying informational content is a condition for the application of commercial speech analyses; accordingly, the courts should not apply the commercial speech framework in this context. The writer proposes that the constitutional validity of a decision to cancel registration should be assessed in the light of different constitutional theories, i.e. either an unconstitutional conditions analysis or a public forum test. He concludes that cancellation of the REDSKINS mark would be unconstitutional when assessed in the light of the unconstitutional conditions analysis. When viewed under the public forum test, the author suggests that it would be necessary to develop the underlying issues further, since the level of constitutional scrutiny when conducted under a public forum test would depend on characterisation of the forum (i.e the Principal Register) as a designated public forum or a restricted public forum.

This article provides a sound overview of the way in which commercial speech doctrine has developed, as well as constituting an interesting analysis of its application to trademark registration and cancellation on Section 2(a) grounds. It also presents some interesting alternative frameworks for First Amendment analysis in the context of trademark registration. It further raises, but does not fully consider, the question of the level of protection that the courts should be giving to trademarks used primarily in the affiliatory sense, as opposed to marks clearly used as source identifiers. He suggests that there are fewer theoretical grounds for protecting affiliatory uses.

More commentary on the Lanham Act applied to trademark registration. Article in US academic journal[426]

The paper under review is a student article which proposes an amendment to the Lanham Act, referred to in the previous section, in order to prohibit trademark registration of official Native American tribal insignia. Section 302 of the Trademark Law Treaty Implementation Act 1998 required the United States Patent and Trademark Office (USPTO) to study the issues arising from the protection of official insignia of officially recognised Native American tribes and to present a report in this subject to the Chairs of the House and Senate Judiciary Committee by the end of September 1999. This article does not examine the USPTO hearings or the USPTO report, nor does it address the aforementioned decision by the Trademark Trials and Appeals Board (TTAB) on the REDSKINS trademark. Having first reviewed the cultural issues, the history of the treatment of Native Americans in the US as well as giving a summary of general trademark law principles, the author proposes an amendment to the Lanham Act to include a statutory bar to registration of official tribal insignia as an initial step in recognising the rights of Native Americans to their insignia and cultural symbols.

Unauthorised use of items from database does not infringe copyright. Swedish court decision[427]

In this case, the claimant company held the exclusive right to the commercial utilization of the database rights in lists of football fixtures set by the English and Scottish Football leagues. The fixture lists displayed the pairings of football clubs on any given date. Each pairing consisted of one club playing at home, the other being the visiting side. The fixture lists in question had been compiled as a result of a considerable investment in time, effort and planning. More particularly they had to meet the following criteria: (a) no side was allowed to play more than two consecutive home or away matches, (b) clubs located close to each other should not play home games simultaneously, (c) fixtures should not be timed in such a way as to conflict with important national events or other significant fixtures such as international football matches, or with dates already set aside for domestic cup competitions, and (d) each fixture list required approval in terms of the availability of policing resources. The fixture databases for the English and Scottish league matches set the dates for 2,036 and 720 fixtures in the English and Scottish leagues respectively.

The defendant firm operated sports pools betting in Sweden, some of which involved the forecasting of the outcome of football matches. One of these bets required forecasting the results of 13 football fixtures. Another bet required the punters to forecast the eight matches in which the highest number of goals was scored. A third bet involved guessing the correct result in three games which were listed in a programme containing not only English and Scottish football matches, but also ice hockey matches and other fixtures. In the course of operating these bets over the year, the defendant listed a large number of matches from the claimant's lists of fixtures. The claimant instituted court proceedings for infringement of its database rights, and sought an injunction as well as a substantial sum by way of compensation. The defendant denied that the lists in question constituted protectable databases, since the investment made by the creators of these fixture lists did not consist in determining the date and location, but in actually compiling the list of fixtures; therefore the database merely represented a by-product of creating the data. Even if a list of football fixtures constituted a protectable database, argued the defendant, it had not infringed any database right since it had not engaged in the substantial copying of data which resulted in the creation of a list which was in competition with the claimant's lists.

The City Court of Gotland ruled that the action brought by the claimant should be dismissed. It held that the compilation of a database of football fixtures was a protectable database under Swedish law. However, the protection given to the database was a narrow one, and only concerned the unauthorised copying of "all or considerable parts of a product" or thinly disguised plagiarism. The unauthorised use of these data by Svenska Spel did not constitute an infringement in that there had not occurred any reprinting or copying of the information in the same or in a similar compilation.

(This decision will be returned to when examining the appeal lodged by William Hill against the decision by Laddie J in its dispute with the British Horseracing Board over database rights; see below, p.85.)

Alpine ski held to constitute a patentable invention. Swiss court decision[428]

In the case under review, the defendant was the holder of a German patent having an Austrian priority date of 22/9/1991, relating to an alpine ski which possessed improved damping characteristics without incurring any increase in rigidity. The applicant had successfully opposed the issuing of the patent at first instance, and had obtained its revocation on the basis that it did not constitute an invention. The defendant thereupon successfully appealed to the Federal Patent Court (*Bundespatentgericht*) on the basis of an amended version of the patent. The latter claimed an alpine ski for which the ratio of bending and bending frequency coefficients - measured in accordance with a certain Austrian standard - exceeded certain values for the forward and middle part of the ski, and for which these coefficients in the front and middle parts stood in a particular ratio to each other. A number of dependent claims described embodiments possessing the characteristics of the claimed ski.

The appellant applied for the quashing of the order restoring validity to the patent on the grounds that the claim was not novel, that it failed to involve an inventive step, and merely described the problem to be overcome without proferring any solution to it. The appellant also argued that, by claiming a minimum value for the various ratios, the patent extended to any improvement in alpine

ski construction possessing these characteristics, irrespective of the structural means used to obtain these improvements and regardless of whether those means had been disclosed or not. Finally, the appellant maintained that alpine skis having these characteristics were already known.

The Federal Court dismissed the appeal. It held that the Federal Patent Court was right to rule that the patent disclosed a patentable invention. The patent in question claimed an alpine ski presenting certain physical characteristics, and this was a technical teaching. A technical teaching can be constituted by the description of an object as long as that description represents the solution to a technical problem, rather than merely its description. A ski of the type which was claimed could be made by a person skilled in the art on the basis of the information presented, without having to exercise inventive skill, and such a ski would possess the improved properties claimed.

The Court also held that the subject-matter of the patent was new. The patent would have lacked novelty had any ski possessing the claimed properties been already in existence, even if there was no known method of establishing whether or not it had those properties. However, on the available evidence, none of the known skis measured had possessed the claimed characteristics. This was the case even though, within the tolerances allowed for under applicable Austrian standards, a particular ski could hypothetically have complied with those standards as well as possessing the characteristics claimed. As objectively measured, there was no ski which possessed these characteristics.

In addition, the Court ruled that the patent disclosed an inventive step. The requirements as to the ratios of the natural bending frequency claimed could not be found in any Austrian standard relating to the bending values of skis, nor in any prior patents mentioning certain natural bending frequencies. Inventive skill was involved in "deliberately bringing the reference quantities referred to in Claim 1 into relationship with each other in order to obtain measured quantities which provide information on the deliberate combination of opposite characteristics" of alpine skis.

More Canadian patent litigation with sporting implications

This column has already had occasion to cast its eyes towards the world of Canadian patent litigation in order to discover certain decisions which have implications for the world of sport.[429] Since then, there have been further developments in this field.

In a decision of 21/4/2001,[430] the applicant had applied to register the SPACE SAVER trademark on the basis of its use in Canada in association with various types of existing equipment. The opponent alleged, amongst other things, that the trademark was (1) unregistrable under section 12(1) of the Trademarks Act on grounds of descriptiveness, and (2) not distinctive of the applicant. The opponent relied on results of a search on the Internet which located several uses of the phrase "space saver" and the words "space saving" to describe exercise equipment which folds away when not in use. Copies of advertisements and product sheets describing the "space saving" or "spacesaver" attributes of the products sold both by the applicant and opponent were also provided.

During the oral proceedings, the applicant indicated that it might amend its trademark application to rely on section 14 of the Trademarks Act and claim that the trademark was not without distinctive character. The amendment seeking to rely on section 14 was filed three days later. One of the affidavits filed by the applicant in the opposition was relied on in order to support the section 14 claim.

The Trademarks Opposition Board (TOB) refused the application. Since the amendment was not prohibited by the Trademarks Act or regulations made under it, the applicant was entitled to amend its application to rely on section 14. However, it was not appropriate to allow the applicant to rely on section 14 as a defence to the opposition. While section 14 may be relied upon in relation to issues of registrability, this provision was not applicable to the issue of distinctiveness under section 38(2)(d) of the Trademarks Act.

The everyday user or purchaser of exercise equipment would be likely to respond to the words "space saver" by regarding it as equipment which takes up less space than traditional equipment. The argument put forward by the applicant that the trademark was not descriptive because the words were not material to the composition of the goods was dismissed. When determining whether a trademark is clearly descriptive of the character or quality of the wares, account must be taken of the

result brought about by their use. The words "space saver" represented a direct reference to the nature of the applicant's product. It was inappropriate to confer on the applicant a monopoly in words which others operating in that sector may fairly seek to use in order to describe a feature of their own wares. In spite of the existence of other third party registrations for SPACE SAVER marks, the applicant's mark was clearly descriptive of the character or quality of the wares covered by the application. Ground (1) was successful.

As regards Ground (2), the question whether the trademark was also clearly descriptive as from the filing date of the statement of opposition was considered. A trademark which is clearly descriptive could not be distinctive. Although there was less evidence of the descriptive use of the term "space saver" as from that date, the applicant had failed to establish that its mark was distinctive as from the relevant date. Even if the trademark was not clearly descriptive, the descriptive nature of the words rendered the trademark non-distinctive since they indicated a feature of the wares rather than a single source. Ground (2) was also successful.

"Polo Club" trademark registration refused because of likelihood of confusion (UK)[431]

In this case, the applicant, being the Royal County of Berkshire Polo Club Ltd., applied to register the mark "10 Royal Berkshire POLO CLUB" in Class 3 for perfumery, aftershave, preparations for hair, shampoo, soaps, essential oils, cosmetics, hair lotion, etc. The opponent, Polo Lauren Company LP, opposed the application under Section 5(2) of the Trade Marks Act 1994 on grounds of conflict with its earlier trade mark "POLO", registered in Class 3 for the same and similar goods. Before the Trade Marks Registry, the hearing officer had refused registration, ruling (a) that the opponent had successfully adopted the luxury and upmarket image of the game of polo to associate with its range of toiletries; (b) that it had established a considerable degree of goodwill and reputation in the word POLO; (c) that the majority of customers would focus on the word POLO as being the most recognisable characteristic of the applicant's mark and it was likely that the general public would thus be led to believe that the applicant's and the opponent's goods emanated from the same undertaking or connected undertakings; and (d) that the public was aware of the practice of dual banding and there was a real risk that a significant number of people would believe that the applicant's trademark was a further instance of this established trade practice. The applicant appealed against this decision to An Appointed Person.

The Appointed Person allowed the appeal. An objection raised under Section 5(2) of the Trade Marks Act raised a single composite question: were there similarities (in terms of marks and goods or services) which would combine to create a likelihood of confusion if the earlier trademark and the sign subsequently presented for registration were used concurrently in relation to the goods or services for which they were respectively registered and proposed to be registered. The objection needed to be assessed bearing in mind the commercial realities of the market place, having regard to the fact that distinctiveness, resemblance and proximity of trading were matters of fact and degree which had to be given such weight and priority as they deserved as part of the overall assessment.

There could be no objection under section 5(2) where it did not appear that the general public could believe that the goods or services supplied under the marks in contention emanated from the same undertaking or from economically linked undertakings. Belief in the existence of a joint venture or licensing arrangement met this requirement. Mere association as a result of analogous semantic content was not sufficient to conclude that there was a likelihood of confusion even if the earlier trademark had a particularly distinctive character. A mark which presented a highly distinctive character, either by itself or because of the recognition which it enjoyed in the marketplace was given better protection than trademarks carrying a less distinctive character. The less use had been made of the trademark in connection with the goods for which it was registered, the less distinctiveness it was likely to have acquired and thus the protection claimed for it was more likely to be restricted to its inherent distinctiveness. The use of a trademark did not prove it was distinctive, and increased use did of itself did not do so either; the use and increased use had to be in a distinctive sense to have any materiality. The more descriptive and less distinctive the major feature of a mark, the less the likelihood of confusion might be.

In order to determine an objection under section 5(2), it was necessary to assess the extent (if any) to which normal and fair use of the opposed mark as a trade mark for the goods or services would

capture the distinctiveness of the earlier trademark cited against it and give rise to the required likelihood of confusion. The assessment had to be made from the point of view of the average consumer of the category of goods or services in question and he/she was deemed to be reasonably well-informed and reasonably observant and circumspect. When approaching the issue of whether the use of the applicant's trademark was liable to cause confusion it was necessary to beware of approaching that question with the knowledge that there was a question, when the real task was to determine what impression the use of that mark would have made on people in the ordinary course of trade in the goods.

The use of the word POLO in the applicant's trademark failed to capture the distinctiveness of the opponent's earlier trademarks. People exposed to the applicant's mark would notice that it contained the word POLO and would also notice that it contained the terms ROYAL BERKSHIRE and CLUB. The message from the applicant's trademark came from the words in combination, and that was not something which people would overlook or ignore in the ordinary way of things. The word POLO functioned as an adjective in the applicant's mark but would be perceived as a noun in the opponent's marks. The adjectival use of a word was distinguishable from use as a noun and the resulting differences might, and in this case were, sufficient to preclude a likelihood of confusion.

Defining the legal parameters of televised broadcasts of sporting occasions. Article in Italian academic journal[432]

Several times per day, our television screens are filled with pictures of sporting events, these broadcasts taking the form of short bursts of sporting brilliance, pictures merely illustrating the team or personality being talked about, or even extracts used for satirical purposes. Hitherto these broadcasts have not given rise to notable cases of litigation; however, there is no guarantee that this will remain the case for ever and a day, in view of the increasing awareness of all those involved at various levels of professional sport of their intellectual property rights (real or imagined!). The authors of the article under review are therefore perfectly justified in exploring the legal issues involved.

The authors commence by setting out the Italian legal framework surrounding these broadcasts - or rather the lack of it, since there is no legislation governing such use of sporting pictures and a limited amount of case law. However, on the basis of the available case law, the authors conclude that the courts take the view that a sporting spectacle does not constitute the fruits of the human brain, and therefore cannot enjoy copyright protection. This view appears to have been endorsed by the majority of leading authorities on the subject.

The authors then proceed to examine the legal tension between the rights of the event organiser and the right of the general public to information. For this purpose they go into the comparative mode, examining the legislation of various countries which have devoted specific attention to this issue - more particularly France and Argentina. The conclusion reached by them is that the right to information is given as wide a scope as possible, but does not extend to the right for third parties to exercise autonomous rights over the source material which it is sought to broadcast, where such source material is the subject of private and exclusive rights exercised by another party.

In their general conclusion, the authors point out the wide variety of scenarios which can arise in this context, and the need accordingly to apply any legal rules in a discriminatory manner. It is clear, for example, that to broadcast flashes of sports fixtures during a news bulletin is a different proposition from featuring them in the course of a variety programme. In the absence of any specific legislation covering this area, the authors feel that the regulations of the Italian Football Federation could be of some assistance. This allows the news bulletins to carry extracts from football fixtures as from 8.30 pm in the case of afternoon matches, and as from 12 midnight in the case of evening fixtures. The Law on Copyright (*Legge sul diritto di autore*) in relation to operas, allows extracts for the purposes of critical appraisal, discussion or instruction to be shown to the extent justified by this purpose and which does not represent any competition for the commercial utilization of such works.

OTHER ISSUES

Legal battle arises over million dollar baseball[433]

When San Francisco Giant batter Barry Bonds hit his record-setting 73rd home run of the season, he

little realised that he was going to enter the legal annals of the game as well. The ball in question is valued at $1 million, and Californian restaurateur Alexander Popov has taken legal proceedings against Silicon Valley Patrick Hayashi, alleging that the latter made off with the record home run ball in the scramble that followed the hit. More particularly he claims that the ball came straight at him, that he caught it, but that immediately afterwards he was thrown to the cement and gouged in the nose.

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

8. COMPETITION LAW

NATIONAL COMPETITION LAW

Price fixing of Premiership replica shirts still rife, claims newspaper report (UK)[434]

The excitement thousands of English football fans experienced at the start of the current season was dampened to a certain extent by their resentment at what many still perceive to be the excessive cost attached to supporting their teams - particularly where this takes the form of purchasing a replica shirt. It is generally thought that the cost of making these is as little as £7, but they generally retail at prices not unadjacent to £40. About half this sum finds its way to the manufacturer, whereas the retailer receives £13 and the Inland Revenue approximately £7. That leaves a relatively small percentage for the clubs, whose main profits emanate from issuing licensing contracts to manufacturers, from royalties on each kit sold, and from the additional income generated by their own retailing and mail order outlets.

Three years ago, the Office of Fair Trading (OFT) received assurances from the Premier League clubs that the latter would take steps to discontinue the price fixing practices in this market. Fans were told to expect falls in prices by up to 33 per cent as the supermarkets put in their bid to undercut the manufacturers' suggested retail prices. This drop in prices, however, never materialised. According to the supermarkets, the main reason for this is that the manufacturers are reneging on their pledge to supply shorts to cut-price outlets such as Tesco and Asda. According to Tesco spokesperson Russell Craig,

> *"(A)fter the fair trading investigation, we were expecting to be able to stock licensed shirts. But the manufacturers are still refusing to supply us. The makers of football kit - including Adidas, Umbro, and Nike - use the same arguments as designer companies such as Levi's, saying we are not a suitable outlet and we don't have the facilities to stock their products."*

Thus the manufacturers may not be fixing the price, but they are still choosing the retailer, which has the same effect. Because the sportswear manufacturers refuse to use Tesco as distributors, the latter have to resort to the "grey market" - which means buying direct from factories in the EU which have been licensed by the clubs and importing products to sell at reduced prices.

Duncan Thomson, sports marketing manager for Umbros, denies that his firm is engaging in price fixing, explaining its reluctance to distribute to supermarkets by the consideration that it has an authentic sports brand and wants it sold through relevant sports outlets. He added that since the new rules on price fixing were introduced two years ago, there had been more competition on the market, since the manufacturers sell the kits to the retailers and leave the retail price for the latter to fix.

Asked why it had as yet failed to take action in order to ensure that the assurances that price fixing would end are respected, the OFT replied that it had been monitoring these assurances; however, its spokeswoman was unable to confirm whether or not price fixing was still being practiced. She added that no further investigation was being envisaged. A spokeswoman for the national Consumer Council expressed her concern that the OFT seemed to be "losing the plot" in this regard.

For the Football Supporters' Association, however, spokesman Steve Powell did not seem unduly concerned, stating that since the Premiership clubs signed a "fans' charter" last year, the latter had been obtaining better value for money.

This column will continue to monitor developments in this field closely.

US golf supplies company gives Australian competition authority enforceable undertakings on anti-competitive agreements[435]

In May 2001, American Golf Supplies Pty Ltd and its director, Paul Roser, gave enforceable undertakings to the Australian Competition Commission Court that they would

- refrain from engaging in conduct which constitutes resale price maintenance
- refrain from requiring their retail customers to abstain from selling or advertising PING golfing products at prices other than its suggested retail prices;
- develop a corporate trade practices compliance programme, and
- undertake corrective advertising.

This company had started to circulate its memorandum of trading terms for PING fitted accounts to its retail customers in June 2000. One of the clauses it contained was that retail customers were not to advertise a price for PING products other than at the retail prices suggested by American Golf Supplies. When a major Sydney golf retailer advertised PING products at a discount, American Golf Supplies cut off its bonuses and rebates (a rather painful operation) until the retailer undertook to sign the memorandum. American Golf Supplies reversed these decisions and reinstated the benefits in question after having been contacted by the Commission. It also wrote to its retailers advising them to ignore the offending clauses in its agreements.

Requiring a customer to refrain from advertising goods at a price less than that specified by the supplier constitutes resale price maintenance. The principle underlying this rule is that the ability to advertise discounts is essential to retailers who seek to engage in price competition.

The Commission stated its concern that other similar practices could be occurring in the golf products market in which prestige is regarded as a major factor in maintaining sales at the top end of the market.

EU COMPETITION LAW

Commission discontinues its investigation into Formula One and other four-wheel motor sports[436]

In the first issue of this year's volume,[437] this column reported that the EU Commission had signalled an end to an anti-trust investigation into motor racing by reaching an understanding with Bernie Ecclestone, the power behind Formula One racing. However, it was not until the end of October 2001 that an official statement to that effect was issued by the Commission. The terms of the compromise with the world governing body FIA have not been entirely those which were announced earlier that year. At the time, fears were expressed that nothing fundamental would change as a result of this investigation. The manner in which the Commission has formulated its discontinuation of the enquiry, however, gives some reason for hope in this direction.

The Commission's investigation into the FIA regulations and commercial agreements relating to the FIA Formula One championship occurred following voluntary notifications in 1994 and 1997 requesting clearance from EU competition rules. In 1999, the Commission objected to some of the rules on the grounds that the FIA had abused its powers by placing unnecessary restrictions on promoters, circuit owners, vehicle manufacturers and drivers, as well as to certain provisions in the commercial agreements concluded with television broadcasters.

Although it fully acknowledges the need for organisations such as the FIA in order to regulate the organisation, sporting rules and competitions of the sport, the Commission stated that the spectacular transformation of sports such as motor racing into major commercial operations has inevitably prompted third parties to challenge certain rules and business agreements under EU competition law. Accordingly, the Commission, acting through Mario Monti, the relevant Commissioner, embarked upon negotiations with the FIA, as a result of which the latter agreed to amend its rules for the purpose of bringing them into line with EU law. These amendments seek to ensure that (a) the role of the FIA will be restricted to that of sports regulator, avoiding any commercial conflicts of interest, (b) these rules are not used in order to prevent or impede new competitions unless this is justified on grounds related to the secure, equitable and orderly conduct of motor sport, and (c) internal and external appeals procedures against FIA decisions are strengthened.

In order to prevent conflicts of interest from arising, the FIA has sold all its rights in the FIA Formula One World Championship and will allow the creation of potential inter-brand and intra-brand competition between Formula One and similar races and series. This will ensure that the FIA will not exert any influence over the commercial utilisation of the Formula One championship. Also, both the FIA and SLEC/FOA, the companies in charge of the commercial utilisation of Formula One racing, have agreed to a number of modifications in the commercial agreements for Formula One, which are intended to lower or eliminate barriers to access to the creation and operation of other motor sport series, particularly those which are in potential competition with Formula One racing. Thus, for example, restrictions have been removed in circuit contracts on the hosting of other motor sports events.

In addition to its efforts aimed at ensuring that FIA restricts its role to that of sports regulator, the Commission has also taken account of the effect which lucrative television rights in sport could produce on domestic broadcasting markets. To this end, FIA has undertaken to change the current agreements and given certain pledges as to how this aspect would be conducted in the future. More particularly broadcasters in the countries concerned will be invited to bid for the TV rights on the expiry of the current - or any future - contracts. The parties in question have also undertaken to reduce the duration of new free-to-air broadcasting contracts to a minimum of three years (except for those contracts under which specific investments justify a maximum duration of five years).

Commission gives clearance to major sports rights venture[438]

As this issue went to press, the Commission announced that it had given clearance to an important sports rights venture. More particularly it has cleared the deal under which French pay-television group Canal+SA and the Luxembourg-based RTL Group acquired joint control of the French sports rights agency Groupe Jean-Claude Darmon SA (henceforth GJCD). As part of the agreement, Canal+ and RTL will cause their own sports rights agencies, being Sport+(France) and UFA Sports (Germany) respectively, to merge into the GJCD joint venture.

The Commission stated that, according to its investigation, the venture would merely result in insignificant and limited overlaps in the market for the acquisition and resale of sporting television rights which were not such as to reinforce either the position of Canal+ in the downstream pay-TV market or the presence of RTL on the European market. The KirchMedia Group and the European Broadcasting Union (EBU) would remain strong competitors.

The new joint venture will include the activities of GJCD, Sports+ as well as UFA Sports, and will operate as a trader in sporting television rights and provider of marketing services for sporting events, particularly for football. The Commission had made a careful examination of the impact of the merger, which was the first one to have been notified for statutory clearance in the European Union in the area of sporting rights. However, as a result of its inquiry the Commission only found minor horizontal overlaps, i.e. in the market for the acquisition and resale of football broadcasting rights for events played annually and, even in this field, they are restricted to the qualifying matches of the UEFA Champions League and of the UEFA Cup. In France, where the merger will have the greatest impact, the overlaps amount to less than 10 per cent of the market and constitute a mere 4-5 per cent of the total matches played during the qualifying rounds of the UEFA Champions League and the UEFA Cup.

The Commission found no overlaps in terms of the rights for the final rounds of the UEFA Champions League and the UEFA Cup or for the national leagues and cups, which are infinitely more lucrative. It also found that the markets for the acquisition and resale of football broadcasting rights to events which are played more intermittently, such as the FIFA World Cup and the European Championships, had been left unaffected by the deal.

Having established that the merger did not result in any major overlaps, the Commission also examined the extent to which this transaction could adversely affect the markets for downstream television broadcasting (i.e. the so-called vertical integration) especially in the light of third party concerns that the merger might reinforce the dominant position of Canal Plus on the pay television markets in several member states, as well as strengthening RTL's presence on the free television market. The Commission's inquiry, however, demonstrated that this would not be the case, particularly in view of the strong competition emanating from other European traders in sporting rights such as TEAM, KirchMedia and the EBU, the latter two being themselves either vertically integrated or engaged in co-operation in the acquisition of sports rights.

The Commission also took account of the major increase over the past few years in the bargaining power of the rights holders, particularly as regards the most lucrative football rights, as well as the absence of any significant obstacles to access to the wholesale market in sports rights.

All this led the Commission to conclude that, since the horizontal overlaps were not substantial, the creation of the joint venture would not significantly reinforce the position of the parent companies in the pay television or free-to-air television downstream markets.

Major speech by Commission administrator on sport and EU competition policy[439]

In a major address made in Lille, France, on 10/5/2001, Jean-François Pons, Joint Director-General for Competition Policy with the Commission, drew together the major strands of the recently enhanced interaction between the world of sport and the competition rules of the European Union. He commenced by drawing attention to one of the main reasons why these two areas were becoming increasingly related, which was the increasing economic importance of sport in society, and although sport as such was not regulated by the Treaty of Rome or any other major EU instrument, the business side of sport was subject to the Treaty of Rome as was the case with any other commercial activity. In addition, the Ministers of Sport of the various EU member states had the opportunity to meet in order to define common goals and directions. Also, the Nice European Council had adopted a declaration which invited the EU and its member states to respect the specific nature of sport and to consult its federations on a regular basis.

Focusing more particularly on EU competition law, M. Pons pointed out the extent to which sport represented an area which showed a number of important differences with other fields of economic activity. First of all, the rules of the game themselves do not come within the purview of EU competition law, as the European Court of Justice (ECJ) made clear in the *Deliège* decision.[440] It also had the special characteristic of being the only economic sector to show a certain degree of solidarity as between competitors - whereas in other sectors the removal of competitors is welcomed, eliminating competitors in sport calls into question its very existence. Sport as a business is also unique in that it is divided into the professional and amateur sectors, but with interesting links between the two.

The Director-General then proceeded to give a number of recent examples of the interaction between sport and EU competition law which bore out the exceptional nature of sport referred to above. In this context he mentioned the Lille/Mouscron case. The Belgian football club of Mouscron wished to play its European matches in Lille, which is in France but very close to the Belgian town. However, UEFA refused to give its blessing to the Mouscron/Metz fixture being played in Lille. Thereupon Mouscron complained to the Commission, which held that the UEFA rule in question, which stipulates that each club must in principle play its home matches in its own ground, or in a stadium within the same country, was a sporting rule. UEFA had adopted it in order to ensure that a certain degree of fairness should apply, in that matches should be played throughout the European territory, and that home and return matches should not take place within the same country. The Commission therefore held that this was an organisational rule which fell outside the scope of competition policy.

He then discussed the transfers issue (which strictly speaking does not fall within the scope of competition policy, but of the free movement of persons), outlining the major points and objectives of the recent "agreement" between FIFA and the Commission on this issue.

By way of conclusion, M. Pons expressed the hope that the above served to illustrate three positive trends in the relationship between EU competition law and sport: (a) a gradual and necessary clarification of the legal "rules of the game" to be applied to sport, (b) a line in the ECJ case law which seeks to reconcile the business aspect of sport with the specific characteristics which set it apart, and (c) a marked change in attitude on the part of the sporting authorities, which have come to accept that there are certain general legal rules which apply to their business activities.

9. EU LAW

Tenth European Sports Forum held

On 17 and 18 October 2001, the European Sports Forum, which brings together representatives from

the sporting federations, national authorities and the European Commission, met for the tenth time in Brussels. This event had a number of legal implications, mainly contained in the speech made by Viviane Reding, European Commissioner for Sport.[441] This dealt with the priorities which European policy on sport should set itself, and highlighted aspects such as (a) recognising the specificity of sport when confronted with the demands of EU law, (b) the need for sporting organisations to improve standards of internal democracy and management, and (c) the fight against doping. The latter aspect of Mrs. Reding's speech will be dealt with more fully in the section relating to drugs legislaton (below, p.94).

Mrs. Reding also highlighted the fact that 2004 has been declared "European Year of Education through Sport".

Conference on Adjudication in European Sport held

On 28/11/2001, there took place in the German city of Trier a conference on "Adjudication in European Sport", organised in co-operation with the European Academy of Sport in Rheinland/Pfalz, and supported by the European Union. The Conference was based on the premises that every sports federation had its own judicial system which decides on penalties, qualifications, etc. It sought to examine, from the point of view of both European and national law, the relationship between sports adjudication and the state court system, what are the requirements which a sporting tribunal must satisfy.

The various topics on he Conference agenda were (a) the importance of sporting adjudication at the national and at the international level, (b) opportunities for sports practitioners and sporting organisation to bring proceedings in enforcement of their rights, (c) the requirements to be met by a true arbitration tribunal, (d) arbitration in sport through the Court of Arbitration of Sport (CAS), and (d) arbitration tribunals in sport - conditions for their acceptance.

Horseracing database rights decision goes to appeal - and to the ECJ (UK)

The reader will recall from a previous issue[442] the High Court decision in which Justice Laddie held that bookmakers William Hill had infringed the copyright held by the British Horseracing Board (BHB) on its database, which takes £4 million per year and 80 employees to maintain. This case will now engage the attentions of the EU judiciary, since the bookmaking firm appealed against this decision to the Court of Appeal, and the latter had made a reference for a preliminary ruling to the ECJ under Article 234 of the Treaty.

More particularly the ECJ will be required to give its ruling on the interpretation of Directive 96/9 on the legal protection of databases. This Directive was incorporated into UK law with effect from 1/1/1998 by the Copyright and Rights in Databases Regulations 1997.[443] It creates a two-tier system in relation to databases, under which copyright protection and the new database right are capable of subsisting independently of each other within the same database. Before the High Court, the BHB had claimed that William Hill had infringed its database rights (a) extracting or re-utilising a substantial part of the BHB database, contrary to Article 7(1) of the Directive and (b) by repeatedly and systematically extracting or re-utilising insubstantial parts of the BHB database, contrary to Article 7(5) of the Directive.

On the "substantiality" aspect, Article 7(1) states that this element has to be assessed in quantitative and/or qualitative terms. The defence had argued that in quantitative terms, the part used by the bookmakers was not substantial, representing as it did but a very small item compared to the vast amount of information contained in the BHB database, and applied the same reasoning in relation to the qualitative test. However, Laddie J, although he accepted that a comparison between that which was used on William Hills's website and the whole of the BHB database was appropriate to assess the quantitative test, stated that it was equally important to assess how important the part used was to the alleged infringer, which represented the qualitative test. William Hill had used the most recent and core information in the database in a manner which had not been authorised by its owners, which is why the part taken had to be regarded as a substantial part. As to the "extraction and reutilisation" element, the defendant had argued that these words had to be interpreted restrictively, The word "extraction" should be construed in the sense of taking away the part complained of from the parent database. The judge, however, held that the term "extraction" did not mean the permanent removal of

data from a parent database, and that subsequent and indirect use, such as was the case here, could also amount to "extraction" for the purposes of the Directive. As for "reutilisation", the defence argued that this must mean merely the first publication of the part complained of, since it was not possible to make something available to the public if the latter already had access to it. Laddie J, however, held that the Directive was intended to prevent the unlicensed use of data taken without permission from a database; the fact that the data were already available to the public was irrelevant here.

As regards the alleged infringement of Article 7(5), the systematic and repeated extracting and re-utilization of insubstantial parts of the BHB database, William Hill had argued that the constant addition to and updating of the database meant that there never existed a single database from which it took a part rather, it took a single insubstantial part from several distinct databases, each of which was created by the addition of new data to the existing databases. However, the judge ruled that the Directive applied to such dynamic databases in the same manner as to discrete databases.

On appeal, William Hill argued that (a) it had not been proven before the first court that the information used on its website derived from the BHB database, (b) that Laddie J interpreted the Directive incorrectly, by giving it a wider meaning than the provisions in the Directive expressly stated, which made a reference to the ECJ necessary, and (c) that the injunction granted to the BHB was inappropriate.

On the need to refer the matter to the ECJ, William Hill had referred to two decisions by courts in Europe which had allegedly provided a much narrower interpretation of the Directive,[444] and that the ECJ itself had yet to rule on the Directive. The Court of Appeal held that the guidance available from previous cases on the appropriateness of a referral indicated that such a referral to the ECJ should be made where the domestic court cannot resolve the issues with complete confidence, or if there is any scope for reasonable doubt. This was the case here. On the issue of the appropriateness of the injunction, the Court of Appeal agreed with the submissions of the appellant and discharged the permanent injunction.

The authors Hamish Porter and Rustam Roy[445] are critical of some of the issues on which the Court of Appeal sought a ruling from the ECJ, arguing that some points are irrelevant whereas others are clear under the Directive and could be dealt with by the Court of Appeal applying the *acte clair* theory. Only the fifth question, i.e. "Where there is a constantly updated database, is there a new database separate from the previous database whenever any substantial change has occurred?" do they consider worthy of the ECJ's attention.

Austrian court refuses to refer football transfer dispute to the ECJ[446]

In this case, a clause contained in a contract between two Austrian football clubs made provision for a transfer fee to be paid for a player who changed from team A to team B. Relying upon the *Bosman*[447] precedent, team B refused to pay this transfer fee. The Austrian Supreme Court (*Oberster Gerichtshof*) did not consider it necessary to request the ECJ to give a preliminary ruling, holding that the principles contained in the *Bosman* ruling did not apply to purely domestic cases, for which the rules on the free movement of persons contained in Article 48 (now 39) of the Treaty of Rome were inapplicable. Therefore, a transfer fee which was paid in respect of the transfer of a footballer from one Austrian club to another was not inconsistent with EU law. In addition, the *Bosman* rule only applied to contracts made after 15/12/1995, the contract in question having been concluded prior to that date.

Will the Ginola/Gregory dispute finds its way to Europe - and does this show player power has gone too far? Article in professional journal (UK)[448]

In the previous issue of this journal,[449] it was reported that Aston Villa's talented but moody Frenchman, David Ginola, had fallen out with his manager John Gregory over adverse comments which the latter is said to have made about his weight and had started the process of taking court action against his present employer. The exact legal grounds for such action was not yet known when that feature appeared - and is not even known at the time of writing, as mystery and confusion continue to surround this issue. However, as one of the possibilities was that Ginola might be tempted to take this opportunity to become one of the first footballers to take advantage of the new "rules" on transfers, this affair has contributed towards one of the hottest debates in sport today - i.e. has player

power gone too far, and will it cause irreparable harm to the sport? This is the question which was prominently featured in a recent issue of the professional journal *The Lawyer*.

The article outlines the changes which have come about in the players' legal position as a result of the *Bosman* ruling, and features various comments made by various legal authorities in the game on their implications. Prominent amongst these is Peter McCormick, who sits on the legal committee of the Premier League and advises all 20 Premiership clubs on such matters. He has two concerns. One is the financial implications for football, with money flowing out of the game and into the pockets of players. In this context, he points to the outcome of research by analysts Deloitte & Touche into the economics of football, which revealed that Premiership clubs were spending 66 per cent or more of their turnover on players' wages.[450] The other worry relates to the potential for endless litigation which the new regime offers. He points out that the rules in question were a compromise and therefore worded very vaguely, which promises to be a lawyers' paradise.

Josh Smith, of Charles Russell's sports law group, is less pessimistic - he points out that when the *Bosman* ruling first dawned on the world of football, it was confidently predicted that this would mark the end of the transfer system.

UEFA negotiate with Commission over possible return to foreign player limits[451]

One of the implications of the famous *Bosman* ruling has been to ensure that within the EU, football clubs may not be subjected to any restrictions as to the number of EU nationals they may employ. However, in late August, it was disclosed that the European governing body for football, UEFA, had started talks with the European Commission on the possibility of reintroducing certain limits on the number of foreign players which each club would be allowed to field. Gerhard Aigner, UEFA Chief Executive, said that he accepted that there was no return to the old rules based on national restrictions, but that his organisation remained deeply concerned about the implications the *Bosman* ruling had for home-grown talent - a fact brought home very forcefully two years ago, when for the first time ever in English professional football, Chelsea fielded a side none of whom were English.

Exactly how it would be possible to depart even marginally from the *Bosman* rule without reintroducing national restrictions is not clear to the present writer.

10. COMPANY LAW

Bayern Munich vote to become public company (Germany)[452]

Shortly before this issue going to press, it was announced that the directors of Bayern Munich, one of the most successful German football clubs, have voted in favour of transforming the club into a public company (*Aktiengesellschaft*). Bayern's vice-president, former international star Karl-Heinz Rummenigge, hailed this move as heralding a new era for the club and claimed that this made the latter Europe's No.1 club.

The only other German club to have become a plc is Borussia Dortmund.

ISL debacle: the fallout

In the previous issue, the sorry tale of the demise of sports marketing firm ISL was extensively documented.[453] There are various sequels to this debacle.

Since ISL was acting on behalf of other federations than FIFA, these suddenly found themselves short of a company to handle their commercial side. In the case of the International Amateur Athletics Federation (IAAF), however, this gap was relatively short-lived. On 25/9/2001, it entered into an agreement with Dentsu Inc, a Japanese company, to be its worldwide partner responsible for its sponsorship, media, including the Internet (except for European Broadcasting Union territory) and licensing.[454]

A sporting organisation which has been affected much more seriously by the ISL collapse is the Association of Tennis Professionals (ATP), the ruling body of world tennis, which has had to make 15

staff redundant between their four offices in London, Florida, Monaco and Sydney. The $1.2 billion rights agreement between the ATP and ISL was one of the major factors in the latter's demise.

Dewsbury RLC company applies to go into administration (UK)[455]

The limited company which operates Dewsbury Rugby League Club applied to go into administration. The last season ended with Dewsbury winning the Northern Ford Premiership, as well as four other trophies, yet only succeeded in earning £17,000 in prize money. The club budget had no provision for paying out so many win bonuses - let alone problems with the South Stand, which reduced its capacity to 900. The company currently has debts of over £100,000.

Hampshire CC launch shares share sale campaign (UK)[456]

In November 2001, Hampshire Cricket Club launched a campaign, partly through the sale of shares in their newly-formed company, to raise the sum of £7 million. Hampshire ceased to be a friendly society the previous month, and Rod Bransgrove, the new chairman, intends to use the club's status to ease their financial position, which deteriorated when the cost of constructing their new ground at West End increased beyond £20 million.

Spurs change company management to banish traces of Sugar reign (UK)[457]

In an attempt to remove the last traces of the reign of former Chairman Alan Sugar, and to increase the influence of the club's new owners ENIC, North London football club Tottenham Hotspur, in mid-October 2001, announced a restructuring of their company management. The changes mean that Daniel Levy, the managing director of ENIC, who purchased Spurs from Sugar in February 2001,[458] has taken over the day-to-day management of the club. It was also announced that two former Sugar executives were leaving White Hart Lane - John Sedgwick, the operations manager and a close ally of Sugar, and John Ireland, the company secretary.

Commonwealth Games telecom provider calls in administrators[459]

In October 2001, the organisers of the Commonwealth Games, to take place next year in the present writer's home city of Manchester, received a major setback when the telecommunications provider for the event, Atlantic Telecom, became engulfed in a financial crisis. The company called in the administrators after rescue negotiations had failed and share-trading in the company was suspended as its stock price dwindled to just five pence from a high of 1305 p. in February 2001.

No further developments in this affair had been noted at the time of writing.

Why sport's dot.com bubble burst - and how £275 million turned to one pound[460]

In most of today's shopping malls, it is possible to eke out one's meagre finances by frequenting an establishment where everything costs one pound. A few weeks ago, it did not require too much of a flight into fantasy to imagine that its shelves could have displayed companies which merely a few months earlier had been regarded as the hottest commercial property since Manchester United went public. In early November 2001, a firm called UK Betting purchased for exactly that sum a company whose mission statement was to create the "first major sports brand" of the new century, and which at the brief crowning moment of its existence had 360 staff in its employment and been valued at £275 million. The subject-matter of this bargain-basement purchase was called Sportal. Strictly speaking, the £1 label was not entirely correct, since the new owners paid £190,000 for the Sportal hardware. Nevertheless, this sum represents a paltry leftover from a company which 18 months earlier seemed to be on an unstoppable course towards commercial immortality.

Sportal was created at the initiative of Rob Hersov, a South African-born businessman who established the dot.com company in July 1998 backed by about £4.8 million. It experienced a rapid growth, and made the headlines through its policy of signing up the internet rights of the top European football clubs, on the principle that these were the best clubs in the world and therefore

required no marketing - they would market themselves, and indeed they did just that. Thus Sportal acquired two major sources of revenue: the advertising revenue generated by operating the clubs' websites, and its ownership of the rights to show any action involving those clubs on the internet. By December 1999, teams such as Paris St.-Germain, Juventus, Milan, Parma and Kaiserslautern had been signed up and Sportal offices had been opened in Spain, France, Italy, South Africa and Germany. This enabled it to raise a further £50 million for expansion purposes, followed by the opening of its Australian offices and BSkyB taking a 5.4 per cent shareholding.

From that point onwards, its momentum seemed unstoppable. Its UK multisport site was launched in February 2000, and during the subsequent weeks Sportal was showered with company deals. The company also associated itself with the Yahoo! Internet server in order to provide the latter with football news and stories, launched a new WAP (Wireless Application Protocol) mobile telephone service, and secured the contract to design and produce the Euro 2000 website (in six languages). All this successful activity attracted the interest of French media giant Canal Plus, which offered to buy up the company for £275 million. However, according to Hersov, a major tie-up between Universal and Vivendi, a major shareholder at Canal Plus, was in the making, causing a reappraisal of all the deals then on the table. This apparently held up the sale for several weeks.

It was around this time that the dot.com star was on the wane, as was reflected in the plummeting figures recorded on the Nasdaq hi-tech financial index. Sportal's profile was kept aloft by Euro 2000, which turned out to be a major success for it. However, this came at a cost. The operating costs were thought to be some £5 million; in addition, television rights holders for the event argued that Sportal should not be allowed to show action replays of the goals on its website - a view with which UEFA agreed. This was a major source of embarrassment to the company. In addition, the Sportal brand exposure was not being translated into commensurate revenue. The firm's turnover was said to be £1 million per month, which was inadequate for the purpose of operating such an ambitious enterprise. Also, the shadows were lengthening on the markets, with online companies already beginning to lose their shine.

Nevertheless, Sportal battled on. It launched its sites in Australia and South Africa, and secured what was arguably the most ambitious branding agreement of all, when it entered into a shirts deal with top Italian side Juventus for the club's Champions League fixtures. It also continued to forge Internet partnerships and to engage in new sponsorship deals, one of them being with Ford. However, in the course of the last quarter of 2000, the company incurred losses amounting to over £13 million, making it clear that it required further financing if it was to retain its position.

Ultimately, Sportal's fall was as rapid and spectacular as its ascent. Approximately one year after the crash by the boo.com fashion house, which set off the decline in dot.com fortunes, Sportal had been forced into two waves of redundancies in order to reduce overheads, but still its position remained tenuous. Whereas, as has been mentioned earlier, at one time it experienced no difficulty in attracting financial backing to the tune of £50 million, it now only managed to secure £8 million (from French billionaire Bernard Arnault) in order to stave off liquidation. The respite was but brief, since a combination of Sportal's now perceived fragility and the events of 11 September led to the Board meeting at which it was decided to discontinue business.

Sportal was not the only sporting dot.com company to have bitten the dust recently. Quokka Sports, Firststake.com and Worldsport.com are also concerns which were once riding high on the dot.com revolution, only to crash spectacularly shortly afterwards.

11. PROCEDURAL LAW AND EVIDENCE

Procedural aspects of golf negligence case

The case of *Noade v. Teague*, which was reported under the heading Torts and Insurance (see above, p.49), also had some procedural aspects worth documenting.

This was the decision by the Queen's Bench Division of the High Court in which a golfer whose tee drive had hit his playing partner on the knee was cleared of negligence. At the end of the claimant's case, the counsel for the defence sought to obtain a direction of no case to answer. In so doing, he pleaded the legal authorities which state that in a civil trial without jury the court should not give a ruling on the application without putting the defendant upon his election as to whether he or she will

call evidence. In 1987, when the right to jury trial in personal injury actions was abandoned, Lord Chief Justice Lowry issued, on behalf of the Queen's Bench Judges, a notice, which was not a formal Practice Direction, and which was displayed on the Bar Library notice board, that in such cases a submission of no case to answer would be entertained without putting the defendant upon election. Since that time, it would appear that there is no example of a case in which a judge has put the defendant upon election. The judge accordingly heard the submission without putting the defendant Teague upon election. The long-established procedure of dismissing an action at the end of the claimant's case where there is no case to answer does not infringe the claimant's right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). Having heard the submission, the judge found a case to answer and the defendant called evidence.[461]

13. FISCAL LAW

Betting tax abolished - it's official (UK)

It was reported in a previous issue[462] that the Chancellor of the Exchequer had stated his intention to abolish betting tax. This blue-letter day for the punter finally dawned on 6/10/2001.[463]

The British Horseracing Board (BHB) claims that bookmakers are poised to realise a tax saving of £250 million as a result of this change. This claim must be viewed in the context of a recommendation made to the Government by the BHB that it should implement a rollover of the existing levy scheme for 2002-03, which would produce around £90 million for the benefit of racing as compared to the £62 million achieved this year.[464] (See also, on the subject of the manner in which racing is to be financed, above p.64).

Boris Becker's fiscal tribulations - an update

The issue was dealt with earlier, under the Criminal Law heading (see above, p.15).

Woodford golf club win appeal against rise in rates (UK)[465]

The Woodford golf club is an unpretentious 9-hole affair, which normally attracts local rates of around £11,000. However, earlier this year Secretary Ray Crofts received the shock of his life when he learned that this figure had rise to £31,000 following a general rating revaluation. However, the club appealed against this decision, and won. The issue apparently hinged on the question whether the golf club had exclusive use of the course. As Woodford is located on common ground in Epping Forest, this was obviously not the case.

The Inland Revenue may still appeal against this decision.

"Sports clubs will close" following tax changes (UK)[466]

In November 2001, record Olympic medal winner Sir Steven Redgrave and former Sports Minister Kate Hoey voiced their opposition to Government plans to modify tax legislation which, according to recent research, has the potential to close many amateur and voluntary sports clubs. More particularly the Central Council for Physical Recreation (CCPR) have claimed that the Government proposals, which were released in a Green paper entitled "Paying for Local Government", would cost amateur clubs in England up to £40 million per year.

English local authorities currently possess discretionary powers to grant rate relief to sporting clubs. However, if the said proposals by the Government are implemented, any amateur sports club having a rateable value of over £8,000 would not be eligible for relief, thus putting them on the same level as small businesses. This could mean that bowls clubs, for example would have to find an extra £45,000 per year.

The CCPR recommend that the Government should abolish the present system and introduce a mandatory 80 per cent reduction, which is the figure currently applied to charities.

Tax-free testimonials issue - an update

The previous issue of this organ[467] carried a report that Sports Minister Richard Caborn was making moves to urge the Treasury to reconsider the tax-free status of testimonial matches organised for the benefit of high-earning sports stars such as footballer Ryan Giggs. Mr. Caborn's resolve may be strengthened by a decision to organise a benefit for former jockey Richard Dunwoody taken by a committee formed by that purpose, which includes Manchester United manager Sir Alex Ferguson. The committee intends to organise a series of dinners and a ball, as well as a golf day, to raise money for Mr. Dunwoody. The latter was Britain's most successful jockey when he was compelled to retire in 1999 as a result of an arm injury.

A spokeswoman for the Treasury confirmed that the proceeds would be tax-free. This event may serve to bring forward the day on which the fiscal status of these money-raising exercises is changed. However, the Jockeys' Association of Great Britain, which provides support for retired jockeys, pointed out that good jockeys earn in a year what some Premiership players can receive in a week.[468]

14. HUMAN RIGHTS

RACISM IN SPORT

Being black "helps Williams sisters", claims Hingis

Relations between tennis stars Martina Hingis, and the American sisters Serena and Venus Williams are currently said to be monosyllabic. The main cause for this breakdown is a claim made by the Swiss player that the sisters receive special treatment because they are black. More particularly she claimed that on many occasions, they secure sponsorship deals on account of the colour of their skin.[469] However, the Williams duo has angrily denied this, claiming that the amount of sponsorship they enjoy was due solely to hard work and a habit of winning. Venus Williams, in fact, claimed that there remained a considerable element of anti-black racism in the sport.[470]

Portuguese club charged over racist abuse given to Heskey

The European Champions' League tie between Liverpool and Portuguese side Boavista produced some fine football, but also had an ugly side in the racist taunts administered to black Liverpool player Emile Heskey by some sections of the home crowd at the Stadio do Bessa in Oporto.[471] The Swedish UEFA delegate at the match included a mention of the abuse in his official report. This resulted in a charge made against the Portuguese club by UEFA.[472] At the time of writing, the relevant disciplinary hearing had not yet been held. Boavista stand to incur a heavy fine if the allegations are accepted by the relevant body.

OTHER ISSUES

High Court gagging order is "an attack on press freedom", according to Press watchdog

In November 2001, a High Court judge, Jack J., granted an injunction against the *Sunday People* tabloid newspaper preventing it from identifying a footballer who allegedly cheated on his wife by having affairs with two women.[473] The High Court judge had ruled that the article, which was to have been published in April 2001, breached the Human Rights Act and had decided that sexual relationships were confidential in law.[474] This prompted Lord Wakeham, Chairman of the Press Complaints Commission, to describe the ruling as an "unprecedented" assault on Press freedom. He urged the Court of Appeal to overturn the decision.[475]

The outcome of the appeal was as yet unknown at the time of writing. This column undertakes to follow further developments with considerable interest.

"Sex change" for Bobby Moore aimed at "challenging stereotypes"[476]

In a recent initiative by the Equal Opportunities Commission (EOC), the former England captain, the late

Bobby Moore, was replaced by a woman as part of a campaign to challenge stereotypes and encourage youngsters to abandon entrenched views of what constitute male and female tasks. This initiative takes the concrete form of a poster on which the victorious captain is depicted with a female face.

The EOC stated that the campaign was aimed at "giving young people the confidence to do something different". Polls of school pupils aged 11-16 which were conducted for the EOC had revealed that youngsters were still trapped by gender stereotypes. Despite believing in equality for the genders, young people traditionally opted for male or female academic subjects.

Exactly what the former West Ham and England skipper would have made of this can only be guessed at.

Irish supporters break ban on women in Iran stadium[477]

Approximately 300 Irish women claimed a sporting first in November 2001 when they witnessed their country in action in an Iranian football stadium - but for the hosts' female fans the game remained a prohibited spectacle. When Ireland were scheduled to play Iran in a World Cup play-off, the question arose as to whether its following would be restricted to the male gender by Iran's theocratic rules. Initially, it looked as though this would be the case following a ruling by the Iran Football Federation. However, the outcry that followed caused the Federation to relax its ban for the visiting supporters.

15. DRUGS LEGISLATION AND RELATED ISSUES

GENERAL ISSUES

UK testing procedures to change - but for the better?[478]

When the leaders of the main sports governing bodies of the UK met Sports Minister Richard Caborn in September 2001 in order to discuss the future financing of legal fees incurred in fighting drugs cases (see below, p.96), they used the occasion to attempt to persuade Mr. Caborn to make radical changes to drug testing procedures in the UK.

At present, this is carried out by UK Sport, a Government-financed quango, which reports the results to the governing bodies who are then supposed to take appropriate action. However, two years ago, in the course of the notorious nandrolone cases involving several British athletes, more particularly Linford Christie - whose positive test only became known following a leak to the French sports organ *L'équipe* - it emerged that in a number of cases positive results were not being disclosed for long periods by UK Athletics. The outcry which followed these revelations prompted UK Sport to pledge more open and accountable testing procedures. These are due to enter into effect in January 2002.

However, at the relevant meeting with Mr. Caborn, the relevant sports administrators informed the Sports Minister that since UK Sports also distributes Lottery cash to athletes and governing bodies, there is a potential conflict of interest. More particularly they are attempting to persuade the Government to institute a unified and independent drug-testing agency in the American style.

WADA relocates to Montreal[479]

In August 2001, the World Anti-Doping Agency (WADA) took the historic step of deciding to move its headquarters from Lausanne, Switzerland, to Montreal, Canada. This marks the first occasion on which a major world governing body in sport has moved away from Europe. This is seen as yet another defeat for the old Olympic regime of former International Olympic Committee (IOC) President Juan Antonio Samaranch, who set up WADA two years ago in the wake of the Tour de France drugs scandal. It is also seen as a personal triumph for Canadian Sports Minister Denis Coderre, who has lobbied tirelessly over the past year to move WADA away from its current location.

Ukrainian law on monitoring doping in sport adopted[480]

In May 2001, the Ukrainian Parliament adopted a Law on anti-doping monitoring in sport. This Law sets out the legal and organisational conditions for anti-doping monitoring in the Ukraine, as well as

the participation of the relevant agencies in this exercise. The organisation of anti-doping monitoring is carried out in accordance with the requirements of the anti-doping code of the Olympic movement, and is implemented by the National Anti-Doping Centre of the Cabinet of Ministers, which is responsible for formulating and circulating the anti-doping programme.

WADA organises essay competition on doping in sport[481]

The World Anti-doping Agency (WADA) recently organised an international essay competition on "Legal requirements to conduct blood testing in doping control". Entries had to be in English or French and be 8,000-12,000 words long. The competition is restricted to those under 35 and attracts a prize of $1,000.

IOC publishes new list of prohibited substances and methods, and warns on food supplements

On 31/8/2001, the International Olympic Committee (IOC) published the new list of prohibited substances and methods. This list, which is the outcome of co-operation in this field between the IOC and the World Anti-Doping Agency (WADA), entered into effect on 1/9/2001, and is valid until the end of 2002. On 14/8/2001, the Monitoring Group of the Council of Europe's Anti-Doping Convention approved the adoption of this new list.

The main new feature on this list is the particular focus on athletes seeking authorisation to use anti-asthma medication. A full medical file will be required, and this will then be studied. New tests can then be ordered if the file appears insufficiently well supported. In addition, prior notification for corticosteroids is to be reintroduced if the rules of the International Federation concerned provide for this.

The new list can be consulted at the www.olympic.org website.

A month later, the IOC warned competitors not to use food supplements, following an exhaustive IOC study. Initial reports from tests carried out on 600 nutritional supplements showed that between 15 and 20 per cent of the products examined contained non-labelled substances which could lead to a positive doping test.[482]

EC/WADA deal on research into feasibility of "drugs passports" reached[483]

One of the ideas which has recently been mooted in the campaign against doping in sport is to issue individual athletes with passports displaying details of drugs tests they have taken. This proposal took a step forward in August 2001, when the European Commission signed an agreement with the World Anti-Doping Agency (WADA) to provide funding for further research in this area. The Commission is to pay £300,000 as part of an overall deal worth £1.4 million, whilst other funds will assist with the task of monitoring standards of laboratories performing the tests.

A pilot passport scheme is currently being operated in seven countries, and it is hoped that the scheme will become mandatory for the 2004 Olympics.

Fight against doping tops agenda at European sports summits

Ever since sport found its way onto the agenda of the European institutions - and not only because of its incidence on their fundamental legal issues such as the free movement of persons, which accounted for *Bosman* - the campaign to eradicate drug-taking from all areas of sporting activity has been a prominent feature of many of the debates held at this level. Thus the European Commission - as was indicated in earlier issues of this column - has lost little time in giving its full support to the projects initiated by WADA which fall within its sphere of action[484] (see also previous section). In addition, the Council of Europe has adopted its own Anti-Doping convention, as is mentioned above.

Recently, a number of European "sports summits" have been taking place at which this problem has been brought into sharp focus. Thus when the various Ministers of Sport of the Member States met in

Brussels in 12/11/2001, it featured very prominently on the agenda of this particular gathering. In fact the European Commissioner for Sport, Viviane Reding, had specifically expressed the wish that this be so, particularly as, between now and 2006, most of the world's major sporting occasions will be taking place on European soil.[485]

The object of placing this issue on the agenda of those meeting was essentially a strategic one. It presented the opportunity for the Sports Commissioner and the relevant Ministers to exchange views on the best way in which to strengthen EU action in this field. More particularly attention focused on the plans currently being mooted by the Commission to present a Community action programme which could be presented as early as the coming spring (2002). The object of this programme is not to harmonise national laws or the rules of the sports federations on the subject of doping, but to assess how co-operation between the Member States and the sporting bodies could be improved, and how best to use and apply the various EU policies which affect this area.

The Ministers and the Sports Commissioner also took stock of the situation as regards the manner in which to finance WADA, whose Founding Council was to meet a few weeks later (3/12) at Lausanne, Switzerland. Immediately prior to the meeting, the Commission and the EU Presidency had issued a letter to the Sports Ministers confirming the position which had already been announced in our previous issue,[486] namely that the conditions had not yet been met which would allow the Commission to make a proposal to the Council and Parliament of the EU for a decision on financing WADA. The letter encouraged the Member States to prepare for making direct contributions to the WADA budget in the course of 2002.

Earlier, the campaign against doping had also been a major debating issue at the 10th European Sports Forum, to which reference has already been made in this issue (see above, p.84). In her keynote speech which opened the Forum, Ms. Reding once again stressed the need to eliminate this cancer from the sporting arena. Whilst pointing out some of the successes earned thus far by concerted action in this field, she squarely confronted the question whether European and international action had truly contributed towards improving understanding between governments and sporting federations, and whether they had actually tackled the true reasons behind the increase in sports doping. The current reality, she continued, was that doping was no longer the result of individual actions by athletes, but the consequence of an organised system which incited athletes and their clubs to meet the enormous economic demands currently made on sporting activity. Therefore, nothing stood to be gained from focusing anti-doping action merely on penalising the individual.

Instead, she proposed to set in motion two practical initiatives. One was the EU anti-doping action programme, which has already been referred to, which would enable police co-operation, harmonisation of procedures and improved co-ordination of research in this area. The other was to consist in organising a meeting between the EU Sports Ministers and representatives from the sporting federations in order to conduct a review of the various efforts hitherto undertaken in the field of the harmonisation of rules and procedures and of co-ordination between governments and sporting authorities.

One of the main working parties which met and discussed during this Forum was the Working Group on the Fight against Doping in Sport. Having debated thoroughly the various issues and problems which existed in this field, the Working Group, led by Frederik Serruys, arrived at the following conclusions:

- The Group reiterated the need to pursue the harmonisation of rules on lists, testing methods and penalties used in this field. Excessive differences between national rules and procedures hindered the free movement of persons and goods, and could also produce adverse effects on competition. They should therefore be avoided.
- A mandatory single list of doping substances should be adopted, incorporated into national legislation, and enforced. WADA has an important part to play in this respect.
- WADA should be given the wherewithal to be effective, transparent and effective so that it could achieve its objectives.
- Differences between penalties for doping must be removed, and penalties imposed should be communicated across national frontiers.
- Attention should be given to the doping dimension of police co-operation
- The pharmaceutical industry should be involved in the prevention of doping.
- It is necessary to tackle the structural reasons for the increased incidence of doping
- Doping has become an outright public health problem, particularly since it has spread from the professional to the amateur level

- Europe must continue to lead the field in this area
- The problem is at the same time an international, European and national issue, therefore acting at any of these three levels to the detriment of the others makes no sense.

Abusing the cistern? Chinese authorities draw bottom line in catching drugs cheats[487]

China, which has in the past been implicated in doping scandals, found a new way of attempting to ensure a "clean" World University Games, which were organised in Bejing in August 2001. In a move clearly designed to give new meaning to the term "closet monitoring", the Games' authorities decided to line the toilets of testing stations with mirrors in an attempt to expose athletes tampering with urine samples.

Olympic officials have viewed the University Games as a rehearsal for China's suitability to stage the 2008 Olympics. Whether this experiment will be repeated on that occasion was not clear at the time of writing.

FOOTBALL

Blatter accuses clubs of doping players

In late September 2001, FIFA President Sepp Blatter entered the doping fray when he accused certain clubs of administering drugs to players without the latter's knowledge.[488] He refused to name names, but added that some clubs were more concerned with money than the sport itself. He had heard evidence to back his claims from certain players, and he believed them.[489]

FIFA are under pressure on the question of doping, not only because of a number of top players who have recently tested positive (see below, and previous issues of this organ) but also because it has failed to join the global strategy mapped out by WADA. There was at least a suspicion that Blatter, by making these accusations, was merely attempting to divert attention away from the shortcomings of his organisation in this regard (and many others - once again, see previous issues!).[490]

Davids suspended - but did he get off too lightly?

From the previous issue,[491] it will be recalled that Edgar Davids, the Netherlands and Juventus midfielder, had tested positive for nandrolone. In August 2001, Davids was banned for five months and fined $30,000 by the Italian league for this offence.[492] The relative leniency of this sentence, as well as others caught in similar circumstances (e.g. Davids's Netherlands colleague Frank de Boer) - at least compared to penalties imposed in other sports - has caused some adverse comment. In some quarters it is being suggested that this benevolence is explained by fears of court litigation.[493]

Stam suspended after failing drugs test

Just before going to press, it was learned that former Manchester United defender Jaap Stam, who also plays for the Netherlands at international level, was suspended from competitive football with immediate effect after having tested positive for nandrolone, the banned anabolic steroid. Stam, who currently plays for Lazio Roma, immediately denied knowingly having taken any illegal substances.[494] This news will serve further to damage the image of Italian football after the Davids and de Boer cases (see above).

Stam could also face criminal charges over the failed test, with the Public Prosecutor's department (*Ministero Pubblico*) of Rome being able to start proceedings under new legislation introduced in the summer of 2001.[495]

CYCLING

Giro organisers promise drugs clean-up (Italy)[496]

In mid-November 2001, the organisers of the prestigious *Giro d'Italia* (Tour of Italy) race, which last

year was marred by drugs scandals,[497] announced that the 2002 event would be subjected to an anti-doping campaign aimed at "cleaning up" the race.

Ullrich under investigation by Italian authorities following Giro drugs find[498]

One of the riders to have been involved in the 2001 *Giro* drugs scandal referred to in the previous section was Germany's Jan Ullrich, runner-up in the last two Tours de France and the reigning Olympic road champion, after allegedly performance-enhancing drugs were found in his hotel room during the famous raid which disrupted this year's event. In October 2001, he found himself the subject of an investigation by the relevant Italian examining judge as a result of this find.

Round-up of individual cases

- In late September 2001, the UCI, cycling's world governing body, announced that it was to appeal to the Court of Arbitration for Sport in Lausanne, Switzerland, against a decision by Danish officials to clear their fellow-countryman Bo Hamburger of taking EPO. [It will be recalled from the previous issue[499] that in August 2001, Hamburger had won a legal battle with the Danish cycling federation to that effect.[500]]
- In August 2001, the Swiss cycling federation banned rider Roland Meier for eight months after the latter had tested positive for EPO.[501]
- In October 20001, Zinaida Stagurskaya, the Belarussion rider who is the current women's road race champion of the world, was banned for four months by the UCI after having tested positive for the diuretic fintermine during the women's Tour of Italy in July.[502]
- During the same month, the Italian Olympic Committee's anti-doping authority requested the domestic cycling federation to suspend rider Filippe Simeoni for six months in connection with the use of banned performance-enhancing substances. Simeoni had already admitted to the relevant public prosecutor to having used banned substances such as testosterone and growth hormones.[503]
- In November 2001, Niklas Axelsson, Sweden's leading cyclist, admitted to having taken drugs, having used the banned substance EPO. Like his compatriot Ludmilla Enquist (see below, p.98) he made the admission in order to pre-empt a positive test - in his case at the World Championships in October.[504]
- Richard Virenque, the cyclist who served a 10-month suspension for drugs abuse,[505] signed a new two-year deal with the Belgian Domo-Farm team.[506]

ATHLETICS

Athletics campaign to halt spiralling legal costs from drugs cases[507]

Going to law has never been cheap at the best of times, as UK Athletics, the governing body overseeing the sport in Britain, have recently had occasion to discover when a bill for £500,000 landed on their doormat in September 2001. This sum represented the fees charged by their lawyers, Farrer & Co., for one year's work on a number of high-profile drugs cases. This bill sent shock waves through an organisation whose predecessor, the British Athletics Federation, had itself been bankrupted by the legal fees incurred over the Diane Modahl case (see above, p.57).

It is hardly surprising, then, to learn that athletics has joined other sports such as tennis, football and swimming - as well as the British Olympic Association - to request the Government to underwrite their legal costs arising from doping cases. A meeting to that effect between the leaders of the relevant governing bodies and Sports Minister Richard Caborn took place on 11/9/2001. In the absence of any further announcements in this area, it must be assumed that this issue is still under consideration at the time of writing.

Skeete senior banned after admitting "spiking" of son's supplements

In late September 2001, the father of sprinter John Skeete was banned from coaching after admitting that he had spiked his son's health supplements with anabolic steroids, as a result of which the runner failed a doping test. This is the first occasion on which a coach has been found guilty of a

drugs offence by UK Athletics, and could lead to Skeete *fils* having his two-year suspension rescinded by the International Association of Athletics Federations (IAAF) under the "exceptional circumstances" rule.[508] The fact that UK Athletics found him "morally innocent" because he ingested the substance unwittingly will no doubt be taken into consideration for this purpose.[509]

US sprinter Miller tests positive for high levels of caffeine

In mid-October 2001, it was learned from USA Track & Field, the American body governing athletics, that Inger Miller, the former 200 metres champion, tested positive for the stimulant caffeine at the 1999 World Indoor Championships in Japan, where she had finished third.[510] She has been stripped of her bronze medal and had her £10,000 prize money withheld as a result.[511] This news explains at least one of over 20 positive drugs tests on US athletes, the revelation of which caused a storm prior to the Sydney Olympics, when international athletics administrators accused their US counterparts of attempting a drugs cover-up.[512]

The Olga Yegorova affair - an update

The previous issue[513] contained a feature on the controversy surrounding the Russian athlete Olga Yegorova. It will be recalled that the stir caused by the miraculous improvements in the athletic performance recorded by the Russian long-distance runner was only matched by the equally bizarre tale of the legal and political machinations which surrounded her drugs test, appearance at, and participation in, the World Athletics Championships in Edmonton over the summer of 2001, and the resulting threat of a boycott by her fellow-athletes, prominent amongst whom was British runner Paula Radcliffe.

The Russian athlete, having emerged medal-rich but virtually friendless from the Edmonton championships, nevertheless received a boost in late August when the US sprinter Marion Jones stated that she would refuse to endorse calls to suspend Yegorova from competition. Jones added that she disapproved of the athlete-led protests against the Russian, but supported demands by competitors that the authorities should produce more reliable tests for banned drugs.[514] Jones's comments could be explained not only because of the unhappy experience of her husband C.J. Hunter in this regard - whose own positive drugs test was mired in controversy[515] but also by an increasing state of rebellion by US athletes in relation to the drugs testing procedures of USATF, the American athletics federation, which have been the subject-matter of considerable disapproval from the IAAF itself.[516]

Then Paula Radcliffe was the one to find support from a colleague when Olympic 10,000 metres gold medallist Derartu Tulu gave her wholehearted supported to her stance. At Edmonton, the Ethiopian had outsprinted Radcliffe for the 10,000 metres title.[517] The British runner also found an ally in newly-elected IOC President Jacques Rogge, who informed her in late October 2001 that the ruling body was hoping shortly to validate a stand-alone urine test for EPO, the drug which Yegorova had been accused of taking.

German javelin throwing champion banned

In September 2001, German javelin thrower Carolin Soboll was banned for two years by the IAAF arbitration panel for nandrolone abuse. The German had come second in the European Junior Championships of June 2001.[518]

OTHER SPORTS

Rugby League. In early October 2001, Workington full back Craig Fisher was banned indefinitely having failed a drugs test and subsequently failing to attend his hearing. The Rugby League revealed that Fisher had missed three dates with officials, and that he would not be allowed to compete until he attended a hearing.[519]

The following month, it was announced that David Alstead, the Warrington full-back who tested positive for drugs earlier in the year, would not be suspended, after a Rugby Football League hearing accepted that he had not knowingly taken a prohibited substance.

Squash. In early November 2001, this sport intensified its anti-doping stance when it announced, through its world governing body the WSF, that it would only accept as member nations those countries which had followed their strict testing policy at the national level. WSF President Susie Simcock stated that, although she was convinced that the sport was dope-free, the relevant authorities refused to become complacent about the issue.[520]

Swimming. In September 2001, the world governing body FINA announced that it would for the first time apply blood tests in order to detect the banned blood booster EPO, commencing at the Goodwill Games in Brisbane, Australia.[521]

Rugby Union. In November 2001, Adrian Hadley, the Welsh international who won 27 caps for his country during the 1980s, admitted to having taken "speed" (amphetamine) prior to the Wales-Scotland match in 1986. However, he claims that he was unaware that the tablet in question contained this substance.[522]

Bobsleigh. In early November 2001, Ludmila Enquist, the Russian-born former Olympic and World athletics champion, who subsequently changed nationalities to Swedish and sporting codes to bobsleigh, announced that she would fail a doping test. Previously, she had admitted to using prohibited anabolic steroids.[523] The sponsors of her bobsleigh team subsequently announced that they would withdraw their support in the wake of these admissions.[524]

16. ISSUES SPECIFIC TO INDIVIDUAL SPORTS

FOOTBALL

Premiership referees come under pressure

"Who would be a referee" is the question which many a football fan - if he is being quite honest with himself - must have asked himself from time to time. Nowhere does this question seem more appropriate at present than in relation to the guardians of the game's laws in the Premier League, who are finding that their newly-enhanced status is bringing problems as well as benefits.

The pressure started quite early during the current season, when David Elleray and Graham Barber were the first of the new select group of professional referees to face the prospect of having their services dispensed with. Elleray raised eyebrows when he sent off two Spurs players during a match at Everton, whilst failing to penalise a reckless challenge by Tottenham player Mauricio Taricco. Barber, on the other hand, faced criticism for having awarded an allegedly dubious penalty to Arsenal, as well as sending off Middlesbrough's Ugo Ehiogu, when the Gunners won at the Riverside Stadium, as well as ignoring a lethal tackle by defender Tony Adams.[525] By October, Dermot Gallagher had been suspended for failing to dismiss Leeds's Robbie Keane when the latter pushed David Beckham in the face. In addition, Paul Durkin and Neale Barry were temporarily demoted to the Football League.[526] These apparent errors prompted calls by the Professional Footballers' Association (PFA) for more consistency on the referees' part.

FIFA plan for referee exchange scheme[527]

In mid-September 2001, FIFA President Sepp Blatter unveiled plans to use the world governing body's resources in order to enable talented referees from countries which do not have professional leagues to officiate in the top European leagues. Thus, quoth Blatter, their talents would not go to waste and refereeing standards would improve worldwide.

This apparently is part of Blatter's drive to implement professional refereeing throughout the world. He is also seeking to achieve the fast-tracking of former players to become referees and to increase the age limit of match officials from 45 to 50.

Will the "Old Firm" move south (UK)?

Even though the likes of Aberdeen, Dundee United and Heart of Midlothian have from time to time been given a taste of life at the top table, it is a widely-recognised fact that football north of the

border has for the past century been dominated by the "Big Two" of Scottish soccer - Glasgow Rangers and Glasgow Celtic. Although this absence of genuine and lasting competition has not prevented either club from winning European honours, it is quite understandable for even the most Braveheart- minded Scot to cast the occasional envious eye south of Hadrian's wall and occasionally wonder what life would be like if the Old Firm were allowed to play in company which was more commensurate with their resources and facilities. This was particularly the case in view of the failure of the proposal to create an Atlantic League for other European clubs in a similar position to that of the Glasgow sides.[528]

This proposition, however, for a long time seemed little more than a pipe dream until the end of August 2001, when the proposal to allow Celtic and Rangers to join the English Premiership received support from no less a figure than Gerhard Aigner, UEFA's General Secretary. He stated that, in his view, his organisation would not stand in anyone's way if everyone concerned agreed to the proposal. David Dein and Peter Ridsdale, Chairmen of Arsenal and Leeds United respectively, also gave the proposal their backing.[529] Two months later, the plan received another boost when Peter Kenyon, Manchester United's Chief Executive, gave his support to the proposal. Kenyon said that he saw the 2003 negotiations over the Premier League's next television deal as the ideal opportunity to reduce the division to 16 - or at most 18 - and to introduce the Glasgow clubs to its ranks.[530]

Certain problems and obstacles, however, remain. For it to succeed, the proposal would need the backing of 14 clubs of the current Premiership - which bearing in mind the reluctance of the proverbial seasonal bird to bring forward the Yuletide season looks quite unlikely. In addition, the remaining Scottish clubs will not be jumping for joy at the prospect of losing such lucrative ties (both home and away) in the future.

This column will obviously monitor any progress in this matter with the keenest of interest.

Club v. country: the Australia/France imbroglio and its fall-out

The issue of the clash of allegiances facing players who are selected to play for their country is not a new one, particularly as it often proves impossible or undesirable to arrange matters in such a way that decent intervals occur between domestic, European and international fixtures. Earlier, the specific issue of liability and compensation payable to clubs for players' wages whilst they are on international footballing duty, as well as for any injuries they might thus sustain and therefore become unavailable to their clubs - has been adumbrated elsewhere (see above, p.45). There was, however, one particular fixture which threatened to cause irreparable damage to relations between clubs, those responsible for national squads, and the international footballing authorities - to wit the Australia v. France fixture on 11/11/2001.

With two months to go before this interesting encounter between the ever-improving "Socceroos" and the reigning World Champions in Melbourne, David Dein, the Vice-Chairman of Arsenal, initiated a campaign amongst Europe's top sides to prevent their players from appearing for France in that friendly fixture.[531] Arsenal stood to lose the services of four players during that period, and clubs such as Manchester United, Real Madrid, Juventus and Bayern Munich would also be affected, albeit to a lesser extent.

The French footballing authorities, however, showed little sympathy with these protestations, and world governing body FIFA even less, threatening to impose one-match bans on any player whose club refused to release him for this tie.[532] However, underhand manoeuvring is never far behind anything in which FIFA becomes involved, and it soon emerged that FIFA President Sepp Blatter was once again up to his politicking worst when he started to apply pressure on the French footballing federation to have the tie postponed. The latter, however, indignantly rejected this plea, with warm support from Australian manager Frank Farina.[533] From the Australian viewpoint, this fixture represented a key warm-up game in the context of their World Cup campaign.

FIFA's next cack-handed intervention was not far behind, when it "strongly recommended" that both teams should use only one player per club for the fixture. This was rejected out of hand by both the national federations involved.[534] Mark Viduka, one of the two Australian internationals playing for Leeds United, strongly supported his national federation, gently pointing out that, compared to the number of occasions players from the Home Nations were expecting to be released in the course of a season, the France/Australia game represented but a minor inconvenience.

Ultimately, FIFA withdrew from its attempts to impose any conditions on selection for the teams involved, and in later October announced that it would allow the national sides to field the players they wanted.[535] It also warned the clubs involved against any "convenient sick notes", reminding them that any medical withdrawals were subject to a physical examination by a doctor subject to approval by the French footballing authorities. This did not stop the lobbying and backstairs politicking, with Arsenal manager Arsène Wenger - ironically himself a Frenchman - vowing to continue his bid to obtain a compromise solution from FIFA.[536] Defiantly, French coach roger Lemerre selected eight players from English Premiership clubs.[537]

Rule changes for Champions League (and other competition) proposed

Under current UEFA rules, teams from the same country cannot meet each other in the European Champions League prior to the quarter finals stage, mainly in order to avoid clashes between teams from the stronger nations in the first and second rounds. However, in early November 2001 it emerged that ITV was leading an informal lobby group to amend this rule, arguing that there was an increased desire for a "free" draw which did not artificially keep teams apart. However, at the time of writing no active negotiations to that effect had even been planned.[538]

Later that month news emerged of an even more controversial change to the Champions League current formula - this time emanating from the European ruling body itself. UEFA are seeking to abolish the second stage of the tournament with effect from the 2003-04 season. Instead, a complex group and knockout format would be instituted. There would be four groups of eight teams, each team playing seven matches and four seeded teams in each group playing four games at home and three away. Four teams from each group would then proceed to the knockout stage.

However, this move has met strong resistance from the leading clubs. They have advocated a slimmed-down format of 24 teams rather than the current 32, and a system of four groups of six teams. This would guarantee a minimum of ten matches before proceeding to the final stages.[539]

At the time of writing, it did not seem likely that UEFA would allow itself to be deflected from its proposals.

Europe's leading managers have also called for an end to the "golden goal" rule, i.e. the period of extra time, following a draw at full time, in which the first goal scored decided the match. This rule currently applies in all the major European competitions. At UEFA's Third Elite Coaches' Forum which took place in Geneva, Switzerland, in August 2001, the unanimous view was expressed that this rule fails to add to the spectacle and serves only to increase pressures on players and referees. Suggested alternatives included reverting to the old unrestricted 30 minute period of extra time, combined with the old penalties knock-out stage, or a system whereby the team which goes one goal down in extra time has three minutes in which to rectify the situation.[540]

Here again, a change in the rules looked unlikely at the time of going to press

Bates bites the dust in power struggle with Dein

Previous issues have documented the controversial part played by Chelsea chairman Ken Bates in the Wembley saga, which was part of a wider struggle for power within the English FA. As part of this struggle, Bates had set his sights on becoming Vice-Chairman of the Assocation, ousting arch rival David Dein, Arsenal's Vice-Chairman, in the process.[541] However, this plan ended in failure in late August 2001, when a vote taken by representatives of the Premier League clubs confirmed Dein in his position.[542]

Beckham's "Predators" get the boot in Sunday leagues (UK)

The distinctive Adidas Predator boots, costing up to £150 and made famous by Manchester United and England star David Beckham, have been given the red card by Sunday league officials in Kent, who claim that they are too dangerous. A spokesman for manufacturers Adidas, however, pointed out that the boot in question carried FIFA approval and had to undergo rigorous safety testing procedures for use in the UK.[543]

Gibraltarian footballers "let down" by FA over fight for FIFA and UEFA recognition[544]

For some time, the British outpost of Gibraltar has been campaigning for recognition at the level of FIFA and UEFA. However, its 2,000 players claimed they were "let down" by the English FA in this quest. FA Chairman Geoff Thompson was amongst the 52 delegates at the UEFA Congress in October 2001 to prevent access to territories not recognised by the United Nations as an independent state. FIFA plan to do likewise in 2003. The Faroe Islands, a Danish dependency, had already been allowed access to UEFA. Gibraltar's application has been deferred to 2003.

Austrian politician faces fine for match-fixing allegation[545]

Rightwing Austrian politician Jörg Haider, who resigned as leader of his Freedom Party over his policies, faces a maximum £30,000 fine after accusing a referee of match-fixing. In November 2001 he claimed that this was the reason why FC Kärnten, of which he is the President, lost a domestic fixture. The Austrian Football League's Ethics Committee has urged the imposition of a heavy fine. No decision had been taken at the time of writing.

Rogue football agents "to be outlawed" by Premiership clubs (UK)[546]

Unethical football agents who attempt to sell players behind managers' backs are to be outlawed by legislation shortly to be introduced by the English Premiership clubs. The prime instigators of this plan are Arsenal FC, who suffered anxious moments over the summer of 2001 amidst reports that their French international Patrick Vieira, who was about to begin a new three-year contract with Arsenal, was unsettled and wished to leave Highbury. Agents attempting to lure Vieira away from Arsenal and thus obtain part of the resulting transfer fee, were blamed for this uncertainty (see above, p.47).

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- In August, UEFA upheld an appeal made by Austrian side Tirol to have the second leg of the Champions' League tie with Lokomotiv Moscow replayed. Tirol had argued that the referee issued a yellow card at Moscow player Maminov instead of team-mate Ruslan Pimenov, who would have been sent off for a second yellow card offence.[547]
- In September, Arsenal defender Martin Keown was given a one-match suspension and a £10,000 fine for elbowing Mark Viduka of Leeds United last season, even though FA guidelines recommend a three-match ban in such cases. A charge of stamping on Lee Bowyer during the same fixture was held to be "not proven".[548]
- Around the same time, Jimmy Floyd Hasselbaink (Chelsea) and Matteo Sereni (Ipswich) had their sendings-off incurred during matches with Arsenal and Leicester City respectively repealed by an FA Disciplinary Committee, following video evidence.[549] In both cases, it was alleged that their alleged victims had exaggerated the offence. On similar grounds, Aston Villa striker Dion Dublin escaped a three-match ban in October for the red card which he incurred over his clash with Southampton's Tahar El Khalej.[550]
- During the same month, Celtic manager Martin O'Neill's attempt to set aside a one-match ban, i.e. the European Champions league fixture against Oporto, was rejected by the Court of Arbitration for Sport. O'Neill had originally been suspended over arguing with the referee during the previous Champions' league tie with Juventus following the late award of a penalty to the Italian side.[551]
- Still in September, Leicester City player Frank Sinclair was fined two weeks' wages by his club for his part in a drinking binge with Chelsea players the day after the 11 September attacks. Chelsea had earlier imposed the same fine on John Terry, Frank Lampard, Eidur Gudjohnsen and Jody Morris, who were also involved in the incident.[552]
- In October, Leeds United manager David O'Leary escaped FA disciplinary action over his furious confrontation with referee Paul Durkin after the latter admitted that should have sent off Graeme Le Saux for a two-footed tackle on Leeds player Danny Mills, for which he had been banned from the touchline.[553]
- In November, UEFA penalised Arsenal player Oleg Luzhny, suspending him for four Champions' League matches - one more than the maximum - for having punched a Schalke 04 player during the Gunners' 3-1 defeat in Gelsenkirchen (Germany).[554]

"Grannygate Welshman" Sinkinson returns to play for Wales

Reference was made in he previous issue to the "Grannygate" scandal, under which serious doubts had appeared over the eligibility of players picked for international honours with Wales, but whose connections with the Principality were, to say the least, tenuous.[555] This controversy had led to the introduction of more stringent eligibility requirements. One of the players enmeshed in the original scandal, New Zealand-born Brett Sinkinson, whose grandfather appeared to have hailed from Lancashire rather than Carmarthen, had initially been banned from playing for Wales on these grounds.

However, Sinkinson now qualifies for inclusion in the Wales squad on residential grounds, and made his return against Romania in September 2001.[556]

Junior club expose RFU rules anomaly (UK)[557]

In October 2001, an English junior club exposed the anomaly in the rule of the Rugby Football Union (RFU) which states that foreign nationals serving in the British Armed Forces must be classed as foreigners for the purpose of competitive matches. The case of Blackpool RFC has forced a review of this regulation, following the discovery that its group of Fijian soldiers, who are serving at a nearby base of the Royal Irish Greenjackets, must compete as overseas players. This had caused Blackpool to be expelled from the Intermediate Cup for having fielded three overseas player rather than the permitted two.

Healey fined over published comments during Lions tour (UK)

The trials and tribulations of the British Lions on their last tour of Australia, both on and off the field, have already been alluded to earlier (see above, p.56). One of the incidents which contributed towards the controversy surrounding the tour took the form of published comments made by the England wing Austin Healey about Wallaby lock Justin Harrison in particular and Australian males in general, of which "plank" and "ape " were a fairly representative sample. The Lions authorities duly exacted retribution in September, when a disciplinary panel found him guilty of bringing the tour party into disrepute and fined him £3,000 plus costs.[558] The panel did, however, accept that there were extenuating circumstances, namely that a degree of poetic licence had been used by Healey's ghost writer, former Wales captain Eddie Butler.[559]

The present writer cannot help wondering why public figures, if they pocket the fee for newspaper articles, should not have to face up to the responsibility for its contents as well.

New Premiership club criteria to enter into force (UK)[560]

By March 2002, strict new criteria for membership of the Zurich Premiership will enter into effect. These include a minimum ground capacity of 4,800 with specified provision for covered seating and terracing, as well as a professional administration led by a Chief Executive and with an emphasis on community development.

The next season will also witness a revision of the £1.8 million salary cap to which Premiership clubs have been subjected for the past three years. The principle of the cap will remain, but this is likely to take the form of a fixed percentage of turnover.

Anglesea banned, then reprieved (UK)

Gouging is one of the less acceptable practices on the rugby field, and in September 2001, Sale flanker Peter Anglesea was found guilty of this offence by the RFU. For this misdemeanour, the player concerned was suspended from the game for one year. This was the longest ban ever imposed on a professional player in England - twice as long as was the case some years ago with England players Kevin Yates and Neil Back.[561]

However, Anglesea won an appeal against this penalty in late October, in a decision which once again raised doubts over the adequacy of Rugby's disciplinary procedures - given that the matter rested on video evidence and that a system which can have two panels arrive at totally opposite conclusions thereon surely needs some reconsideration.[562] In fact, at the time of writing proposals were being studied by the RFU for an overhaul of the system. This would involve a team of independent citing officers who will not attend the game in person, but will have a match assigned to them for which they will make decisions on the basis of video evidence. Clubs would be able to draw attention to controversial incidents, but would have no power to cite a player.[563]

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- Rob Andrew, the former England player, could face disciplinary action from the RFU following criticism of the England rugby manager Clive Woodward prior to the England v. Australia fixture in November.[564]
- In October, Bristol director of rugby Dean Ryan was banned from coaching on match days for one month and fined £2,000 for publicly criticising the performance of a referee, in a landmark ruling in a case which was the first of its kind in English rugby.[565]
- In September, Wellington player Al Pala was banned for life for assaulting a linesman after having been dismissed in a Third Division fixture. This makes him the second New Zealander to receive a life ban in a fortnight. The official in question was not seriously injured, but the match was abandoned.[566]
- In October, French club Montferrand were issued with a £10,000 suspended fine by European Cup Rugby for the unruly behaviour of their fans towards match officials following the game with Cardiff.[567]

RUGBY LEAGUE

One-match ban on Stevens pronounced ... and confirmed

Although the recent tour by the Australians to these isles was generally considered to have been a fairly sporting matter, there were one or two incidents which required disciplinary action. One such incident occurred in the course of the first Test at Huddersfield, when prop Jason Stevens was seen on video stamping on Great Britain's Terry O'Connor. For this offence an International Federation disciplinary panel banned him from the second Test and fined him $500.[568]

The Australian management attempted to secure a High Court injunction in order to have this ban overturned. However, on the day before the fixture in question, and after a hearing lasting over three hours, Higginbottom J upheld the decision.[569]

Rugby League united at last

Readers of this organ will be aware that "the other" Rugby code has experienced plenty of strife at the administrative and management level over the past year, but ultimately decided to unite and compromise.[570]

However, Rugby League has also had its fair share of internal bickering and pursuit of self-interest which has threatened to tear the game apart over the past few years. It finally came to its senses at the RFL Council meeting held in Leeds in October 2001, when proposals for a five-tier league structure as well as a transparent system of promotion and relegation received unanimous support.[571] The clubs also voted for a system of six play-offs in each of the professional divisions once the latter become fully operational in 2003, and will reconsider the questions of expanding the World Club Championship and of supporting a European Nations tournament. More particularly it is planned to organise a World Champions League, featuring the Grand Final winners as well as the runners-up and third-place club from the Superleague and Australia's National Rugby League vying for places in a World Club Grand Final.[572]

The outcome of the meeting was seen as a personal triumph for Sir Rodney Walker, the RFL Chairman, who had originally commissioned the strategic review only to see it receive the usual mixture of

apathy and opposition in some quarters. The original 100-odd recommendations were slimmed down to half a dozen in a file marked "urgent". At the meeting in question the clubs were made aware that unless they adopted a more positive and unified approach, the game was heading for oblivion.

The Super League is to remain a 12-club elite competition, but the top six sides - instead of the top five - will play off for a place in the Grand Final. The sides finishing first and second in the League table will both be given a bye into the later stages. As for the Premiership, that will remain a single league of 19 clubs during the next season, with a break in mid-season in order to compete in the National League Cup. However, the Premiership will split into two divisions of 10 clubs as from 2003, and interest will be stimulated by a transparent system of promotion and relegation. Over the next season, the top nine clubs will play off for the Grand Final and qualify by right for the new National League Division One in 2003.

Also, as from 2003, the third and forth divisions will consist of amateur sides from the British Amateur Rugby League Association (BARLA) and the Summer Conference, and from that season onwards all the divisions will run their seasons concurrently with the Super League. Once in place, the three professional divisions will each have a top six play-off in order to determine the Grand Final winners, or who is promoted, subject to meeting the necessary criteria. The system of promotion/relegation will be on a one-up, one-down basis.[573]

Rugby League chiefs have also introduced legislation aimed at clamping down on comments by outspoken Super League coaches (see John Harbin case below).[574]

Superleague bosses block Broncos move[575]

In early September 2001, Superleague bosses unanimously opposed a plan to relocate financially challenged club London Broncos to the North for the next season. Northern Ford Premiership clubs Leigh Centurions and York Wasps had both stated an interest in offering the London club a new home. However, the Super League clubs voted against this.

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- In September, Sonny Nickle, the St. Helens forward, was suspended for six months following a tackle which broke the jaw of Leeds hooker Robbie Mears.[576] On appeal, this sentence was changed to a nine-match ban, leaving St. Helens unsure whether in fact this was not an increase in punishment.[577]
- The two-point deduction imposed on Wakefield Trinity for breaches of the salary cap last season, reported in the previous issue[578] was confirmed on appeal in September.[579] This resulted in an outburst from Wakefield coach John Harbin, which earned him a written warning from his club. This is thought to have spared him from a charge of bringing the game into disrepute.[580]
- In August, Huddersfield's hooker Paul Rowley was banned for three games and fined £300 for foul play during a fixture with Halifax.[581]

CRICKET

"Chucking" accusations hit cricket once more

Geoff Griffin, Ian Meckiff, Harold Rhodes, Charlie Griffiths, Shoaib Akhtar, Brett Lee ... these are all names which, some with more justification than others, have throughout the history of cricket been associated with the illegal bowling action - i.e. that in which the bowler fails to retain straight arm throughout his delivery. In the light of recent developments, there is a danger that a few more names will soon be added to this "rogues' gallery".

The main subject-matter of the recent controversy has been the manner of delivery engaged in by Sussex and England bowler James Kirtley. Initial concerns about his action were raised during the England A tour of New Zealand two years ago.[582] However, the England and Wales Cricket Board, with the assistance of the University of Brighton, studied videos of his action, and cleared him of the accusation.[583] It was accepted that the kink in his right arm was caused by a hyper-extension of the elbow.[584]

However, doubts about Kirtley's action resurfaced in October 2001 following England's one-day match against Zimbabwe in Harare, when referee Nauchad Ali raised doubts about the question whether the England paceman was prone to "chuck" some of his deliveries. Strictly speaking, Ali broke with official protocol in so doing, having spoken to the media about this problem before contacting the relevant cricketing authorities.[585] However, Ali did eventually follow the rulebook when, after having studied videos of the bowler's action during the Zimbabwe match,[586] he officially reported the bowler's action to the International Cricket Council.[587] Under ICC rules, this gave Kirtley six weeks in which to co-operate with Bob Cottam, the former Hampshire bowler who now is the ECWB's bowling adviser, in order to take remedial action. Kirtley, however, made no secret of the fact that he considered such action entirely unnecessary, and referred to the previous ECWB procedure which had cleared him of "throwing".[588]

However, the ECWB, having looked at his action anew, concluded that Kirtley had failed to satisfy the Board that his action was legal. He will therefore have to resume work with Bob Cottam in order to take remedial action, if his action has any chance of being approved prior to the commencement of the next season.[589] It is obvious that this affair is far from over.

In the meantime, doubts had once again arisen over the probity of Pakistani bowler Shoaib Akhtar's action, after match referee Denis Lindsay and umpires Rudi Kuertzen and George Sharp submitted an official report following the Khaleej Times Trophy in Sharjah, held in November 2001.[590]

Terrorist attacks leave India tour in doubt - with massive legal implications (UK)

Cricket tours to the Indian sub-continent have always caused a number of selected England players to indicate a reluctance to participate. Even before the September 11 attacks, wicketkeeper/batsman Alec Stewart and fast bowler Darren Gough had indicated their desire not to take part in the 2001 Tour of India, and were told in no uncertain terms by the Chairman of Selectors that they could pull out of the India tour and still expect to play during the subsequent visit to New Zealand.[591] However, the terrorist attacks of September 2001 made the political and social climate there even more volatile, which caused more England players to harbour doubts about their desire to be part of that tour. In mid-October, as the bombing of Afghanistan commenced, Graham Thorpe expressed the players' concerns, particularly in relation to that part of the tour which was to take place in areas with a heavy Muslim presence.[592]

However, in late October the International Cricket Council (ICC) ruled that the tour should proceed despite these concerns. In addition, it emerged that, under new regulations introduced by the ICC at their annual meeting in Kuala Lumpur, England would face a fine of at least £1.4 million should they withdraw from the tour, and would also be liable to pay compensation to India.[593] India also threatened with retaliating by calling off its own 2002 tour of England should this be the case.[594] In the meantime, the anti-western riots in places close to the venues for some of the Tour matches claimed several dead, which only served to increase doubts over the tour's fate.[595]

Ultimately, the India tour did go ahead, but without bowlers Andy Caddick and Robert Croft.[596]

Tendulkar ball-tampering incident brings ban - and turmoil

Just prior to the commencement of the tour of India by England referred to above was due to commence, the Indian side were competing their own visit to South Africa, which also brought its fair share of controversy. On the third day of the second Test in Port Elizabeth, Indian batsman Sachin Tendulkar was pictured by television cameras running his fingers along the seam of the ball whilst bowling.[597] The next day, match referee Mike Denness imposed a one match ban, suspended for one year, on Tendulkar, as well as fining him 75 per cent of his match fee. In addition, Virender Sehwag was issued with a one-match ban with immediate effect, as well as a fine, for using crude and offensive language, displaying dissent at the umpire's decision and attempting to intimidate the umpire by charging him. Indian captain Sourav Ganguly was issued with a fine and suspended ban for failing to control his team, and several other Indian players were fined for excessive appealing and showing dissent at the umpire's decision.[598]

This provoked a furious reaction from the Indian side, who accused Denness of having been one-sided in issuing these penalties and having closed his eyes to any transgressions on the South Africans'

part. In India, the media accused Denness of "colonialist" attitudes and angry anti-Denness demonstrations took place in Calcutta and elsewhere. However, ICC chief Malcolm Speed was unmoved and gave Denness his full support, flatly refusing a written request from Indian Board president Jagmohan Dalmiya to stand the former England captain down from the next Test.[599]

Concern of authorities at dissent and "sledging" grows

One of the less attractive features of the modern game is the practice of "sledging", i.e. verbal intimidation engaged in by fielders against batsmen. This has gone hand in hand with an increase in the dissent displayed by cricketers against umpires' decision. So serious has the problem become that, at the conclusion of the 2001 season, the Chairman of the first-class umpires' association, Allan Jones, urged his fellow-officials to unite in order to defeat the problem. He commented that the problem was getting worse, and that the new regulations introduced the previous summer[600] had proved to be toothless. More particularly he complained that where players were reported to the ECWB, the matter appeared to end there, with the umpires not even being informed what penalty, if any, had been imposed.[601]

The need to curtail the practice of "sledging" was highlighted once again by the aggressive scenes involving England's Nasser Hussain and James Foster, on the one hand, and Zimbabwe's Andy Flower on the other hand, during a one-day international between the two countries in October 2001. Neither player was disciplined. This led to a pledge on the part of the ICC to stamp out this practice. And this time, apparently, they mean it - they plan to have eight full-time referees by April 2002 with instructions to implement stiffer fines and suspensions should players step out of line.[602]

Australians abandon video replay evidence for doubtful catches[603]

In October 2001, the Australian Cricket Board (ACB) announced that, following a number of complaints, it was to abandon the use of television replays in domestic fixtures in order to give determine whether or not a catch had been taken cleanly.

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- In October, Australian leg-spinner Stuart MacGill was fined £550 by New South Wales Cricket for displaying crude and abusive behaviour whilst playing for his state side against Tasmania.[604]
- Following the verbal fracas in the one day fixture between Zimbabwe and England referred to above, England players Nasser Hussain and James Foster, as well as Zimbabwe skipper Andy Flower, were issued with "severe reprimands".[605]
- Earlier, during the later stages of Australia's triumphant tour of England, Alec Stewart, the home wicketkeeper, was fined 20 per cent of his match fee by referee Talat Ali for dissent after becoming spinner Shane Warne's 400th Test victim, displayed by standing his ground and not departing the crease immediately.[606]

RACING

Fits and starts - Jockey Club act after summer of discontent

The summer of 2001 will go down as a memorable one for British racing, but not for the right reasons. Particularly the starting procedure seemed to be the cause of a chapter of accidents and mistakes which have aroused a storm of criticism - including a lack of stalls handlers for the larger handicap races, late starts for various races and the general behaviour of horses in the stalls, which appears to be worsening constantly.[607] Matters reached crisis point at the Bank Holiday meeting at Epsom on 27/8/2001, when the result of the Tote Exacta Sprint was allowed to stand in spite of a mishap with the stalls. Because of the antics of a rear runner, the eight stalls nearest to the stands rail opened marginally later than those of the nine other runners, which included the eventual winner Boleyn Castle, ridden by John Reid. The stewards interviewed Reid as well as six of the riders who had started from the late-opening stalls before allowing the result to stand.[608]

This was not to the liking of some of the other competitors and their backers. Under Rule 14, the stewards have the power to annul the result if a stalls malfunction "materially prejudices a sufficient number of runners in the race". The stewards concluded that this was not the case on the basis of the evidence presented to them. However, Fergus Sweeney, who rode the 3-1 favourite The Trader and finished unplaced, claimed that the late opening of the stalls cost him about a length, which could make all the difference. Under the old rules, the stewards had no choice but to void a race if a problem with the stalls impeded some runners. However, three years ago some flexibility was introduced to the system after a horse which was thus "disadvantaged" still contrived to win.[609] After the race, John Maxse, the Jockey Club's Public Relations Director, indicated that the Club would examine problem areas at the start of races.

Several weeks later, another stalls mishap caused a race to be mired in controversy at Doncaster. The EBF Carrie Red Fillies' Nursery Stakes was scheduled to be contested over six furlongs and 110 yards, but the stalls were located behind the six-furlong pole, thus shortening the race. The stewards claimed that they had no power to annul the race after the "weighed-in" announcement had been made, and the bettors had been paid out on the course long before the stewards' inquiry was held. However, it is claimed they should have been alerted to the fact that something was amiss by the announcement of the result and the speed recorded, which was abnormally fast for the officially scheduled distance.[610] They referred the matter to the Jockey Club for further investigation.[611]

Several days later, the Jockey Club announced a series of procedures which they expected to solve the increasing number of problems arising at the start of races. Its Regulatory Committee recommended the following measures:

- the number of stall handlers on duty on each racing day to be increased as from the start of the Flat season next year;
- the Racecourse Association to be called upon to propose the design, operation and phased introduction of new stalls;
- an informal Stewards' Inquiry to be called where a race starts off more than three minutes late;
- a review of the procedures and penalties for dealing with horses requiring special handling.[612]

Jockeys campaign for right to display sponsors on race breeches (UK)[613]

As matters stand at present, owners have the right of veto over personal jockey endorsement by sponsors when their horses are engaged in races. Britain's top jockeys are campaigning to strip owners of this right, as it is preventing them from wearing lucrative sponsorship branding on their race breeches. Such advertising would guarantee the displaying of the brand name on each occasion when the jockey goes to post, and thus be worth a good deal of money.

BHB in turmoil as key executives quit[614]

That all is not well at the headquarters of the British Horseracing Board (BHB), has been apparent for some time now. One of the main causes for the present malaise appears to be the personality of BHB Chairman Peter Savill, a man of considerable drive and talent (witness his role in persuading the Government to scrap the levy in favour of commercial negotiations between racing and bookmakers[615]) but whose abrasive manner finds it difficult to tolerate those who fail to match his own exacting standards. This factor has apparently led to a number of high-profile resignations in recent months.

First, Teresa Cash, head of communications and marketing, resigned in early September 2001 after little more than six months in the post. Then Paul Greeves, the highly respected racing director, submitted his resignation, whilst Chris Reynolds, who joined the BHB as managing director just over a year previously, was understood to be working out 12 months' notice. This exodus of top talent left Secretary-General Tristram Ricketts as the sole executive director set to remain at the Board. Coincidentally, these seismic changes came at a time when major plans were being announced for a major restructuring of the BHB at executive and board level for the post-levy era.

Kinane injunction case settled[616]

It will be recalled from the previous issue that in July 2001, Irish jockey Mick Kinane had won an

interim injunction from the Irish High Court against a suspension imposed for careless riding at Leopardstown.[617] In August, the full hearing was held, the outcome of which was in Kinane's favour. The High Court ruled that the agreed procedures had not been followed by the Irish Turf Club's Appeals and Referrals Committee.

Trainers and jockeys disciplined for "schooling in public"

In racing, "schooling in public" is the practice whereby unscrupulous trainers and jockeys use certain races as an opportunity for training their horses rather than fielding trained and experienced runners. It is prohibited by Jockey Club rules, and several prominent exponents of the racing fraternity have recently been disciplined for engaging in this practice.

In mid-October, Norman Mason, trainer of Grand National winner Red Marauder, was fined £2,400, and three of his jockeys were banned, after a Jockey Club inquiry was held following accusations of "schooling" during a race at Bangor. The horses were banned from running in any race for 30 days between 25 October and 23 November, whereas jockey Pat Eddery was banned for ten days and his colleagues Calvin McCormack and Gerard Ryan for seven days.[618]

A few days later, trainers Luca Cumani and Ed Dunlop faced Jockey Club enquiries on similar grounds, arising from a race at Epsom. Cumani and his jockey Shane Kelly were cleared[619] whereas Dunlop incurred a hefty fine under the "non-triers" rule.[620] Several days later, trainer Paul Ritchens and jockey Andrew Thornton were found guilty of the offence. Ritchens was fined £700 and Thornton banned for five days, whereas the horse was suspended from running for 30 days.[621]

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- Jockey Christophe Soumillon was banned for four days for careless riding and his mare Proudwings placed last at Deauville (September).[622]
- Jockey Jamie Spencer was compelled to miss the Sunday of this year's Ascot festival after incurring a one-day ban for causing interference at Pontefract (September).[623]
- Following yet another whip offence at Haydock, Shane Kelly was referred to the Jockey Club, which imposed a ban of 19 days - four of them suspended - under the "totting up" rule. Earlier, he had already served 16 days for whip misuse.[624]
- At Pontefract, jockey George Duffield picked up a four-day whip ban after having been found guilty of contravening whip guidelines (September).[625]
- Dean McKeown incurred a seven-day suspension at Newcastle over the running and riding of Wensley Blue, trained by Pat Haslam. The stewards took the view that the horse had been "tenderly ridden throughout the race", thus infringing the "non-triers" rule (October).[626]
- Kieren Fallon incurred a five-day ban after having been found guilty of irresponsible riding of a minor nature, after winning the Group Two Peugeot Sun Chariot stakes on Independence (October).[627]
- David Elsworth was hit with a heavy fine following an incident with a racecourse security steward at Newmarket, having been found guilty of "improper conduct" (October).[628]
- Darryl Holland was banned for three days after having been found guilty of irresponsible riding aboard Early Mornin Mist at Brighton (October).[629]
- Timmy Murphy was given a three-day whip ban at Taunton, after having been found guilty of using his whip with excessive frequency (November).[630]
- Tom Scudamore received a two-day ban for excessive whip use at Cheltenham (November).[631]
- Mick Fitzgerald had a six-day ban imposed on him at Cheltenham for irresponsible riding (November).[632]

ICE HOCKEY

Newcastle Jesters expelled from Superleague

In October 2001, Newcastle Jesters were expelled from the Superleague after the troubled club failed to meet the latest deadline for payment of its debts.[633] The Jesters' owners have three months in which to sell the franchise before the latter reverts to the Superleague, who hope that there will be a

team playing in Newcastle once again next season. In the meantime the Superleague continues with seven teams.[634]

Round-up of individual cases (all months quoted refer to 2001, unless stated otherwise)

- Nottingham Panthers defenceman Clayton Norris was issued with a ten-game suspension by the Superleague disciplinary panel after an incident left Trevor Roenick, the London Knights forward, requiring 17 stitches for a serious facial injury (October).[635]
- Belfast Giants' enforcer Paxton Schulte was banned for one game after accruing six fighting penalties this season. He was thus the first player to receive the automatic ban under the fighting rule introduced at the start of the Superleague season (October).[636]
- Paul Cruise, Sheffield Steelers' former National Hockey League (NHL) forward, was given an extra game's ban for making obscene gestures during a game at Ayr. He had already been suspended automatically for one game after receiving a match penalty for fighting, but the Superleague disciplinary committee increased it to two (November).[637]
- Nottingham forward Claude Savoie was banned for five games after trial by video. The Superleague took this action after the Canadian winger had been cited by London Knights, defenceman Rich Bronilla having been left needing a dozen stitches in his knee after he was floored by Savoie's check from behind. Although the incident was missed by the three match officials, the Superleague acted after having watched the relevant video.[638]

TENNIS

New types of ball approved - "super tiebreak" experiment extended[639]

The traditional call for "new balls, please" at Wimbledon may soon take on a new meaning as two types of ball were ratified by the International Tennis Federation (ITF) in September 2001. One is slightly larger than those currently in use, and is designed to slow down play on the harder surfaces and grass, whereas the other is harder and is intended to speed up the game played on clay. It is intended to use these balls in the junior and amateur games first.

The ITF also sanctioned an extension of the experiment with a deciding super tiebreaker, which was implemented recently at the mixed doubles final at the US Open. It will continue until 31/12/2002, and will be played when a match is at one-set or two-sets all, to replace the deciding set. The first player to reach ten points is the winner, provided he/she leads by a two-point margin. Initially this will be restricted to doubles matches.

Cowan will henceforth need to "walk alone" at tournaments[640]

Barry Cowan, who captured the country's imagination when he almost caused Pete Sampras an early exit at the 2001 Wimbledon tournament, will no longer be allowed to listen to his personal cassette player in court. Cowan, a fanatical Liverpool FC supporter, ascribed his memorable performance to being able to listen to the Anfield anthem "You'll Never Walk Alone" during breaks between games. Officials have now banned this practice.

Game, spit and match to Tabara[641]

The normal gesture at the end of a match is the handshake across the net, but following a long tie at the US Open in August 2001, Michal Tabara, of the Czech Republic, replaced this with a spit, accusing his opponent Justin Gimelstob of feigning injury so that he could call his trainer on court and catch his breath in the heat and humidity of Flushing Meadow. Tabara was fined $1,000 for this misdemeanour.

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MOTOR RACING

Media allowed access to FIA Court of Appeal for Jarno Trulli expulsion case[642]

In October 2001, the media were for the first time allowed to attend a session of the FIA Court of Appeal, which was called to enable the Jordan/Honda team to petition against the exclusion of Jarno Trulli from fourth place in the US Grand Prix at Indianapolis on 30/9/2001 on the charge that his car was illegal. The Jordan/Honda team appealed against this decision on the grounds that the statement which they had made on the subject was given to a panel of two stewards when, in fact, the third, Roger Peart, was absent. Tim King QC, representing the team, asked the Court to consider the stewards' decision null and void on these grounds.

The judges ruled in favour of the Jordan/Honda team. However, this left a few questions unanswered - such as the reason why Peart's signature actually appeared at the bottom of the disputed statement.

Silverstone GP subject to clearance by FIA[643]

For the 2002 Formula One world calendar, the British Grand Prix at Silverstone has only been provisionally included following concern expressed at the manner in which the weather succeeded in transforming the Easter 2000 race into a muddied fiasco. The Silverstone Grand Prix will now win approval only subject to a favourable report into the traffic arrangements at this year's race. The report was due to be submitted in time for the FIA World Council meeting in December following an inquiry conducted by Britain's national governing body, the Motor Sports Association (MSA).

OTHER SPORTS

Hockey. Jon Royce, the former Great Britain women's coach, who was suspended since April 2001 as a result of allegations of bullying, resigned from the English Hockey association in October 2001. The investigation by the EHA into his conduct was accordingly closed.[644] The investigation is said to have cost the EHA around £250,000, and the allegations against Royce were never proven. Although the captain of the team in question, Pauline Scott, alleged that she was compelled to undergo psychiatric treatment as a result of Royce's actions, she had actually praised his methods shortly before this happened.[645]

Boxing. Anthony Mundine, the Australian Aborigine former rugby league player, who has converted to Islam, was stripped of his super middleweight ranking by the World Boxing Council after claiming that the US had brought on the 11 September attacks itself.[646] Whether the boxing authorities understood that the current "war against terrorism" is being fought in order to "preserve our way of life" - which presumably includes freedom of speech - is not quite clear.

Sailing. The boat Illbruck, which was prominent in the Volvo Ocean race in November 2001, escaped with a relatively soft penalty when its team was fined $1,000 in Cape Town by an international jury on the basis that they had made unlawful modifications to the boat's propeller strut.[647]

Footnote

(1) *Daily Mail* of 19/11/2001, p. 79.
(2) *The Lawyer* of 5/11/2001, p. 5.
(3) *Gazette* of 13/9/2001, p. 12.
(4) *Counsel*, June 2001, p. 6.
(5) *Anwaltsblatt* No. 10/2001, p. 554.
(6) *Neue Juristische Wochenschrift* No. 36/2001, p. X.
(7) *The Lawyer* of 15/10/2001, p. 23.
(8) *Gazette* of 4/10/2001, p. 5.
(9) *The Daily Telegraph* of 20/9/2001, p. S6.
(10) [1999] 3 *UNSW Law Journal*. The author apologises for the late inclusion of this issue, which only reached him in recent months. However, he considers that, even though this issue was published in anticipation of the 2000 Games, the legal issues dealt with are of such fundamental importance as to warrant a comprehensive overview of its contents.
(11) *Op. cit.* p. 662-689.
(12) [2001] 2 *Sport and the Law Journal* p. 28-9.
(13) [1999] 3 *UNSW Law Journal* p. 691-707.
(14) [2001] 3 *Sport and the Law Journal* p. 28-9.
(15) [1999] 3 *UNSW Law Journal*, p. 708-720.
(16) « The Doping Cases and the need for the international court of arbitration for sport (CAS) », *op. cit.*,p. 721-745.
(17) « AOC Athletes' Agreement for Sydney 2000: the implications for the athletes », *op. cit.* p. 746-762.
(18) *UNSW Law Journal*, op. cit. p. 763-780.
(19) *Ibid.*, p. 781-798.
(20) *Ibid.*, p. 798.
(21) *Ibid.*, p. 799-812.
(22) « Sharing the spirit : the impact of the Sydney 2000 Olympics on human rights in Australia », op. cit. p. 813-825.
(23) « Host city selection : reforms to the selection

process », op. cit. p. 829-842.
(24) *Ibid.* p. 843-857.
(25) «The legalities of overbooking, overcrowding, delay and disappointment : lessons for the Sydney 2000 Olympics », op. cit. p. 858-869.
(26) « Market solutions to Olympic problems : do athletes, networks, and sponsors really need the IOC ?" op. cit. p. 870-880.
(27) Op. cit. p. 881-884.
(28) « Procedural fairness in doping disputes », op. cit. p. 885-892.
(29) « Sporting symbolism on an international stage : the right to appeal to humanity » op. cit. p. 893-901.
(30) *It's All in the Game*, Durham, N.C., [2000]
(31) "South African cricketers, Nazi judges and other thoughts on (not) playing the game" [2000] 4 *Osgood Hall Law Journal* p. 563-582.
(32) "Adjudication as sport: rhetoric astray" [2000] 4 *Osgood Hall Law Journal* p. 583-590.
(33) *The Observer* of 2/9/2001, p. 10.
(34) *The Independent* of 31/10/2001, p. 23.
(35) *Daily Mail* of 31/10/2001, p. 69.
(36) *The Independent*, op. cit.
(37) See [2001] *Sport and the Law Journal* p. 66.
(38) Decision of the Court of Appeal (*Cour d'appel*) of Chambéry dated 28/2/2001, in *Brun et al. v. Ministère public, JCP-La Semaine Juridique Edition Générale* of 26/9/2001, p. 1807.
(39) *The Guardian* of 20/11/2001, p. 15.
(40) [2001] 2 *Sport and the Law Journal* p. 10.
(41) See [2001] 1 *Sport and the Law Journal* p. 61.
(42) *Daily Mail* of 20/8/2001, p. 71.
(43) *The Daily Telegraph* of 26/9/2001, p. S3.
(44) [2001] 1 *Sport and the Law Journal* p. 18.
(45) *Daily Mail* of 8/9/2001, p. 13.
(46) *Daily Mail* of 15/9/2001, p. 41
(47) *The Guardian* of 8/9/2001, p. 9.
(48) *Ibid.*
(49) *Daily Mail* of 15/9/2001, loc. cit.
(50) *The Daily Telegraph* of 19/9/2001, p. S3.
(51) *Daily Mail* of 3/10/2001, p. 76.
(52) *Evening Standard* of 17/8/2001, p. 4.
(53) *The Independent* of 12/9/2001, p. 15.
(54) *The Observer* of 28/10/2001, p. 13.
(55) *Ibid.*
(56) *The Guardian* of 27/10/2001, p. S16.
(57) *Daily Mail* of 2/11/2001, p. 83.
(58) *Neue Juristische Wochenschrift*, No. 42/2001, p. XII.
(59) Press Statement of the Supreme Court of 17/9/2001, No. 66/2001.
(60) Decision of 5/9/2001, No. 5StR 330/01.
(61) [2001] 1 *Sport and the law Journal* p. 10.
(62) *Daily Mail* of 3/10/2001, p. 74.
(63) *The Guardian* of 16/10/2001, p. 15.
(64) *Daily Mail* of 11/10/2001, p. 89.
(65) *The Observer* of 4/11/2001, p. 6.
(66) *The Daily Telegraph* of 9/11/200, p. S3.
(67) *The Guardian* of 6/9/2001, p. 25.
(68) *The Daily Telegraph* of 18/10/2001, p. S2.
(69) *Daily Mail* of 11/10/2001, p. 30.
(70) Decision of the Criminal Division of the Italian Supreme Court (*Corte di Cassazione*) of 25/2/2000, in [2001] *Responsabilità civile e previdenza* p. 133 et seq.
(71) "I limiti all'esercizio dell'attività sportive in caso di sport a violenza necessaria o eventuale", annotation to this decision, *op. cit.* at 135 et seq.
(72) *Daily Mail* of 16/9/2001, p. 47.
(73) *The Guardian* of 20/10/2001, p. 15.
(74) *The Daily Telegraph* of 20/10/2001, p. 3.
(75) *The Guardian* of 19/10/2001, p. 21.
(76) *The Guardian* of 24/10/2001, p. 28.
(77) [2001] *Sport and the Law Journal* p. 66.
(78) *The Independent* of 31/10/2001, p. 9.
(79) *The Daily Telegraph* of 4/10/2001, p. 14.
(80) *The Daily Telegraph* of 29/8/2001, p. 5.
(81) *Daily Mail* of 29/8/2001, p. 80.
(82) Wrage, N., « Allgemeine Oddset-Sportwetten : zur Strafbarkeit des Buchmachers gemäß » 284 StGB » *Juristische Rundschau* No. 10/2001, p. 405-407.
(83) [2001] 1 *Sport and the Law Journal* p. 15 et seq.
(84) *The Guardian* of 13/9/2001, p 35
(85) *Daily Mail* of 13/9/2001, p. 93
(86) *Findlaw Sports Law*, at http://sports.findlaw.com
(87) *Ibid.*
(88) *The Guardian* of 3/10.2001, p. 30.
(89) *The Guardian* of 25/10/2001, p. S5.
(90) *Findlaw Sports Law*, loc. cit.
(91) *Ibid.*
(92) *Ibid.*
(93) *Ibid.*
(94) *Ibid.*
(95) *Ibid.*
(96) *The Daily Telegraph* of 28/9/2001, p. S6.
(97) *Findlaw Sports Law*, loc. cit.
(98) *Ibid.*
(99) *The Guardian* of 25/10/2001, p. 17.
(100) *The Observer* of 2/9/2001, p. 18.
(101) *Findlaw Sport*, loc. cit.
(102) [2000] 2 *Sport and the Law Journal* p. 13-14.
(103) *The Guardian* of 9/10/2001, p. 35.
(104) *The Sunday Telegraph* of 30/9/2001, p. 23.
(105) *The Sunday Telegraph* of 4/10/2001, p. S1.
(106) *Ibid.*
(107) *Ibid.*
(108) *The Guardian* of 6/11/2001, p. 26.
(109) *Daily Mail* of 12/10/2001, p. 90
(110) *Ibid.*
(111) [2001] 2 *Sport and the Law Journal* p. 16-17.
(112) *The Daily Telegraph* of 26/9/2001, p. S5.
(113) *The Daily Telegraph* of 28/9/2001, p. S5.
(114) *The Sunday Telegraph* of 30/9/2001, p. S7.
(115) *The Guardian* of 18/10/2001, p. 35.
(116) *The Daily Telegraph* of 18/10/2001, p. S8.
(117) *The Daily Telegraph* of 19/10/2001, p. S6.
(118) *The Sunday Telegraph* of 26/8/2001, p. S9.
(119) *Ibid.*
(120) *The Daily Telegraph* of 31/8/2001, p. S2.
(121) *The Daily Telegraph* of 15/10/2001, p. S4.
(122) *The Sunday Telegraph* of 21/10/2001, p. S9.
(123) *Daily Mail* of 6/9/2001, p. 86.
(124) Wilde, S., *Caught : The Full Story of Cricket's Match-Fixing Story* [2001].
(125) *The Sunday Telegraph* of 16/9/2001, p. S9.
(126) See [2001] 2 *Sport and the Law Journal*, p. 14-15.
(127) *The Daily Telegraph* of 23/10/2001, p. S5.
(128) *The Sunday Telegraph* of 21/10/2001, p. S9.
(129) *The Observer* of 4/11/2001, p. S3.
(130) Decision of the Court of Appeal (*Cour d'appel*) of Chambéry dated 11/1/2001, in *Bois et al. v. Ministère Public, JCP-La Semaine Juridique Edition Générale* of 26/9/2001, p. 1807.
(131) *Daily Mail* of 10/11/2001, p. 91.
(132) *The Guardian* of 25/8/2001, p. S17.
(133) *The Guardian* of 16/11/2001, p. 32.
(134) *The Guardian* of 8/11/2001, p. 30.
(135) *Het Nieuwsblad/De Gentenaar* of 12/10/2001, p. 29.
(136) Readers may recall a feature on the treatment administered to certain African footballers by some Belgian clubs - see [2001] 1 *Sport and the Law Journal* p. 34-35.
(137) No. 336, Italian Official Journal (*Gazzetta Ufficiale*) No. 193 of 21/8/2001.
(138) *The Daily Telegraph* of 7/9/2001, p. 6.
(139) *Daily Mail* of 28/9/2001, p. 90.
(140) *Daily Mail* of 10/10/2001, p. 82.
(141) *The Independent* of 30/10/2001, p. 2.
(142) *The Mail on Sunday* of 4/11/2001, p. 118.
(143) *Daily Mail* of 24/9/2001, p. 72.
(144) *The Mail on Sunday* of 21/10/2001, p. 116.
(145) *The Mail on Sunday* of 4/11/2001, p. 118.
(146) *The Guardian* of 3/11/2001, p. 14.
(147) *The Mail on Sunday* of 26/8/2001, p. 12.

(148) *The Observer* of 26/8/2001, p. 5.
(149) *The Guardian* of 29/8/2001, p. 3.
(150) *The Independent* of 31/8/2001, p. 5.
(151) *The Guardian* of 3/9/2001, p. 8.
(152) *Daily Mail* of 29/9/2001, p. 72.
(153) *The Daily Telegraph* of 8/10/2001, p. S4.
(154) *Daily Mail* of 3/10/2001, p. 89.
(155) *The Guardian* of 31/10/2001, p. 17.
(156) *The Guardian* of 22/10/2001, p. 14.
(157) See *Sport and the Law Journal* [1999] 3, p. 10 and [2001] 1 p. 12.
(158) [2001] *Sport and the law Journal* p. 12.
(159) Decision of 10/7/2001, in Cases 1588/00 to 1590/00, 1597/00 and 1598/00, and 1600/00 to 1618/00, DD 01.016.
(160) « Is voetbal oorlog ? » in: [2001] 8 *Delikt en Delikwent*, p. 904.
(161) See [2001] 2 *Sport and the Law Journal* p. 21.
(162) *Daily Mail* of 28/9/2001, p. 88.
(163) *The Guardian* of 28/9/2001, p. S1.
(164) *Daily Mail*, op. cit.
(165) See [2001] 2 *Sport and the Law Journal* p. 21.
(166) *Ibid.*
(167) "Cricket and the Touting Offence", in *Justice of the Peace* of 22/9/2001, p. 741.
(168) Cm 932 (1990).
(169) *The Daily Telegraph* of 5/9/2001, p. 7.
(170) See [2000] 2 *Sport and the Law Journal* p. 14.
(171) *The Daily Telegraph* of 4/10/2001, p. S8.
(172) *The Times* of 3/11/2001, p. S36.
(173) *The Lawyer* of 8/10/2001, p. 33.
(174) *Gazette* of 13/9/2001, p. 8.
(175) *Gazette* of 6/9/2001, p. 8.
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European Competition Law and Sport - Some Recent Developments

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INTRODUCTION

At the present time, there are some sixty cases related to the practice, regulation, broadcasting, marketing and commercialisation of sport pending decisions by the European Commission and the European Court Justice. Since the inception of the European Economic Community, as it then was, in 1957, now renamed European Union (EU), European Competition Policy has developed into an arcane and complex body of Law, which has been successful in striking down restrictive agreements and collusive practices and abuses of dominant positions in support of the aim and establishment of an open, free and single market, in which goods, services, people and capital move freely. The impact of this Policy has been felt over the years by a wide range of industries and, in more recent times, increasingly in the sports field as well. The irony of the free market is that rules are required to keep markets open as far as possible - or to use the rather overworked sporting metaphor - to create a '*level playing field*'.

In the time available, this review of recent developments in European Competition Law in relation to sport must necessarily be a selective and inevitably an incomplete one, as much has happened and is continuing to happen, and so there is much to report on and review. Accordingly, I shall confine myself to giving an overview of some of the more important and interesting legal developments during the last twelve months or so, which illustrate the Policy being adopted by the Commission and the way the jurisprudence of the European Court of Justice is developing in the sporting arena.

Before doing so, however, I think that it would be useful to put the subject into some kind of context and perspective by explaining the background to EU Policy on Sport and the concepts and principles that have shaped its formation and developments and will continue to do so in the future.

EU POLICY ON SPORT

At first sight, one may reasonably ask, what has sport got to do with the EU; and what has the EU got to do with sport? Any connection between the two might seem bizarre. Sport is a social and leisure activity, while the EU is essentially a single market for business, comprising some 380 million people. But apart from the social and health aspects, sport has an important economic dimension too.

Sport has become a global industry, representing more than 3% of world trade and more than 1% of the combined GNP of the 15 EU Member States, in which more than 2 million jobs have been created directly or indirectly in the sports industry. In the UK, for example, sport provides employment for some 420,000 people, and is worth £12 billion a year in consumer spending.

The founding fathers made no mention of Sport in the Treaty of Rome, signed on 25 March, 1957. But, over the years, as the Community has grown into a major regional economic powerhouse, the need was felt to give the Community a human dimension, in addition to its economic one, as part of the inexorable progression towards European integration. Thus, the idea of a "*People's Europe*" emerged. The Community needed a 'soul'.

At the time of launching the Single Market Programme, the Community recognised the importance of Sport as a symbol, through which a popular perception of Europe could be created. In the Adonino Report on a People's Europe, the committee charged with the responsibility of promoting the Community as a reality in the lives of ordinary citizens, placed particular emphasis on Sport. The Commission took up this theme in its Communication on a People's Europe, stating that it:

"cannot ignore the very important place which sport occupies in everyday life. [It] provides an

excellent means of communicating with people and making them aware of the European idea."

Sport has a social dimension as well as an economic one. It also has a political dimension: the European Parliament also recognises the role that sport can play in creating European citizenship. In the words of the Commission, the executive arm of the EU, the connection, therefore, between the EU and sport:

"extends beyond the world of work to leisure activities and the involvement of the citizen in the every day life of the community."

Following the implementation of the Single Market Programme, the EU introduced a Declaration on Sport at the Vienna Council in December, 1998, as an amendment (Declaration 29) to the Treaty of Amsterdam 1997, which came into force on 1 May, 1999. This Declaration invited the European Institutions to listen to the Sports Organisations when important questions affecting sport are in issue. Strictly speaking, however, this Declaration has no binding legal force and is, therefore, largely of symbolic value. But it is of persuasive authority in that it recognises, in a quasi-formal way, that sport has certain defining characteristics, which should be taken into account when EU Policy is being applied to the structure and regulation of sport. Other Statements on Sport have followed at subsequent bi-annual Euro Summits.

More recently, at the European Summit held in Nice between 7 - 10 December, 2000, EU leaders agreed a more detailed 'Declaration on Sport', largely in response to pressures and 'lobbying' from a number of leading International Sports Federations, not least FIFA.

The 'Nice' Declaration on Sport' is more comprehensive than the one in the Amsterdam Treaty of 1997. However, it follows the underlying principle stated in the 'Amsterdam Declaration on Sport' that EU Bodies are required to *"listen to Sports Associations when important questions affecting sport are in issue."* The complete text comprising more than 1,000 words - the first time the EU Member States have devoted so many words on sport - is set out in Appendix I to this Paper. The scope and length of the Declaration clearly shows that sport is now discussed at the highest political levels in the EU. And, although not a legally binding measure, with such strong political support from the Member States for seeing respect being accorded to the special characteristics of sport ('*specificity*' of sport), it is unlikely that those responsible for the application of EU Law in a sporting context will disregard this Declaration but will follow its guiding principles.

The EU has consistently stated that it has no intention of framing detailed rules on every aspect of sport. It applies the concept of '*subsidiarity*', whereby Community action is only justified in those cases where such action would be more effective than action at the national level.

To serve as a focal point for Community action on Sport, the Commission set up a specialised Sports Unit within the former DG X, now known as the Education and Culture Directorate General.

The connection between sport and the EU has also to be seen in the context of the expansion eastwards of a frontier-free Europe. According to the Commission, Sport is:

"an integral part of our heritage...[and] has always brought people together, transcending language and national stereotypes."

In its paper on "*The European Community and Sport*", the Commission sees the future of Sport in a changing Europe in the following terms:

"...sport, with its ability to break down barriers, is a prime factor for integration."

And adds:

"For this reason alone it has earned a place in the new Europe."

To bring this brief history up to date, at the request of the Vienna Council in 1998, the Commission undertook a widespread consultative exercise, including taking soundings at the Olympia EU Sports Conference in May, 1999, on *"safeguarding current sports structures and maintaining the social function of sport within the Community framework."* The result was the so-called '*Helsinki Report on Sport*'. This was due to be presented at the European Council of Ministers' meeting held in Helsinki in December,

1999. Unfortunately, due to other pressing matters on the Agenda, including the '*Anglo-French Beef War*', the Ministers never got round to considering the Report. However, it constitutes an official statement of the Commission's position on sport.

It states that the European approach to sport is *"based on common concepts and principles"* and that sport is an *"instrument of social cohesion and education."* And goes on to say:

> *"there is a need for a new approach to questions of sport both at the European Union level and in the Member States, in compliance with the Treaty, especially with the principle of subsidiarity, and the autonomy of sporting organisations."*

The Report recommends "*convergent endeavours*" between the Community, the member States and the Sporting Movement to ensure a global and consistent vision of sport.

At the Community level, the Commission calls for:

> *"the application of the Treaty's competition rules to the sporting sector [to] take account of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of results."*

At the Member States' level, the Commission suggests that National Authorities:

> *"need to clarify the legal rules in order to safeguard the current structures in the social function of sport..[and] that each Member State should give legal recognition to governing bodies of each sport."*

At the level of the Sports Federations, the Commission points out that:

> *"the basic freedoms guaranteed by the Treaty do not generally conflict with the regulatory measures of sports associations, provided that these measures are objectively justified, non-discriminatory, necessary and proportional."*

As regards the commercial activities of the Sports Federations, the Commission states:

> *"operations within economic dimensions should be founded on the principles of transparency and balanced access to the market, effective and proven redistribution and clarification of contracts, while prominence is given to the 'specific nature of sport'."*

The Commission concludes its Report as follows:

> *"on the basis of these principles, there is a need for new partnership between the European Institutes, the Member States and the Sports Organisations, all moving in the same direction, in order to encourage the promotion of sport in European society, while respecting sporting values, the autonomy of sporting organisations and the Treaty, especially the principle of subsidiarity..... The convergent efforts of the European Community, the Member States and the Sporting Federations could make effective contribution to the promotion in Europe of sport that is true to its social role, while ensuring that its organisational aspects assimilate the new economic order."*

THE 'RULES OF THE GAME' AND SPORT AS AN ECONOMIC ACTIVITY

In its evolving Policy on Sport, the EU keeps a 'legal eye' on activities of International Sports Governing Bodies, whose economic power and influence are not insignificant.

In a Statement to the European Parliament in Strasbourg on 7 September, 2000 on the EU Commission's investigation into the FIFA transfer rules following *Bosman* (See below), Madame Viviane Reding, the EU Commissioner for Sport, made the following pertinent remarks on the role of EU Law in sports matters:

> *"The commission's approach to sport is laid out in its Helsinki report on preserving sport structures and maintaining the social function of sport within the Community framework. The report calls for*

the convergence of the endeavours of the sport movement, the Member States and the Community to make sure that sport continues to play its role as an instrument of education and inclusion based on fair play, equal opportunities and reward for merit also in its new economic environment. It is clear that Community Law, and. in particular the principle of non-discrimination, the principle of free movement and the competition rules apply to sport. It is also clear that, as emphasised in Declaration No 29 annexed to the Treaty of Amsterdam, the Community recognises the social significance of sport and the importance of the dialogue with the sport movement.

It is in this spirit that the Commission, under the direct responsibility of my colleague Mario Monti [the Commissioner responsible for Competition], is dealing with certain competition cases relating to sport.

The Commission recognises the autonomy of the sport movement to establish the "rules of the game" that are inherently necessary....The Commission investigates only cases that have a Community and economic dimension."

In a Paper delivered in New York on 14 October 1999 to the Twenty-sixth Annual Conference of the Fordham Corporate Law Institute on '*International Antitrust Law & Policy*', Jean-François Pons, the Deputy Director General of the Competition Directorate of the EU Commission, provided the following guidelines that the Commission was likely to take on sports related Competition Law matters:

"When dealing with competition cases in the sports the Commission must take into account the special character of sport in at least three respects:

- *The rules for the organisation of sporting competitions are very different from those for competition between industrial firms. For instance, it is essential that no clubs participating in an annual championship should drop out prematurely, as this would distort the final results. Rules are then necessary to ensure a minimum level of solidarity and equality between the strongest and the weakest teams in a championship and to guarantee the uncertainty of the results;*
- *Sport is not only an economic activity, it is also a social activity practiced by millions of amateurs and one which plays a positive role in society.....A part of these social aspects of sport is financed by resources coming from economic activities: resources from the strongest clubs, television rights and sponsoring. Thus some form of distribution of resources from top to the bottom of the sporting pyramid is to be welcomed;*
- *Sport organisations (federations) have a role of regulation as well as being involved in economic activities (selling of television rights, of tickets, licensing of their logos, etc.)*

In applying the competition rules to sport, the Commission is seeking to distinguish as clearly as possible between compliance with the principle of competition and the requirements of sports policy.....

The Commission will try to put a stop to the restrictive practices of sport organisations, which have significant economic impact and which are unjustified in the light of the goal of improving the production and distribution of sport events or with regard to the specific objectives of a sport. The Commission will, however, accept those practices of sport organisations which do not give rise to problems in the light of the competition rules of the Treaty either because they are inherent in the sport or necessary for its organisation or because they are justified in terms of the positive objectives referred to above.

It is not always easy to identify the intrinsic sporting nature of certain rules, either because they have significant economic consequences or because the rule, originally established for purely sporting reasons, has taken on more of an economic character as a result of the development of the economic activities associated with the sport. It may also be difficult to establish whether a rule is necessary to the organisation of sport or to the organisation of connections. For these reasons it is only gradually on a case-by-case basis that the Commission and/or the Court of Justice on a basis of preliminary questions presented by national courts will be able to clarify what must be regarded as a rule inherent in sport or a rule necessary for the organisation of sport or sporting competitions. I would not be surprised if, in their future application of competition rules to sport, these institutions reached the conclusion that the following practices would fall outside the scope of Article 81(1) of the Treaty:

- *The "rules of the game"*
- *Nationality clauses in competitions between teams representing countries (national teams).*

- *National quotas governing the number of teams or individuals per country participating in European and international competition;*
- *Rules for selection of individuals on the basis of objective and non-discriminatory criteria;*
- *Rules setting fixed transfer periods for the transfer of players, provided that they ensure some balance in the general structure of the relevant sports;*
- *Rules needed to ensure uncertainty as results, where less restrictive methods are not available."*

As the former EU Competition Commissioner, Karel van Miert, pointed out to the European Parliament in 1999 (OJ EC, 1999, C50, 143):

> *"...it is necessary to determine whether these.....rules are limited to what is strictly necessary to attain the objective of ensuring the uncertainty as to results or whether there exists less restrictive means to achieve it. Provided that such rules remain in proportion to the sport objective pursued, they would not be covered by the competition rules laid down in the EC treaty."*

And as he put it on an earlier occasion:

> *"Other aspects belong to sport, which have nothing to do with economic activity - I am thinking of its social, integral and cultural significance.....These special features do not, however, justify the restriction of the basic freedoms laid down in the Treaty on the European Union, as long as ....[these sport aims]....can be achieved through less restrictive measures. This principle of Proportionality is one of the corner stones of the application of Community law."*

Thus, the EU Policy on Sport is a balancing act between promoting the socio-cultural, health and competitive (in a sporting sense) aspects of sport and regulating its business and commercial side. In those cases where sport is engaged in an "economic activity" at the Community level, the full panoply of EU Law will apply according, of course, to the particular circumstances.

There are many decisions of the Commission and the European Court of Justice illustrating this distinction, dating from the *Walrave and Koch v UCI* decision in 1974, in the which the Court held that *"the practice of sport is subject to Community law insofar as it constitutes an economic activity"*(Case 36-74 ECR 1974 p.1405), to some more recent cases, which we will now mention.

SOME RECENT CASES

Here are some recent cases in which the EU Authorities have held, in accordance with the above-mentioned principles, that the rules or restrictions of Sports Bodies concerned were 'sporting rules' and, as such, justified and not unreasonably restrictive of economic/commercial competition:

- *Mouscron*:the UEFA Cup rule requiring each club to play its home match at its own ground is a 'sports rule' falling outside the EU Competition Rules (December, 1999).

- *ENIC*:the UEFA rules limiting multiple club ownership preserve 'sporting integrity' and are compatible with the EU Competition Rules (December, 1999).

- *Christelle Deliege*: the Belgian Judo League rules limiting the number of participants in international competitions are 'sporting' restrictions and not contrary to the EU Competition Rules, again even if they may have commercial implications (April, 2000).

- *Jyri Lehtonen*: the Belgian Basketball League timing restrictions on transfers from one National League to another were justified on 'sporting' grounds and not incompatible with the EU Competition Rules, again even if they may have commercial implications (April, 2000).

- *UEFA New Broadcasting Regulations*: the Commission approved the amended version of these Regulations, which allow national football associations to block the broadcasting on television of football during two and half-hours either on Saturday or Sunday to protect stadium attendance and amateur participation in the sport, holding that such restrictions were "justified and acceptable" on "sporting" grounds. Competition Commissioner Monti said that *"the decision reflects the Commission's respects of the specific characteristics of sport and of its cultural and social function in Europe in trying to play the role of an impartial referee between the different interests of broadcasters and football clubs"* (April, 2000).

Of course, all of these EU decisions went in favour of the Sports Governing Bodies concerned, but many others have not, including the *Bosman* ruling by the European Court of Justice in December 1995, which 'set the cat amongst the pigeons' in team sporting, especially football, circles. This led to the new International Football Transfer Rules being 'agreed' between FIFA, UEFA and the Commission on 5 March, 2001, but not by the International Players' Union, FIFPRO, who subsequently challenged them in the Brussels Court of First Instance. Another question that remains is whether these new Rules offend the competition rules, in particular Article 81(1). It seems that they have the 'blessing' of the Competition Commissioner, Mario Monti, and that the Commission will not act against FIFA of its own accord. However, the nature of the 'agreement' reached is informal and the Commission has not issued a formal decision. The Commission has only given an undertaking.

But that is another entire story in itself and beyond the scope of this Paper. However. it is interesting to note, *en passant*, that the Balog case, which has come to be known as '*Bosman 2*' and also '*Bosmanovic*' and concerned the right of the Hungarian professional football player, Tibor Balog, to move freely from the Belgian Club 'RSC Charleroi' to the French Club 'As Nancy' at the end of his contract, which had been in litigation since 1998, was settled 'out of court' on 28 March 2001.

The collective purchase and sale of sports broadcasting rights, particularly television rights, has occupied the attention of National and EU Competition Authorities for several years (e.g. EBU Sports TV rights; the German Football Federation (DFB); and BBC/BSkyB English Premier League cases).

More recently, the EU Commission has been investigating the arrangements for the sale of the TV rights to the popular UEFA European Champions League Football Competition. The Commission has issued the following Notification (IP/01/1043) and Background Note (MEMO/01/271) on 20 July, 2001:

Notification

"The European Commission has sent a statement of objectives to European football organisation UEFA challenging UEFA's current arrangements for the selling of the rights to televise the UEFA Champions League. The Commission is concerned that UEFA's commercial policy of selling all the free and pay-TV rights on an exclusive basis to a single broadcaster per territory for a period lasting several years may be incompatible with EC competition law and should be improved to ensure that European sports fans can benefit from wider coverage of top European football events.

UEFA (Union des Associations Européennes de Football) notified its Regulations concerning the joint selling of the commercial rights to the UEFA Champions League to the European Commission in 1999 requesting clearance under European Union competition rules. This statement of objectives relates only to the UEFA Champions League TNV rights. Joint selling on an exclusive basis has a number of effects that threaten affordable access to football on TV unless certain safeguards are taken. UEFA sells all the TV rights to the final stages of the UEFA Champions League on behalf of the clubs participating in the league. One effect of this is that only bigger media groups will be able to afford the acquisition of and exploitation of the bundle rights. In turn, this leads to unsatisfied demand from those broadcasters who are unable to obtain TV rights to football. This lack of competition may also slow down the use of new technologies, because of a reluctance of the parties to embrace new ways of presenting sound and images of football.

The commission fully endorses the specificity of sport as expressed in the declaration of the European Council in Nice in December 2000, where the Council encourages a redistribution of part of the revenue from the sales of TV rights at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. However, the Commission considers that the current form of joint selling of the TV rights by UEFA has a highly anti-competitive effect of foreclosing TV markets and ultimately limiting TV coverage of those events for consumers. The Commission considers that joint selling of the TV rights as practiced by UEFA is not indispensable for guaranteeing solidarity among clubs participating in a football tournament. It should be possible to achieve solidarity without incurring anti-competitive effects.

The Commission will examine carefully any constructive proposals to render the current arrangement compatible with EC competition law and to guarantee open access to TV coverage of football.

The sending of a Statement of Objections does not prejudge the final outcome of the investigation and respects the rights of the notifying party and other interested parties to be heard.

UEFA has a total of three months to reply to the Commission's objections and can also request the

organisation of a hearing at which it would be able to submit its arguments directly to the representatives of the national competition authorities".

European Commission, 'The UEFA Champions League Background Note'
"The Champions League is a tournament organised every year by Geneva-based UEFA between the top European football clubs – 72 clubs participate from both European Union and non-EU countries.

The Champions League is one of the most important sports events in Europe. It is also one of the most watched events on television, generating over 800 million Swiss francs (£530 million) in TV rights, approximately 80 percent of the Champions League's total revenues.

How does UEFA sell the television rights to the Champions League?

UEFA sells the TV rights to a single broadcaster per Member State on an exclusive basis for periods of three to four years (See table in annex). The rights are split into primary and secondary rights. UEFA imposes minimum broadcasting obligations on the TV companies that win the rights. Champions League matches are currently played on Tuesdays and Wednesday. In big football nations the broadcaster must televise a Tuesday match live on either free TV or pay-TV and a Wednesday match live on free TV.

The contract broadcaster must broadcast highlights on free TV both nights. In the smaller member association the contract broadcaster must televise a Tuesday match live match on free TV on Tuesday if a club from that country is playing, and on Wednesday. Once the contract broadcaster has complied with its minimum broadcast obligations, it can exploit any additional rights by free TV or pay-TV.

Why is it the Commission's business how UEFA markets the TV rights to the Champions League?

The Commission initiated its investigation into the joint selling by UEFA of the TV rights because UEFA notified the arrangement to the Commission on 1 February 1999 seeking a legal guarantee that the agreement did not fall in the category of agreements that are prohibited by Article 81(1) of the EU treaty, or an exemption from EU competition rules.

Why is the Commission concerned about the current selling system?

Joint selling of free-TV and pay-TV rights combined with exclusivity has an important effect on the structure of the TV broadcasting markets since football is in most countries the driving force not only for the development of pay-TV services but it is also an essential programme item for free TV broadcasters. UEFA sells all the TV rights to the whole tournament in one exclusive package to one broadcaster per Member State. Because the winner gets it all, there is a fierce competition for the TV rights whose increasing value can only be afforded by large broadcasters. This may increase media concentration and hamper competition between broadcasters. If one broadcaster holds all relevant football TV rights in a Member State, it will become extremely difficult for competing broadcasters to establish themselves in that market. If different packages of rights were sold, several broadcasters would be able to compete for the rights, including smaller, regional or thematic channels.

Isn't this remedied by UEFA's sub-licensing policy?

No, UEFA's sub-licensing policy is rather exclusive and allows only one other broadcaster to show the UEFA Champions League matches that the main broadcaster itself is not showing. Thus a maximum of two broadcasters per Member State can televise the UEFA Champions League to the exclusion of all other broadcasters in that Member State, who cannot even show highlights of the matches.

Does this mean that the Commission wants to ban collective selling of football rights?

No, while joint selling arrangements clearly fall within the scope of Article 81(1), the Commission considers that in certain circumstances, joint selling may be an efficient way to organise the selling of TV rights for international sports events. However, the manner in which the TV rights are sold may not be so restrictive as to outweigh the benefits provided.

Have you received complaints from TV companies, individual clubs, sports fans or others on

current system? And if so what are their arguments?

The Commission has not received any formal complaints. However, it has received observations from a total of 65 national authorities, associations, football clubs, broadcasters and sport rights agencies in reply to a summary of the case published in the EU's Official Journal on 10 April 1999. Critical voices against central marketing are mainly to be found among broadcasters, sport right agencies and the national competition authorities. They contest that joint selling is necessary for the protection of the UEFA Champions League brand or for ensuring broadcasting on free-TV. It is argued that central marketing leads to higher prices for consumers, less football on TV and that UEFA's solidarity measures are inefficient, insufficient and is conducted in a non transparent way.

How are the champions league TV rights currently re-distributed between qualifying clubs?

Out of a total revenue of 800 million CHF, 75% goes to the clubs and 25% remains with UEFA to cover organisational and administrative costs as well as for solidarity payments. This leaves approximately CHF 122 million for solidarity payments, CHF 105 million for operational costs and CHF 47.2 million for UEFA.

Is the Commission against a solidarity redistribution of funds among football clubs?

The Commission fully endorses the specificity on sport as expressed in the declaration of the European Council in Nice in December 2000, where the Council encourages a redistribution of part of the revenue from the sales of TV rights at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. The statement of objections sent by the Commission does not put this principle into question.

Does the Commission believe that the current system leads to less football on TV and higher pay-TV subscription fees?

The Commission is convinced that furthering competition in the broadcasting market will lead to better quality TV coverage and lower subscription fees.

Could you explain how the current system slows down the use of new technologies (as mentioned in press release)?

In joint selling arrangements there is a reluctance to give licenses to apply new technologies such as the Internet and UMTS, because broadcasters fear that it will decrease the value of their TV rights.

What happens now that the Statement of Objections has been sent?

UEFA has 3 months to reply to the statement of objections and has the right to have an oral hearing to defend their case. If UEFA is to propose new ways of selling TV rights, the Commission will naturally examine the proposals and discuss them with UEFA."

The European Competition Commission is essentially concerned about the following elements of the way the TV broadcast rights to the European Champions League are currently sold:

- Exclusivity
- Single Broadcaster
- Per Territory
- Long Contracts

The aim of the Commission's intervention is;

"to ensure that the European sports fans can benefit from a wider coverage of top European football events."

According to the Commission, the current form of joint selling of the TV rights by UEFA has:

"a highly anti-competitive effect by foreclosing TV markets and ultimately limiting TV coverage of those events for consumers."

The Commission also considers that joint selling of TV rights is:

"not indispensable for guaranteeing solidarity among clubs participating in a football tournament."

And adds:

"it should be possible to achieve solidarity without incurring anti-competitive effects."

Indeed, in many submissions by third parties, including broadcasters and sports rights agencies, made to the Commission, UEFA's solidarity measures have been characterised as *"inefficient, insufficient and conducted in a non-transparent way."*

The Commission is convinced that furthing competition in the broadcasting market will lead:

"to better quality TV coverage and lower subscription fees."

Also, the Commission considers that, in joint selling arrangements, there is a reluctance to give licenses to apply new technologies, such as the INTERNET and UMTS, because broadcasters fear that it will devalue their TV rights.

The Commission has, therefore, called on UEFA to submit:

"constructive proposals [in order] to guarantee open access to TV coverage of football."

It will be very interesting to see UEFA's reply and how this Commission investigation develops, in due course.

Another popular sporting event with extensive marketing and television coverage - '*The Formula One Grand Prix*' - has also recently been the subject of a detailed and lengthy scrutiny of its regulatory and marketing arrangements by EU Commission. There is now a Commission decision regarding the 'Fédération Internationale de L'Automobile' (FIA). The nature of the agreement shows that the Commission and FIA have managed to negotiate a settlement that satisfies both. FIA has notified the agreement in terms of Article 19(3) of Regulation 17/1968. Essentially, under the agreement, a division is created between the rules necessary to regulate motor racing which FIA retain and the commercial aspects of the sport which have been hived-off to a commercial organisation for exploitation.[1]

During March 2001, the FIA and the Commission reached this agreement concerning several of FIA's contractual arrangements with regard to regulating and controlling the commercial aspects of Formula One motor racing. These arrangements had met with opposition from the Commission and, after considerable negotiations, FIA's Max Mosley and the Competition Commissioner Mario Monti reached an acceptable compromise. FIA has substantially amended its agreements making FIA a less dominant force in these arrangements. These modifications to the three agreements detailed below were notified in June 2001 and the Commission indicated that its initial objections have been met by FIA and that it would consider the new agreements favourably. The Notice, as is customary practice, invites interested parties to comment on the agreements before approval by the Commission.

"Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163

THE PARTIES
***FIA** was founded in France as a non-profit-making association. It has at present more than 162 members (29 from EU countries). These are national automobile clubs, associations, and national motor sport federations (ASN's). The FIA members organise and regulate motor sport in their respective territories.*

***ISC** is a company founded by Mr Bernie Ecclestone. Its principal activity was the marketing of television rights to FIA international series other than F1. In spring 2000, Mr Ecclestone sold the company to David Richards and the ISC is now charged with the promotion of the FIA World Rally Championship and the FIA Regional Rally Championships.*

***FOA/FOM**, companies controlled by Mr Ecclestone, are engaged in the promotion of the FIA Formula One Championship. The term FOA/FOM, ...includes FIA Formula 3000 International*

Championship Ltd, an Ecclestone family trust interest, which is engaged in the promotion of the FIA3000 Championship. The 1998 Concorde Agreement provides that FOA is the Commercial Rights Holder to the FIA Formula One Championship, FOA is thus responsible for televising and generally commercialising the Championship. On 28 May 1999, FOA changed its name to Formula One Management Limited (FOM) which manages the rights. The commercial rights themselves were taken over by an associated company, now named FOA.

PRODUCTS/SERVICES
These cases concern the following services and products: (a) the organisation of cross-border motor sport series; (b) the promotion of such series; (c) the certification/licensing of motor car sport events' organisers and participants; (d) the broadcasting rights of the FIA Formula One Championships.

THE NOTIFIED ARRANGEMENTS
A summary of these arrangements:

4.1 The FIA rules which comprises its statutes; the International Sporting Code; General Prescriptions applicable to all FIA championships, challenges, trophies and cups; The Regulations of the FIA International Championships; Information contained in the FIA Yearbook and FIA Bulletin.

The Notified Agreements:
The Concorde Agreement. the Formula One Agreement; the Grand Prix contracts between FOA and local promoters; Broadcasting Agreements; the FIA/ISC Agreement. These agreements were of a restrictive and anti-competitive nature as indicated below and were appropriately modified taking the Commission's objections into account:

5. MODIFICATION AND UNDERTAKINGS BY THE PARTIES
The Commission's Statement of Objections issued in June 2000 made the preliminary assessment that FIA has a 'conflict of interest' in that it was using its regulatory powers to block the organisation of races which competed with events promoted or organised by FIA (i.e. those events from which FIA derived a commercial benefit). Moreover for a certain period of time, FIA may have been abusing a dominant position under article 82 of the EC Treaty by claiming the TV rights to motor sport series it authorised. Analogous situation was created in formula one by the imposition of certain clauses in the Concorde Agreement. Finally certain notified contracts appeared to contravene Article 81 and/or Article 82 of the EC Treaty in that they raised further the barriers to entry for a potential entrant: the promoter's contracts prevented circuits used for formula one from being used for races which could compete with formula one for a period of 10 years; the Concorde Agreement prevented the teams from racing in any other series comparable to formula one; the agreements with broadcasters placed a financial penalty on them if they showed motor sports that competed with the F1 series. Certain agreements between the FOA and broadcaster appeared to restrict competition within the meaning of Article 81 of the EC Treaty by granting the latter exclusivity in their territories for excessive periods of time.

Although parties do not agree with the Commission's Objections, they have nevertheless agreed to modify significantly certain of their agreements.

The modifications have the following objectives:
- *to establish a complete separation of the commercial and regulatory functions in relation to the FIA Formula One World Championship and the FIA World Rally Championship where new agreements are proposed which place the commercial exploitation of these championships at arm's length,*
- *to improve transparency of decision-making and appeals procedures, and to create greater accountability,*
- *to guarantee access to motor sport to any person meeting the relevant safety and fairness criteria,*
- *to guarantee access to the international sporting calendar and ensure that no restriction is placed on access to external independent appeals,*
- *to modify the duration of free-to-air broadcasting contracts in relation to the FIA Formula One World Championship.*

In order to achieve a more complete separation between sporting and commercial matters and in order to increase transparency, FIA proposes that Mr Ecclestone relinquish his seat on the FIA

Senate and his role as FIA Vice-President for Promotional Affairs. FIA proposes to make Mr Ecclestone an honorary Vice-President of FIA. FIA is also prepared to stipulate that the representative of the formula one commission should not participate in any decision in the FIA World Motor Sport Council regarding the authorisation of any series, which is a potential rival.

Moreover, FIA will be prepared in principle to participate in the sporting management and attach the FIA's name to series where the series' organiser wishes to form a partnership with FIA, where an organiser promotes the definitive competition in a particular discipline, where that organiser demonstrably properly manages that competition and where the discipline itself is sufficiently popular and developed.

What follows are two examples of the proposed modifications, which FIA undertook to make. These serve as examples of the principles of transparency on access to competition that the Commission is keen to stress. Also observe that FIA had to avoid giving itself a privileged position vis-à-vis the contracts.

FIA/FOA Agreement dated 19 December 1995
The main proposed amendment to the FIA/FOA Agreement (is) to delete any reference to FIA favouring the FIA Formula One Championship or to FIA endorsing the Grand Prix (over other events) and Guaranteeing that no provision in the agreement would prevent FIA from performing its regulatory functions.

Upon expiry of the above-mentioned agreement with FOA, FIA proposes to enter into a 100-year agreement with a commercial rights holder for the marketing of the FIA rights in relation to the formula one championship. All rights to organise and receive revenues from the championship will be transferred to this company for a fixed fee. FOA will not be automatically named as successor to the existing agreement. The draft agreement provides for the separation of commercial and regulatory functions in relation to formula one, allows FIA to use its logos etc. for regulatory purposes, acknowledges FIA as the sole regulator of the championship over others.

FIA proposes to adopt a similar approach to the FIA World Rally Championship (FIA/ISC Agreement) and to any other commercially viable FIA series. FIA will enter into arms-length commercial agreements which will provides for fixed payments to be made to FIA removing thus any incentive for FIA to discriminate in favour of any series for commercial purposes.

FOA broadcasting contracts
FOA has removed from its standard for TV contract the provision whereby broadcasters were afforded a discount of the rights fee payable if they did not broadcast any other form of open wheeler racing by letters dated 14th August 2000 to the two broadcasters in the European Union whose contracts contained such a clause FOA unilaterally waived its rights in relation to it. Where exclusive rights have been granted in relation to terrestrial television, FOA is now limiting the duration of these contracts to a maximum of five years in the case of host broadcasters; and to a maximum of three years in all other cases.

FOA undertakes to notify comparable rival broadcasters when exclusive free to air broadcasting arrangements for a given territory expires and to invite them to apply. FOA has agreed to consider applications for broadcast rights on a non-discriminatory basis.

6. ASSESSMENT
The proposed changes to the regulatory framework and to the commercial arrangements appear to the Commission to introduce sufficient structural remedies minimising the risk of possible future abuse and to set the basis for a healthy competitive environment in economic activities related to motor sport. The Commission considers that, ***inter alia****, the following elements are of particular relevance to this assessment.*

The new rules introduce a separation of commercial and regulatory activities in motor sport, which FIA intends to make effective, ***inter alia****, through the appointment as from 2010 to a 'commercial rights holder' for 100 years, for each of the FIA Formula One and FIA World Rally Championships, in exchange of one-off fixed fee, payable at the outset.*

The modified rules provide that and the Commission has been assured that the FIA rules will never be enforced so as to prevent or impede a competition or the participant of a competitor, save for

reasons inherently linked to FIA's regulatory role of maintaining safety standards ... The reformed rules appear to provide satisfactory guarantees for a new regulatory environment where the FIA's licensing powers and the code's sporting and technical rules will be applied in an objective, non-discriminatory and transparent manner. The FIA will not object to the establishment of new events and the participation of circuits, teams and drivers in them, provided that the essential provisions contained in the code have been complied with. The FIA in this respect confirmed that all those complying with the rules of the code will have their events listed on the international calendar as a matter of right.

The new regulatory environment removes the previously identified obstacles to intra-brand and inter-brand competition. Competing events and series within the formula one discipline (and with other sport disciplines) will be possible. The reforms also create the possibility of increased inter-brand competition. New disciplines can be created, and events and series in potentially competing disciplines can be approved. FIA will have neither the commercial incentive not the regulatory power to limit the type and number of events it authorises, other than on the basis of objective criteria.

The notified agreements as amended will remove those barriers, which had prevented in the past the use of FIA licensed products and circuits or the participation of FIA licenses in different disciplines or in competing events in the same discipline. The proposed changes to the notified agreements will, for example, result in the availability of racetracks in Europe for rival series to use, even if these circuits already host FIA Formula One championship events.

The modified Concorde Agreement establishes the organisational structure of the FIA Formula One Championship and provides for the commercial arrangements aiming at marketing the series. As motor sport and especially formula one is a particularly complex technical activity requiring important investments in technological research and development, it is indispensable for all participants to agree on the way the series are organised. ***In this sport, for instance, all teams participate in all events at the same time. However, it is impossible to market in individual rights of each team participating in the race. As FIA, FOA, the teams, the drivers, the manufacturers and the local organiser or promoter may all have rights in the event, some arrangement between all of them for the sale or rights, especially the broadcasting rights, appears to be indispensable (emphasis added).*** *The Concorde Agreement provides for FOA to be the commercial rights holder for the FIA Formula One World Championship and to negotiate on behalf of the teams and FIA the organisation of the races with the local promoters and the sale of broadcasting rights with broadcasters. These arrangements do not appear to affect prices or output in the market to any significant degree. Individual formula one events do not compete with each other, as they are not broadcasting at the same time. Moreover all formula one events are available for broadcasting.*

All provisions in the notified agreements whereby FIA compelled license holders to surrender to FIA their broadcasting rights have been removed. The agreements no longer contain any rule or mechanism, which would allow FIA to appropriate all media rights to a given championship.

The broadcasting arrangements for formula one, as amended, will bring periods of exclusivity granted to individual broadcasters to a length that does not exceed what seems reasonable in view of the nature of the rights and the obligations and investments undertaken by broadcasters, given the specific features of the sport (emphasis added). *The pricing policy applied to contracts no longer penalises broadcasters who choose to broadcast open wheeler racing events other then formula one..."*[2]

The modifications and undertakings of the parties described above substantially alter the legal and economic context as compared to that described by the Commission in its Statement of Objections. The Commission, as previously mentioned, now intends to take a favourable view of the notified agreements.

Whilst this Notification of the amended FIA Regulations invites comments from interested parties, it clearly indicates that the Commission has taken account of the special nature/character of sport. One may even argue that it has taken the unique issues of motor racing into consideration and has sought to advance the growth of this particular sport. It has caused FIA to re-regulate itself so that it will avoid conflict of interests and will seek only to administer for the good of the sport. It will no longer use its regulatory role to impose abusive and anti-competitive contracts and commercial arrangements.

Another recent case to be mentioned is that of TVDanmark 1, which was decided unanimously by the House of Lords on 25 July, 2001 and concerned the European '*Television without Frontiers*' Directive, which requires certain sporting events of national interest ('listed events') to be shown on 'free to air' television. The case arose out of a dispute between the Independent Television Commission (ITC) and TVDanmark 1, a Danish satellite cable service, based in London, regarding its broadcasting of Denmark's 5 way World Cup 2002 Qualifying Games, even though they are listed events in Denmark. The ITC challenged this arrangements. Here is a summary of the ruling:

R v Independent Television Commission, EX Parte TVDanmark 1 Ltd (2001)
[2001] UKHL 42 LTL 25/7/2001: TLR 27/7/2001: (2001) 1 WLR 1604
HL (Lords Slynn, Nolan, Hoffmann, Hutton, Hobhouse) 25/7/2001

Article 3a(3) Television Without Frontiers Directive 89/552 EEC (as amended by Directive 97/36/EC) was clear that the result to be achieved in an auction of the rights to broadcast sporting events was to prevent the exercise by broadcasters of exclusive rights in such a way that a substantial proportion of the public in another member state was deprived of the possibility of following a designated event. It was not enough simply to give public broadcasters the possibility of buying the rights at a fair auction. Appeal from the decision of the Court of Appeal (summarised below) overturning the decision of the judge at first instance. The issue before the House of Lords was whether the Independent Television Commission ('ITC') was correct in its interpretation of the United Kingdom's obligation under Art.3a(3) Television Without Frontiers Directive Council Directive 89/552/EEC (as amended by Directive Amending TV Without Frontiers Directive Directive 97/36/EC) concerning broadcasts of designated events to another Member State. The domestic regime was contained in Broadcasting Act 1996 and the Statutory Code on Sports and other Listed Events ('the Code'). The Court of Appeal held that the ITC's interpretation was not correct and the Danish broadcaster ('TVD') was correct. The Secretary of State for Culture, Media and Sport and the BBC and ITV intervened in the appeal to the House to argue that the Court of Appeal had misinterpreted the domestic regime.

HELD: (1) The Result that Art.3a(3) required Member States to achieve was to prevent the exercise by broadcasters of exclusive rights in such a way that a substantial proportion of the public in another Member State was deprived of the possibility of following a designated event. The obligation to achieve that result was not qualified by considerations of competition, free market economics, sanctity of contract and so forth. The fact that reference was made to these matters in the recitals to the Directive explained why the scope of Art.3a was limited in the way it was. Its terms represented a compromise between the policies in question and the interests of the general public in being able to watch sporting events for free. The balance between the interests of sports organisers and pay-TV broadcasters in maintaining a free market and the perceived interest of the citizen in being able to watch important sporting events had already been struck in the terms in which Art.3a had been framed. It ought not be revisited when deciding how a member State should comply with its obligations under Art.3a(3). (2) The argument that the public was given the possibility of watching the event if the public broadcasters were given the possibility of buying the rights at a fair auction was wrong. The Directive required the public to have the possibility of the following the event in the sense that a member of the public could watch it if he chose to switch on his television set. If the match was not being shown on any programme to which he had access, he did not have that possibility. (3) The Code had to be read in the context of the regulatory scheme created by Part VI of the Act. It did not necessarily require the ITC to give consent to a broadcaster who had bid highest in a free and open competition. Nor did it give rise to a legitimate expectation that in such circumstances consent would be given. (4) The contrast between the two systems of regulation at "the point of acquisition" (the UK system) and "the point of exercise" (the European system) was greatly exaggerated. Both Part IV of the Act and the Directive were concerned with the exercise of exclusive rights to designated events. The statutory result to be achieved was the same. Whilst the Code said that the ITC would ordinarily make its decision under s.101 of the Act by reference to the terms on which the rights were acquired, there was no hard and fast line that limited the matters which the ITC could take into account when deciding whether the price offered to the public broadcasters was fair or not. (5) Further, the Court of Appeal overstated the uncertainties of "regulation at the point of exercise" and any depression of the value of rights under that system was a consequence that inevitably followed from the protection that the Directive was intended to confer upon the public right of access to such events. (6) The ITC's view that it would accept Danish law

on these matters and on the question of what amounted to a substantial proportion of the public, but that otherwise the decision was a matter for them, was correct. It was also correct to pay regard to the fact that under the Danish system a non-qualifying broadcaster was required to offer to share the rights with public broadcasters who could offer sufficient coverage. (7) Any broadcaster in any Member State who was considering the purchase of exclusive rights to broadcast in Denmark an event designated under Danish law had to take into account the Danish system of regulation. That system of regulation would influence the market for such rights in Denmark and prima face it seemed right that broadcasters in other Member States should have to play by the same rules. That was the object that Art.3a(3) was intended to achieve. The ITC and the judge at first instance had correctly interpreted it in that way.

Appeal allowed. Application for judicial review dismissed.

I think that there can be very little, if any, room for argument or doubt that this case was correctly decided being entirely in line with the clear and stated objective of the new article 3a of the '*Television Without Frontiers*' Directive (see recital 18).

SOME RECENT REFERENCE TO THE EUROPEAN COURT OF JUSTICE

We will now take a look at two important references made recently to the European Court of Justice (ECJ) from the English Courts in sports related cases.

The first case involves the British Horse Racing Board and its claim to Database Rights. Although in *stricto sensu* not a competition law case, I have included it in this Paper, because it raises some important points in relation to the legal protection in the EU against unfair and unauthorised commercial exploitation of these valuable new intellectual property rights, which are themselves a creature of EU Law and whose exploitation may give rise to competition issues.

This is not only the first case to come before English Courts under the EU Database Directive of 1996, but - to date - there has been no ruling on the scope of the Directive by the ECJ.

It is interesting to note the pragmatic approach taken by the Court of Appeal to a Reference to the ECJ - not being the final Appellate Court, the Judges only have a *discretion* to refer the case to the ECJ, unlike the House of Lords that is *bound* to refer, where the case involves a point of EU Law. It will also be very interesting to see the questions formulated for the ECJ to determine and the answers to them.

The case also underlines the importance to Sports Governing Bodies of this new intellectual property right of 'database right' and they will be awaiting the final outcome of the case with great interest.

I am inclined to the view that the trial judge was right in his judgment, particularly when he made the point that the database right would appear to be designed to protect the investment in the database not the form of its exploitation by a third party. The financial investment made by the BHB in the database was quite considerable running into several millions of pounds over a period of several years and, furthermore, they employ some 80 people to maintain and service it.

However, the ECJ will be able to consider the matter in wider European context, very much in line with the following remarks of Sir Thomas Bingham MR in *R v International Stock Exchange, ex p. Else Ltd.* [1993] QB 534, at p.545:

> *"I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can ...[so] resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments..."*

It will be interesting to see what the ECJ decides in due course, which could be two to three years down the line! But, then, that is the price one has to pay for jurisprudence if not justice.

ARSENAL CASE

The second reference to the European Curt of Justice, that I wish to discuss, is the so-called Arsenal case, which is an unfair competition matter but also - perhaps just as importantly - raises a novel point in Trade Mark Law.

Arsenal Football Club Plc v Matthew Reed (Laddie J) 6 April, 2001, Unreported

Claimant's actions in passing off registered trade mark infringement under s.10(1) and s.10(2)(b) Trade Marks Act 1994 against the defendant who, for 31 years, had been selling football souvenirs both inside and outside the claimant's ground. The Claimant was also known by its nickname, "the Gunners". It had for a long time been associated with two graphics or logos; the first consisted of a shield and was referred to as the "Crest Device", the other, referred to as the "Cannon Device" depicted an artillery piece ('the Arsenal signs').

The claimant derived considerable income from the sale of souvenirs, which it sought to control by licensing. Its licenses were required to describe the claimants products as "official" and to mark them in a way that complied with the claimant's current labelling requirements. The claimant has registered the words "Arsenal" and "Gunners" and the Arsenal signs as trade marks. The court had to decide:

(i) whether sales by the defendant of certain unlicensed souvenirs or memorabilia would mislead the public into the belief that those goods were the products of the claimant or were goods associated or connected with or licensed by the claimant because they bore one or more of the Arsenal signs;
(ii) whether an employee of the defendant had attempted to deceive customers by falsely representing that unlicensed products were "official" products, made by or with the license of the claimant;
(ii) whether, from the average customer's perspective, the defendant's words and devices were used as trade marks and whether, on a proper construction of s.10 of the Act, the defendant's sign must be used as a trade mark for the relevant goods; and
(iv) whether the claimant's trade marks were all invalid and should be revoked under s.46 of the Act because they had not been used within a relevant five-year period or revoked under s.47 of the Act because they were incapable of distinguishing the claimant's goods in a trade mark sense and therefore offended s.1(1) and s.3(1)(a) of the Act.

HELD: **(1)** Passing off was designed to prevent damage being caused by deception to goodwill of the claimant and the business, which benefited from the goodwill. *Warnink BV v J Townend & Sons* (1980) RPC 31 followed. The claimant had failed to produce evidence to support its case of likelihood of confusion. It was difficult to believe that any significant number of customers wanting to purchase licensed goods could reasonably think that the defendant was selling them, except when they were expressly marked. In the absence of relevant confusion, the claimant had also failed to show that it had suffered relevant damage as a result of the defendant's activities.

(2) There was no evidence to support the claimant's case in passing off.

(3) The Arsenal signs on the defendant's products would be preceived as a badge of support, loyalty or affiliation to those to whom they were directed. They would not be preceived as indicating trade origin. To succeed on trade mark infringement, the claimant had to rely on the non-trade mark use of those signs, a wide construction of s.10 of the Act. Use of a sign in a non-trade mark sense could infringe a registration. *Phillips Electronics Ltd v Remington Consumer Products (1998)* RPC 283 followed. The law on this point however was not settled and needed to be resolved by the European Court of Justice.

(4) If the claimant had only used the signs in a way that they had been used on the defendant's products, there would have been no relevant trade mark use. The claimant's use of the signs was not, however, so limited and they had been used on swing tickets, packaging and neck

labels in just the way that one would expect a trade mark to be used. The argument of non-use failed.

(5) There was no reason why the use of Arsenal signs in a trade mark sense, for example, on swing tickets and neck labels, was not capable of being distinctive. The fact the signs could be used in other non-trade mark ways did not automatically render them non-distinctive.

Judgment accordingly.

This is an interesting case and, like all unfair competition and trade mark cases, turns on its particular facts and circumstances.

As far as 'Passing Off' is concerned, I think the rejection of Arsenal's claim by the Court was correct, as the claimants did not offer any evidence of any actual confusion on the part of potential customers - perhaps the most important ingredient in the tort of 'Passing Off'. *A fortiori*, Reed's stall displayed a prominent 'disclaimer' to the effect that his Arsenal branded merchandise was not, in fact, authorised or approved by Arsenal! No one, therefore, could possibly be misled in these circumstances. However, the real interest in the case lies in whether Reed's use of the Arsenal marks constituted a trade mark infringement. The distinction made by the Judge between the marks being used a 'badge of support' rather than a 'badge of origin' (the true '*raison d'etre*' and purpose of a trade mark) is, in my view, arguably an artificial one, because, in effect, the marks are being used in both senses. They are there on the merchandise to facilitate sales and also to promote allegiance to the Arsenal Football Club and the Team amongst the fans. In other words, the marks are being applied in a commercial sense.

However, it is a close one to call and it will be very interesting to see how the European Court of Justice decides the issue in due course!

SHOULD SPORT BE EXEMPT FROM EU COMPETITION LAW?

Finally, I would like to briefly raise the issue of whether Sport should be exempt from EU Competition Law, which, despite the Nice Declaration on Sport (referred to and commented on above), will, I think, remain an open question as the EU Policy on Sport continues to develop and evolve through decisions of the European Commission and the Court of Justice in the future.

International Sports Governing Bodies, as is well known, resent outside interference in their affairs. They jealously guard their autonomy and prefer self-regulation rather than external regulation, and have consistently argued that sport is special and should enjoy a special legal status. In other words, Sport and Sports Bodies should be free from legal interference, particularly European Competition Law.

The decision of the European Court of Justice in *Bosman* in 1995 and the following protracted and, at times, acrimonious discussions between, UEFA and FIFA, the European and World Governing Bodies of Football, and the European Union (EU) Competition Commissioner, Mario Monti, which led to the 'agreement' on 5 March of new International Football Transfer Rules (see above), brought this issue, which had never been far from the surface, once again into sharp focus.

As noted above, in its evolving policy on sport, the EU has been at pains to point out that it recognises the *"special characteristics and complex structures of sport"* and *"only intervenes for its benefit."* In fact, in the Report, presented by the EU Commissioner for Sport, Viviane Reding, to the Helsinki Summit in December 1999, the Commission committed *"to safeguarding current sports structures and maintaining the social function of sport within the European framework."* And before that, EU leaders in the amending Treaty of Amsterdam included a Declaration on Sport, calling on EU Bodies to *"listen to Sports Associations when important questions affecting sport are an issue."*

These are not just words. In fact, the Commission and the Court have taken the particular circumstances of sport into account in several decisions in sport-related cases to date, including the ones discussed in this Paper. And, as for listening, Madame Reding held a special meeting with the European Sports Federations in Brussels on 17 April 2001, with the specific purpose of reviewing the sports situation in the EU and identifying future areas of co-operation.

However, as she pointed out, it is primarily up to the Federations *"to adjust to the new economic, social and political climate" and to recognise that "European society is changing radically and sport cannot remain oblivious to these changes."*

However, the question needs to be asked whether sport, which is now a significant 'industry' globally and also in the EU, where, as previously mentioned, it represents more than 1% of GNP, where two million jobs - directly or indirectly - related to sport have been created and where sports sponsorship grew last year by 16% to US$6.5 billion, *should* be treated differently to any other European industry.

Arguments that sport fulfils a useful social function and sports bodies are best left to regulate it themselves might be persuasive and decisive, in the absence of such impressive statistics.

For as Stephen Weatherill, Jacques Delors Professor of European Community Law at Oxford, has expressed it:

> *"the greater the commercial rewards of sports, the harder it is to make the case that sport has a character that is distinct from 'normal' profit-making industry."*

Also, as the Commission itself has observed in a Press Release of 24 February, 1999, IP/99/133:

> *"Sport...has features, in particular the interdependence of competitors and the need to guarantee the uncertainty of results of competitions, which could justify that sport organisations implement a specific framework, in particular on the markets for the production and the sale of sports events...However, these specific features do not warrant an automatic exemption from the EU competition rules of any economic activities generated by sport, due in particular to the increasing economic weight of such activities."*

Furthermore, self-regulation relies on voluntary co-operation - not the force of law, which can - and often does - lead to uncertainty and arbitrariness.

At their 'Summit' in Nice, the EU leaders were not prepared to exempt Sport from EU Law, nor agree to a special 'Protocol on Sport'. Instead, they agreed a new Declaration on Sport, which, as previously mentioned, is a very comprehensive and persuasive one.

At the present time and in the foreseeable future, that is where the matter, in my view, is likely to remain. But the matter is far from dead, as I am sure that the Sep Blatters of this world will again try to squeeze more out of the EU at some appropriate and opportune time in the future.

CONCLUSIONS

The European Union will continue to exert a significant influence on Sport in the foreseeable future, not least because of the power and influence enjoyed by European Sport in a global context.

In the application of EU Competition Law to the sporting arena, a distinction is drawn between sporting rules and commercial ones. In the former case, EU Law does not apply, provided any restrictions satisfy a '*proportionality test*' - that is, go no further than is necessary to achieve their sporting objective. In the latter case, where the practice of sport involves an economic or commercial activity, EU Law does apply. However, for example, as the reform of the International Football Transfer Rules has shown, it is often difficult to distinguish between the two kinds of rules in practice.

As Sport continues to expand economically and commercially, new sporting situations will inevitably arise that fall to be considered under the EU Single Market and Competition Rules by the European Commission and the Court,

As breaches of the EU Competition Rules can result in swingeing fines of up to 10% of the world wide turnover of an offender, to ignore the European dimension in Sport would be sheer commercial folly on the part of all those engaged in the practice and commercialisation of sport. Not least the International Sports Federations, who would do well to swallow other pride and engage in dialogue and co-operate with the EU Authorities, rather than trying to assert their independence on every conceivable occasion and try to ride rough shod over them!

APPENDIX I

DECLARATION ON THE SPECIFIC CHARACTERISTICS OF SPORT AND ITS SOCIAL FUNCTION IN EUROPE, OF WHICH ACCOUNT SHOULD BE TAKEN IN IMPLEMENTING COMMON POLICIES

Presidency Conclusions, Nice European Council Meeting, 7,8,9 December 2000

1. *The European Council has noted the report on sport submitted to it by the European Commission in Helsinki in December 1999 with a view to safeguarding current sports structures and maintaining the social function of sport within the European Union. Sporting organisations and the Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.*

2. *The European Council hopes in particular that the cohesion and ties of solidarity binding the practice of sports at every level, fair competition and both the moral and material interests and the physical integrity of those involved in the practice of sport, especially minors, may be preserved.*

Amateur sport and sport for all

3. *Sport is a human activity resting on fundamental social, educational and cultural values. It is a factor making for integration, involvement in social life, tolerance, acceptance of difference and playing by the rules.*

4. *Sporting activity should be accessible to every man and woman, with due regard for individual aspirations and abilities, throughout the whole gamut of organised or individual competitive or recreational sports.*

5. *For the physically or mentally disabled, the practice of physical and sporting activities provides a particularly favourable opening for the development of individual talent, rehabilitation, social integration and solidarity and, as such, should be encouraged. In this connection, the European Council welcomes the valuable and exemplary contribution made by the Paralympic Games in Sydney.*

6. *The Member States encourage voluntary services in sport, by means of measures providing appropriate protection and acknowledging the economic and social role of volunteers, with the support, where necessary, of the Community in the framework of its powers in this area.*

Role of sports federations

7. *The European Council stresses its support for the independence of sports organisation and their right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives.*

8. *It notes that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport, which co-exist there; they provide the possibility of access to sports for the public at large, human and financial support for amateur sports, promotion of equal access to every level of sporting activity for men and women alike, youth training, health protection and measures to combat doping, acts of violence and racist or xenophobic occurrences.*

9. *These social functions entail special special responsibilities for federations and provide the basis for the recognition of their competence in organising competitions.*

10. *While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy.*

Preservation of sports training policies

11. *Training policies for young sportsmen and women are the life blood of sport, national teams and top-*

level involvement in sport and must be encouraged. Sports federations, where appropriate in tandem with the public authorities, are justified in taking the action needed to preserve the training capacity of clubs affiliated to them and to ensure the quality of such training, with due regard for national and Community legislation and practices.

Protection of young sportsmen and women

12. *The European Council underlines the benefits of sports for young people and urges the need for special need to be paid, in particular by sporting organisations, to the education and vocational training of top young sportsmen and women, in order that their vocational integration is not jeopardised because of their sporting careers, to their psychological balance and family ties and to their health, in particular the prevention of doping. It appreciates the contribution of associations and organisations which minister to these requirements in their training and thus make a valuable contribution socially.*

13. *The European Council expresses concern about commercial transactions targeting minors in sport, including those from third countries, inasmuch as they do not comply with existing labour legislation or endanger the health and welfare of young sportsmen and women. It calls on sporting organisations and the Member States to investigate and monitor such practices and, where necessary, to consider appropriate measures.*

Economic context of sport and solidarity

14. *In the view of the European Council, single ownership or financial control of more than one sports club entering the same competition in the same sport may jeopardise fair competition. Where necessary, sports federations are encouraged to introduce arrangements for overseeing the management of clubs.*

15. *The sale of television broadcasting rights is one of the greatest sources of income today for certain sports. The European Council thinks that moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, are beneficial to the principle of solidarity between all levels and areas of sport.*

Transfers

16. *The European Council is keenly supportive of dialogue on the transfer system between the sports movement, in particular the football authorities, organisations representing professional sportsmen and - women, the Community and the Member States, with due regard for the specific requirements of sport, subject to compliance with Community law.*

17. *The Community institutions and the Member States are requested to continue examining their policies, in compliance with the Treaty and in accordance with their respective powers, in the light of these general principles.*

Revised version of a Paper presented at BAFSAL 9th Annual Conference, held on 18 October 2001 at Lord's Cricket Ground.

Footnotes

(1) For full details see: OJ C169/5, 13.6.2001, Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 - Notification of FIA Regulations, COMP/36.638 - Notification by FIA/FOA of Agreements relating to the FIA Formula One World Championships, COMP/36.776 - GTR/FIA & others.

(2) COMP/35.163 - Notification of the FIA Regulations, COMP/36.638 - Notification by FIA/FOA of Agreements relating to the FIA Formula One World Championship, COMP/36.776 - GTR/FIA & others OJ 13.6.2001, (2001/C 169/03). The underlined words indicate that each sport's special features are taken into account when deciding what is an acceptable practice. It can also be observed that exclusivity per se is not objectionable, but only the manner in which it is exercised.

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Listed Events and Sale of World Cup T.V. Rights

Adrian Barr-Smith

A. SPORTING AND OTHER EVENTS OF NATIONAL INTEREST (LISTED EVENTS)

1. Background

This concept is established by sections 97-105 Broadcasting Act 1996 ("the Act"), as amended by the Television Broadcasting Regulations 2000 (which ensure that broadcasters established in the UK and broadcasting to other EEA states do not circumvent the rules on listed/designated events in those states). It relates to the televising of sporting and other events of national interest which have been listed by the Secretary of State for Culture Media and Sport.

2. Effect

The Act restricts the **acquisition** by a television programme provider of exclusive rights to the whole or any part of live television coverage of a Listed Event and the **broadcasting** on an exclusive basis of such coverage **without** the previous consent of the Independent Television Commission (ITC). In other words, a pay TV (or limited reach) broadcaster is not permitted to broadcast live coverage of a Listed Event, unless rights are made available to a free to air (or universal coverage) broadcaster. Reciprocally, there will be no exclusive broadcast on free TV, unless rights are made available to a pay TV service. In deciding whether to give its consent, the ITC must be satisfied that free to air broadcasters have had a genuine opportunity to acquire the rights on "fair and reasonable" terms. The ITC will take into account a variety of factors such as the transparency of the tendering process, the packaging of the rights, any condition or costs attached, and whether the price sought for the rights is fair, reasonable and non-discriminatory.

The Act also lays down (ss 99/100) that a contract which purports to grant exclusive rights for a Listed Event to a limited reach broadcaster would be "void", unless it allowed for those rights to be made available to a universal coverage broadcaster. However, when the question was actually asked, *'how would this work?'* in the context of the broadcasting of the 2002 World Cup (see below), the response from the regulators was

> *"we haven't really considered this because we thought the Act itself would operate as a deterrent."*

3. ITC Code

Section 104 of the Act requires the ITC to draw up and review a code (the "Code") giving guidance on certain matters. The Code is produced following consultation and has been updated to incorporate the requirements of the Television Without Frontiers Directive (89/552/EC) as amended by the European Broadcasting Directive (97/36/EC). The Code is intended to clarify what constitutes a "live" broadcast and in what circumstances the ITC would grant consent to an exception under the Act.

4. Listed Events

Following extensive consultations, an advisory group set up by the Secretary of State and chaired by Lord Gordon of Strathblane CBE reported on 20 March 1998 that a two tier approach should be adopted.

4.1. Group A Events

These are the "crown jewels", the very backbone of the sporting calendar. Live coverage must be made available on free-to-air TV.

4.2. Group B Events

Whilst these events are significant in their own right, they are deemed to be of lesser importance to society as a whole. The regulatory restriction placed on the broadcast of these events is less onerous. The ITC will give its consent to the exclusive live coverage on a subscription channel, provided that *adequate* provision has been made for secondary coverage on a free to air service. In deciding whether the coverage is "adequate", the ITC will consider, inter alia, the duration of any edited highlights programme and whether the broadcaster has editorial control over the content and scheduling of the edited highlights programme.

5. Revision of Code

The Code was amended in January 2000. In October 2001 a consultation paper was published (website www.itc.org.uk) proposing new revisions to the Code in the light of the *TV Danmark* case. In the *TV Danmark* case, the High Court stated that the Code was "singularly unhelpful" and placed too much emphasis on whether broadcasters had a genuine opportunity to win the rights on fair and reasonable terms *at the time* the acquisition was made, rather than concentrating on how a limited coverage channel, having acquired the rights, *exercises* them. The ITC has set out in some detail how it will exercise its consent in cross border cases akin to *TV Danmark* and the procedure it will follow.

6. Philosophy

At first sight, the concept of "listing" of events is artificial. It distorts the market place. It gives rise to anomalies. The first ever list included the Oxford and Cambridge Boat Race. It is a highly charged political issue. Throughout the campaign of the England and Wales Cricket Board to have England Test Matches de-listed in the mid-1990's, the constantly recurring theme was "what about MPs' postbags?" Proponents of "listing" talk about the traditional right of the TV viewer to see the crown jewels on free to air television. This is nonsense. There is no such tradition. The marriage of TV and live sport is a relatively recent phenomenon.

However, the reason I support the concept of listing is because I believe in a "public service" right. It is the other side of the compulsory licence fee coin. In the UK we are privileged to watch high quality public service broadcasting but we are obliged to pay for it. Those who pay the TV licence fee are entitled to expect "bangs for their buck". This is why I support the concept of "listing" in any country where viewers are required to pay specifically in order to receive public service broadcasting.

B. SALE OF TV RIGHTS TO FIFA WORLD CUP 2002

1. Background

The imposition of the Listed Events restriction has helped to create the problem which exists in relation to next year's World Cup Finals in Japan and South Korea. The problem starts with the huge amount paid by the Kirch Group to FIFA for the worldwide broadcasting rights to the 2 World Cup Finals Tournaments 2002 and 2006. It has been exacerbated by the current economic climate and, in particular, the decline in TV advertising revenues.

2. Deadlock

FIFA granted the rights for £1.6 billion, but Prisma Sport and Media (which is part of the Kirch Group) had difficulty in concluding an agreement for the sale of the rights for the 2002 Competition in the UK. Having concluded lucrative deals in Germany and Spain, Prisma demanded £170 million from UK broadcasters for the rights to the 64 matches.

However, the BBC and ITV jointly offered Prisma a sum of £50 million (a previous offer of £40m was made), which Prisma declared was unacceptable and consequently complained to the Office of Fair Trading (OFT), claiming that the BBC and ITV were effectively acting as a cartel. Following the *TV Danmark* decision, it appeared that the complaint to the OFT is the last regulatory card that Kirch can

play in its desperate bid to open up competition. Many commentators believed the OFT unlikely to open an investigation because of the political dimension of the case.

3. UK position

3.1. Comparison of the offer

The BBC and ITV stated that their offer for the rights was a reasonable one. It amounted to over a 1000% increase, when compared to the £4m they paid for the broadcasting rights to the 1998 World Cup (acquired through the EBU). Plus, they argued that the fee was reasonable, considering the time at which such matches will be broadcast live in the UK at 7am, 9am and 11am.

Looking at the then current ITV/BBC bid, I drew 2 comparisons and assumed that Michael Owen's hamstring doesn't allow him to play and as a result England only play 3 group matches before returning home.

BSkyB's successful bid for Premier League rights in 2001/2 valued each match at just over £5m.

Applying this value to each England World Cup 2002 match x 3 matches = £16m in total.

The remaining 61 World Cup matches would cost ITV/BBC £34m = £560K per match.

BSkyB's 1992 bid valued each Premier League match at £630K.

3.2. ITC Regulation

BBC and ITV also pointed to the fact that, in accordance with UK broadcasting regulation (as mentioned above) and reinforced in the recent decision of the House of Lords in the *TV Danmark* case, the 64 matches **must** be shown on free to air television.

3.3. Anti-Competitive behaviour

In response to Kirch's suggestion that the BBC and ITV were operating a cartel, BBC and ITV argued that:

(i) viewers benefit from their relationship (which has been in place since the 1966 World Cup) due to the fact that the pooling of resources enables all matches to be shown live (incl. such as South Korea v. Costa Rica), and alternative programming is available to viewers on the channel that is not showing the match;

(ii) there is competition for the purchase of rights in the form of Channel 4 (which fulfils the necessary coverage requirements for the broadcasting of Listed Events);

(iii) Kirch accepted joint or consortium bids from broadcasters in Germany, Scandinavia (although the Scandinavian consortium is reported to be shaky) and South Korea for the rights to the 2002 World Cup.

4. Developments

Prisma pointed out that Kirch was under no obligation from FIFA to sell the UK rights and hinted that if it did not receive an acceptable bid it might retain the UK rights and look to make up the deficit from the sale of rights to the 2006 World Cup in Germany (which offers perfect scheduling for all European broadcasters).

It seemed likely that FIFA might intervene in the dispute. Many of the World Cup sponsors such as Coca Cola and McDonalds were concerned with the fact that Kirch has not yet concluded deals in the crucial markets of France, Italy and the UK. The sponsors were eager to have their advertising seen as widely as possible during the Tournament and might have insisted that FIFA act as an intermediary in these disputes.

5. Conclusion

A deal was announced on 18 October and sources close to the BBC revealed that the sum of £160 million would be paid by the BBC/ITV for the rights to both the 2002/2006 World Cups together. The broadcasters also announced that they would seek the ITC's consent to broadcasts of the World Cup Finals Tournaments only on free to air channels.

Revised version of a Paper presented at BAFSAL 9th Annual Conference, held on 18 October 2001 at Lord's Cricket Ground.

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Database Right - A New Revenue Stream for Sports Bodies?

Hamish Porter

INTRODUCTION

We live in the information age, where knowledge, which is up to date, relevant and easily accessible, can command a high price on the open market. A measure of the value of information is the phenomenon of an ISP, America On-Line, whose principal asset was a list of the names and addresses of its subscribers, acquiring the largest media company in the world, Time Warner, a company rich in IP assets. AOL had a market capitalisation greater than that of Time Warner at the time of the announcement of their merger, notwithstanding that their respective balance sheets showed a substantial disparity in favour of Time Warner. This was almost entirely due to the fact that the market valued an extensive subscriber list more highly than a huge catalogue of films, musical works and other copyrights.

Other types of high value data include financial information concerning stocks and shares, trends and prices; rates of exchange, interest rates, etc - invaluable today for financial institutions which make business decisions based on their having at their fingertips up-to-date information. Similarly, in the sports industry, data concerning fixtures, performances, league tables etc. are now seen by sports bodies to be potential revenue earners. Broadcasters, newspaper publishers, bookmakers and many other commercial organisations make money out of this kind of information and therefore have a commercial interest in acquiring it. However, the curious thing about this kind of information is that a large proportion of it is compiled from information which is already in the public domain. This represents one of the principal distinctions between database right and copyright: whilst copyright protects an individual's originality/creativity against copying, the database right protects the investment which the maker of the database has put into his compilation of data. The database right does not protect the information itself.

DATABASE DIRECTIVE

The Database Directive, the full title of which is the Directive of the European Parliament and of the Council on the Legal Protection of Databases of 11 March 1996 (96/9/EC), was required to be incorporated into national legislation by 1 January 1998. The terms of the Directive have been enacted under English law in the form of the Copyright and Rights in Databases Regulations 1997 (the "Regulations").

The Directive has 60 recitals which set out the policy behind the introduction of this new law and the creation of this new right. After stating that the significant differences in the legal protection of databases offered by the legislation of Member States need to be harmonised to prevent the distortion of the functioning of the internal market, the recitals (at paragraphs 9 and 10) go on to say

that databases are a vital tool in the development of an information market within the Community and that, with the exponential growth in the amount of information being generated and processed annually in all sectors of commerce and industry throughout the world, significant investment is being made in advanced information processing systems. The Recitals then state:

> *"(11) whereas there is at present a very great imbalance in the level of investment in the Database sector both as between the Member States and between the Community and the world's largest database producing third countries;*
>
> *(12) whereas such an investment in modern information storage and processing systems will not take place within the community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;*
>
> *(13) whereas this Directive protects collections, sometimes called "compilations" of works, data or other materials which are arranged, stored and accessed by means which include electronic, electro-magnetic or electro-optical processes or analogous processes;*
>
> *(14) whereas protection under this Directive should be extended to cover non-electronic databases."*

In short, the Directive was passed in order to provide harmonised protection across the Member States, and to provide protection for the investment made by nationals of Member States in information processing systems, in order to compete with the successful database industry which had by then been established in the United States.

WHAT DATABASES ARE PROTECTED?

The wording used in the Directive's recitals to explain the policy behind the Directive finds its way into the definition of database in Article 1(2):

> *"For the purposes of this Directive, "database" shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."*

Article 1(3) makes clear that the protection does not extend to computer programs used in the making or operation of databases accessible by electronic means. In other words, database management systems developed in order to make information held on the database accessible to users is not protected. The object of protection is defined in Article 7 (to which I refer later) which makes it clear that what is protected is the investment made in the obtaining, verification or presentation of the contents of the database.

So what is included within the definition of "database" under the Directive? It seems that any collection of data which is arranged methodically or systematically is protected, in whatever form it is held. An example of the kind of collections of data which would be protected as databases, other than the electronic database which is clearly the main object of protection, are maps containing information relating to topographical features of landscape, roads, human settlements, etc; biographies containing factual information about someone's life; bus timetables; electoral registers; lists of customers' names and addresses; and more relevant to the subject matter of today's conference, football league tables, lists of horses or greyhounds running in today's racing fixtures, Wisden's batting and bowling averages for the 2001 season, etc. Provided that significant time or financial expense has been invested in the collection, verification or presentation of these collections of data, they qualify for database right protection.

COPYRIGHT PROTECTION

Collections of data can benefit from two separate layers of protection, database right and copyright. Article 3 of the Directive defines the object of protection for databases protected by copyright:

> *"In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by*

copyright. No other criteria shall be applied to determine their eligibility for that protection."

In the BHB case, when we were discussing with the client whether we should plead both copyright and database right infringement, we had to consider whether lists of runners together with the relevant fixture details amounted to a collection of data which involved intellectual effort in the selection or arrangement of the information held. We decided that this would be a difficult argument to run and that we should plead only database right infringement. After all, neither BHB nor Weatherbys (who compile the information on BHB's behalf) decide which horses are to run in races, except to the extent that they verify that the horses are eligible to run. The owner or trainer of the horse makes that decision and enters the horse for the race in accordance with BHB's procedures. On the other hand, however, the collection of information concerning performances of batsmen and bowlers over the course of a season and the conversion of that information into averages may very well qualify for copyright protection as it involves some intellectual effort in the arrangement of the information in the form of averages. Similarly, a list of the top 100 test innings or international goals is likely to qualify for copyright protection as a database, because it involves a subjective analysis of the quality of a vast number of innings or goals in order to select the top 100. Previously, before the introduction of the Directive into English law, our copyright laws protected compilations of any kind, provided time, effort or money had been spent in creating them irrespective of intellectual effort. The distinction between copyright protection and database right protection is a significant one, as I shall explain later.

WHO OWNS THE DATABASE?

The Directive contains a curious anomaly which may yet be the subject of a reference to the European Court of Justice. Article 4 states that:

> *"the author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the right holder by that legislation."*

This definition is contained in the section under the heading "Copyright". Under the heading dealing with the database right, otherwise known as the *sui generis* right, the Directive states that:

> *"Member States shall provide for a right for the maker of a database which shows that there has been... a substantial investment in either the obtaining, verification or presentation of the contents..."*

We therefore appear to have two alternative owners of the database, the author (i.e. the person who actually put the information together) or the maker of the database (being the person who invested in the obtaining verification or presentation of the contents). The Regulations are clearer in that, in defining who is "the maker of a database", paragraph 14(1) states categorically that he is:

> *"the person who takes the initiative in obtaining, verifying or presenting the contents of the database and assumes the risk of investing in that obtaining, verification or presentation."*

The amendments made to the Copyright Designs and Patents Act 1988 to define which databases are protected by copyright and who is entitled to first ownership of the copyright provide, at section 9(1), that the "author" of a database is the person who creates it, and at section 11(1) that the author of a database is the first owner of any copyright in it, except where it is made by an employee in the course of his employment, in which case it is owned by the employer.

Accordingly, where a database is entitled to both copyright and database right protection, it is possible to have separate owners of each separate right. In the case, for example, of the BHB database, it is compiled by Weatherbys under a contract with BHB and BHB pays for the cost of Weatherbys' services. In these circumstances, Weatherbys is the author of the database under the Directive and under Copyright Act is therefore the first owner of the copyright in the database, but under the Regulations, BHB is the owner of the database right, having taken the initiative in creating the database and having borne the risk of the investment. BHB's contract with Weatherbys does, of course, contain a provision which provides that ownership of the copyright and the database right in the database belongs to BHB but it is a point worth bearing in mind when you commission the compilation of data from a third party.

In the same way that copyright is an item of property that can be transferred, assigned or granted, database right is also transmissible in the same way. This again creates a slight complication under the Directive because, notwithstanding this provision, there are frequent references in the Directive to the rights which the "maker" of the database has. Maker and owner may, clearly, not be the same person if the right has been assigned by the person who took the initiative in compiling the database. It is not clear, therefore, whether the Directive intends "maker" to include owner for the time being.

BENEFICIARIES OF PROTECTION

A database is included within the category of "literary work" for the purposes of copyright protection and thus owners of copyright in a database who are not nationals of an EU Member State are entitled to copyright protection for their databases within the European Community by virtue of the Berne Convention, provided they are nationals of a country which is a signatory to that Convention. In contrast, however, database right is not a right which is included within the ambit of the Berne Convention and, as there is no reciprocal treatment provided to EU nationals abroad in relation to Database Right, the Directive makes clear that the only beneficiaries of protection are makers or rightholders who are nationals of a Member State or who have their habitual residence in the territory of the Community. This includes companies and firms formed in accordance with the laws of a Member State and who have their registered office or place of business within the Community. Companies or firms which only have their registered office in the territory of the Community but who do not have their operations linked on an ongoing basis with the economy of a Member State are not entitled to protection.

In the sports information industry, therefore, databases comprising information relating to baseball or American football (or Australian football leagues), made or owned by companies carrying on business in those countries, will not be entitled to database right protection under the Directive even if licensed exclusively to an EU company for the purposes of exploitation within the EU.

In selecting or arranging the contents of the database, assess with the people actually doing the work, whether any intellectual effort is required in the selection or arrangement of the data so as to determine at an early stage whether the database is entitled to copyright protection as well as database right protection.

INFRINGEMENT OF RIGHTS IN DATABASES

The most important distinction between copyright protection and database right protection for the same database lies in the nature of what exclusive rights are controlled by the owner of the right. Article 5 of the Directive lists the "restricted acts" i.e. those exclusive rights vested in the owner of the copyright in a database. These include:

(a) the temporary or permanent reproduction by any means and in any form, in whole or in part; by virtue of the Copyright Designs and Patents Act 1988, section 17(6); this includes transient copies (e.g. on-screen viewing of a database, storage in any form of media, transmission by email, etc.);

(b) translation, adaptation, arrangement and any other alteration;

(c) any form of distribution to the public of the database or of copies thereof, subject to the exhaustion of rights principle, i.e. the first sale of a copy of the database by the rightholder or with his consent shall exhaust the right to control the resale of that copy within the European Community;

(d) any communication, display or performance to the public;

(e) any reproduction, distribution, communication, display or performance to the public of any translation, adaptation, arrangement or altered copy.

Copyright protection for databases is, in line with protection for other copyright works, subject to the fair dealing provisions. There is also an additional exception contained in Article 6(1) of the Directive, namely the performance by a lawful user of the database of any of the restricted acts necessary for the purposes of access to the contents of the database and normal use of the contents by the lawful

user, shall not require the authorisation of the author or owner of the database. For example, if a licensee of the copyright owner has the right to access an on-line database via his computer terminal, and to get access he needs to copy the contents of the database onto a computer disk, that act of copying shall not be an infringement of copyright.

In simple terms, copyright enables the owner of the right to prevent the copying of his database in whole or in part. Article 5 does not include the word "substantial" when talking about copying part of the database. However, as enacted under English law in the 1988 Act, the database right is lumped together as part of the general category of works known as literary works and in defining the restricted acts, section 16(3) states that the references in this part to the doing of an act restricted by copyright in a work are to the doing of it *"in relation to the work as a whole or any substantial part of it."* Accordingly, in examining whether a restricted act has been committed by a third party in relation to part of the database, it is necessary to analyse whether that part is a substantial part of the whole. As a database is a compilation, the extraction and reproduction of individual pieces of information from the database is unlikely to amount to infringement of the copyright, as individual pieces of information are unlikely to be regarded as a substantial part of a compilation which depends for its protection on the intellectual effort that went into the selection or arrangement of the whole.

This is where the principal distinction lies between the protection afforded to copyright and database right. The restricted acts described above which the copyright owner is entitled to control are concerned with reproduction and distribution. The database right has, as its object of protection under Article 7, the prevention of *"the extraction and/or reutilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively of the contents of the database."* For copyright lawyers, familiar with the concept of reproduction, the terms "extraction" and "reutilisation" are unfamiliar and need careful consideration when evaluating the protection which the database right provides. I will deal with them each in turn.

EXTRACTION

The Directive defines "extraction" as *"the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form."*

William Hill argued, in the BHB case, that once data had been extracted from the database by one party, its further dissemination by that party to third parties precluded further extraction, because once the data had been extracted, it couldn't be re-extracted from the same source. Mr Justice Laddie felt that this was giving too narrow an interpretation to the Directive. In his judgment, he indicated that this interpretation does not recognise the special nature of a database. The first person to "extract" data from the database does so by reading data and passing it on to the next person. He does not cut the information out of the database so that it is no longer there. Moreover, he pointed out that

> *"the Directive does not require that extraction should be direct rather than indirect, nor does the definition involve the concept of taking away. All that is required is that a substantial part of the contents be transferred to a new medium. Thus, the definition refers to "transfer ... to another medium". It says nothing about the resultant state of the database from which the transfer has been made. If someone takes a copy of the contents of a database and loads it onto a new medium, it is no less transferred to the new medium because the same data are left on the original database."*

Indeed, the Database Directive's recitals contain, at recital 44, the statement that even the on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium. As most high value databases are held electronically, it is clear that the protection intended to be given by the Directive is to allow the owner of the database to control access to the contents of his database.

A more compelling argument of William Hill was that once information had been extracted from a database, and reformatted, and then passed on to a third party, it had lost that quality which provided it with database protection, namely (relying on the definition of "database" in the Database Directive) *"a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."* William Hill argued (and continue to argue) that if the database, having been organised in a systematic or methodical way by

the database owner, is rearranged by the first user, and then passed on, the information is no longer protectable because, as the recitals to the Directive make clear, the sui generis right does not protect the information itself.

Reference was made before Laddie J to the old Pools Coupon case, *Ladbroke (Football) Limited v William Hill (Football) Limited* [1964] 1 WLR 273, in which it was held that that which attracts copyright protection by reason of its collocation will, when robbed of that collocation, lose its protection. This principle will continue to apply to copyright protection for databases. However, when the argument was used by William Hill in relation to the database right, Mr Justice Laddie rejected it. William Hill's counsel had to concede, when questioned by Mr Justice Laddie, that in the computer age, databases held in electronic form can be automatically searched (and arranged) using software and thus the systematic or methodical arrangement of the information, although enabling the collection of data to qualify for protection, is not the element of the database which gives it value or, in fact, the aspect of its creation in which significant investment is made. The database's value comes from the investment made in obtaining, verifying or presenting the data and this is what the database right was intended to protect.

The effect of his judgment is, therefore, that if the database owner can prove that the information held by the defendant was derived, directly or indirectly, from his database, the act of *"extraction"* can be established, no matter how many hands that information has passed through before it came to the defendant, and no matter how extensively that information has been re-arranged.

As you can imagine, this was one of the principal points of appeal of William Hill. In their skeleton argument prepared for the Court of Appeal, they made the point most forcefully that if this is the effect of the Database Directive, it provides a much wider and stronger right than anyone had envisaged when the Database Directive was made part of European law. They argued that this is akin to protecting the information itself, something which our old copyright law, which was criticised by the ECJ in the *Magill* case as giving too wide a protection to compilations, fell far short of.

The Court of Appeal, although stating that without the luxury of being able to refer questions to the European Court of Justice they would have upheld Laddie J.'s judgement, decided that this issue was not *acte clair*, and have referred to the ECJ.

A new argument which emerged in William Hill's argument before the Court of Appeal was an evidential one, but based on an issue of timing which may have general application. They argued that BHB had not proved that the data which they display on their web-site, namely the lists of runners, was part of the database at the time that it was transmitted by Weatherbys to Racing Pages, their principal distributor of on-line information, and that the list of runners was only added to the database at a later stage in the processes involved with compiling the pre-race information. The Court of Appeal affirmed Laddie J.'s finding of fact and dismissed William Hill's appeal on this point. However, it does raise a point of general application, and that is whether information collected in manual form could be considered to be part of a database before it is posted on-line. Or, using a more mundane example, is research material compiled in connection with the writing, for example, of an encyclopaedia, part of the database represented by the encyclopaedia? My view on this is that because the database right aims to protect the investment made in the obtaining of the information, and database is defined widely to include *"the collection of data arranged in a systematic or methodical way and individually accessible by any means"*, it will include all material in that collection obtained for the purposes of creating the database product.

RE-UTILISATION

Paragraph 12 of the Regulations defines *"re-utilisation"* to mean *"making the contents of a database available to the public by any means."* This, again, is an extremely wide and all embracing definition and reflects, again, the underlying policy behind the Directive, namely - to encourage investment in databases within the community.

Recital 30 states as follows:

> *"Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorised persons."*

However, because of the limitations of copyright protection, the contents of a database can, through use of digital recording technology, be copied and rearranged electronically without the owner's authorisation, thereby producing a database of identical content which copyright law is powerless to prevent. In other words, copyright protection, prior to the Directive, was directed towards protecting the arrangement of the compilation, rather than the contents itself. Recital 39 declares that:

> *"Whereas in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collecting the contents by protecting the whole or substantial part of a database against certain acts by a user or competitor."*

It is on this basis that the two acts of "misappropriation" circumscribed by the Directive, *extraction* and *re-utilisation*, are expressly limited by Recital 45 which states that the right to prevent unauthorised extraction and/or re-utilisation does not in any way constitute an extension of copyright protection to mere facts or data. It is in this paragraph that William Hill places greatest reliance in seeking to overturn Mr Justice Laddie's judgment.

The act of re-utilisation alleged against William Hill was, of course, the display of selected data (the lists of runners and details of races) on their web-sites.

William Hill's principal argument on re-utilisation was to say that by the time the information was posted on William Hill's web-site, it had been widely published by the media, e.g. the *Racing Post*, Teletext, national newspapers, etc. and thus had already been made available to the public. All William Hill were doing was using the information to attract betting. If such argument were correct, it would, in effect, mean that a database right owner could only control the first publication of the contents of its database, and not subsequent publications by other users, thereby severely impairing the ability of the database owner to recover his investment. In William Hill's argument before the Court of Appeal, they treated database right as being equivalent to confidential information, to the extent that they argued that once the contents of the database had been put into the public domain by the owner or with his consent, protection against re-utilisation of the information so released disappears. This is the effect, they say, of the choice of words used in the Directive for defining "re-utilisation".

William Hill contended that *"making available to the public"* must, by implication, involve telling the public something it does not already know. Mr Justice Laddie rejected this argument by stating that there is nothing in the Directive which suggests that the right to prevent re-utilisation is restricted to secret data on a database and that what it is concerned with is the unlicensed use of data derived from a database. Private use of such data does not fall within the definition of "re-utilisation" but as soon as it is transmitted to the public, it is covered by the database right, and it is irrelevant whether or not the public could obtain that information from another earlier source.

The Court of Appeal, again, were not entirely confident that Laddie J. had got it right (although they were inclined to think that he had) and have thus referred this question to the ECJ, namely whether extraction and re-utilisation involves having direct access to the database or whether it can occur in relation to information held by a third party which was originally derived from the database.

Looking at a different situation, where the information is held by an unlicensed organisation, and simply used internally for research purposes, it would appear that, according to the definition of *re-utilisation* in the database, this use is not proscribed, although the right may have been infringed by unlawful extraction.

There is one point of distinction between the definition of *"re-utilisation"* in the Database Directive and that in the Regulations which is worth looking at in some detail. The definition in the Directive is more extensive than that in the Regulations and reads as follows:

> *"Re-utilisation" shall mean any form of making available to the public all or a substantial part of the contents of the database by distribution of copies, by renting, by on-line or other forms of transmission."*

This provision throws some light on what "making available" means. For those of us who have been tracking the progress of the Copyright Directive through the European Parliament, this definition foreshadows the distribution right. Re-utilisation is more concerned with distribution than with use.

There have been other cases within the European Union on the protection of databases, and some of these were cited by William Hill before the Court of Appeal. They take greatest comfort from a Swedish case, *Fixtures Marketing Limited v. AB. Svenska Spel* heard in the Gotland City Court in April 2000. In this case, Svenska Spel used information from the fixture lists relating to the Scottish League and Scottish Premier League for the purposes of their pools games without the consent of Fixtures Marketing Limited. Under Swedish copyright law, before the Database Directive was implemented, protection was given to compilations, but the protection was concerned with the arrangement of compilations rather than the contents. When the Swedish Government implemented the Database Directive by amending their Copyright Act, they did so without reproducing the exact wording contained in the Directive. The new database right under Swedish law following implementation of the Directive gave the owner the *"exclusive right to produce copies of the work and to make it available to the public."* Contrast this with the words in the Directive and the Regulations, which provide the owner with the exclusive right to extract or re-utilise *"all or a substantial part of the **contents** of the database"* (emphasis added). Not surprisingly, having regard to the manner of implementation of the Directive, the Gotland District Court found that, although the fixture list was entitled to protection as a database, it had not been sufficiently copied to amount to infringement. They stated that

> *"the protection is narrow; it could be said that it is only applicable to unauthorised copying of all or large parts of a product or in the event of thinly disguised plagiarism."*

This decision went to appeal and in May of this year the Svea Court of Appeal gave judgment and upheld the Gotland District Court's decision but on different grounds. They found that it had not been demonstrated that Svenska Spel had extracted the information in their pools coupons from the contents of the database. The judgment is short on reasoning and so it is not possible to determine whether this decision anticipates the English Court of Appeal's uncertainty in the William Hill case over whether, to infringe, you need to have direct access to the database. The Swedish Court's decision is now being appealed to the Supreme Court in Sweden.

SUBSTANTIALITY

Substantiality is a concept with which copyright lawyers in the UK are familiar. The courts have stated in many cases that this is a qualitative as well as quantitative test, so that the reproduction of one paragraph of a book containing 1,000 pages could be a reproduction of a substantial part of the whole. The Directive states, in Article 7, under the heading "***Object of Protection***" that:

> *"Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."*

This qualitative/quantitative test therefore applies both to the question of whether there has been "substantial investment" and to the question of whether there has been extraction and/or re-utilisation of "a substantial part".

William Hill, in the BHB case, claimed that they used only a minor fraction of the information contained in the database as a whole. They contended that substantiality depends on the importance of the part taken to the database, and not to the defendant's use of it. On any day, a visitor to William Hill's website will find lists of runners running in races to be held that day, and of one or two important races in the immediate future. The visitor will not find the names of jockeys, owners, trainers or the colours of the owner and a whole host of other information which forms part of the pre-race information compiled and transmitted by Weatherbys. Moreover, William Hill contended that the entrants for each race in the racing calendar were determined by the owners/trainers and therefore the list of runners was self selecting rather than "obtained" by Weatherbys on BHB's behalf.

Two points therefore arise from this argument:

(a) Has BHB made a substantial investment in compiling the list of runners?

(b) Does the lists of runners in races taking place on a particular day constitute a substantial part of the database?

With regard to the first question, Mr Justice Laddie adopted the approach of treating the investment in the database as a whole as being the critical test, rather than the investment made in compiling that part of the database extracted or re-utilised by William Hill. In so doing, he inevitably came to the conclusion that each list of runners formed part of the database as a whole. This is a point which has been challenged by William Hill on appeal. The Judge at first instance had no difficulty in concluding that a substantial investment had been made in obtaining the information contained within the totality of the database, in verifying that information and in presenting it. BHB thereby obtained a Declaration that the database (with its many constituent parts) qualified for protection as a "database" under the Directive.

With regard to the second question, Laddie J accepted William Hill's submission that the issue of substantiality had to be assessed primarily by comparing what had been taken or used with what is in the database as a whole. However, he said that the importance of the information to the alleged infringer is not irrelevant as this may throw light on whether it is an important or significant part of the database. He went on to say that:

> *"If one of the purposes of the database is to service businesses of the same general type as that run by the alleged infringer with the same type of information taken by him, then the collection, verification and presentation of that type of information within the database is likely to be an important or substantial part of its contents."*

With regard specifically to the information used by William Hill on their websites, he had regard, first, to the primary function of BHB, which is to administer horseracing in Great Britain. On the evidence, he found that the ultimate purpose of the BHB database was to help BHB control and facilitate horseracing and to raise funds for horseracing derived from gambling. On this basis, he found that the major purpose of the BHB database is to ensure that all the relevant data relating to horseracing is accurately stored and available. He stated that:

> *"It is the data relating to the races themselves which represents the ultimate and crucial information within the database. Here, what the defendant is doing is making use of the most recent and core information in the BHB database relating to racing. William Hill is relying on and taking advantage of the completeness and accuracy of the information taken from the raw data feed, in other words the product of BHB's investment in obtaining and verifying that data. This is a substantial part of the contents. No useful purpose would be served by trying to assess this issue first on a quantitative basis and then separately on a qualitative basis. They should be looked at together."*

As you can see, the importance of the information both to the compiler of the information and its target market is the test which was applied by Mr Justice Laddie in evaluating substantiality.

In the Court of Appeal, William Hill challenged the finding of "substantiality" on the following basis:

(a) there has been no relevant investment in the information used by William Hill, and therefore it does not qualify for protection as "a database";

(b) there has been no substantial investment in the information used by William Hill, and so, at best, it is only an insubstantial part of the contents of the BHB database.

William Hill are thus trying a new tack in contesting substantiality. Rather than challenging the finding that the information is important, both to BHB as the governing body of British racing, and to organisations such as William Hill (one of the target market), they are alleging that the lists of runners are either not a part of the database or are only an insubstantial part by virtue of the limited amount of investment made in their compilation.

Another argument used by William Hill in the Court of Appeal was that any investment made by an administrative body such as BHB in performing their functions e.g. compiling lists of runners, should be disregarded in considering whether its database should be entitled to protection under the Directive. Alternatively, that part of the database compiled from the performance of a body's functions should not be regarded as being part of the database entitled to protection under the Directive. This is because, they contended, BHB is funded to do exactly that and it has not taken the initiative or borne the risk of the investment. At present, this issue does not appear to be one that the Court of Appeal has referred to the ECJ but the questions have not been agreed between the parties

yet and William Hill may yet have an opportunity to widen the ambit of the questions by making further representations to the Court of Appeal.

Another issue arises on substantiality by virtue of the provision contained at Paragraph 16(2) of the Regulation and Article 7(5) of the Directive. This states that the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents. Those drafting the Directive could see that someone could derive substantial benefit from a database by extracting little parts of it over a prolonged period. This provision was, therefore, introduced to protect owners of databases against this form of exploitation, enabling national courts to regard the cumulative effect of taking small parts as being the taking of a substantial part. William Hill argued against this by stating that each list of runners comprised a separate database, or separate parts of a changing database, and therefore could not be regarded as cumulative, but the taking of insubstantial parts of separate databases. As I have stated above, Mr Justice Laddie held that the lists of runners form part of the database as a whole but recognised that there was an argument that as the database changed on a day to day basis, there must come a point when its period of protection renews itself by virtue of substantial changes having been made to its contents. Article 10(3) of the Directive states that any substantial change, including changes resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, shall qualify the database resulting from that investment for its own term of protection. William Hill argued that successive changes created new databases and therefore Article 7(5) did not apply, these insubstantial parts being taken from a succession of different databases.

Mr Justice Laddie dealt with this argument by stating that it relies upon an assumption that all databases have to be considered as discrete "frozen" products. However, a database which is under constant revision cannot be regarded as being a series of discrete protected works because no one will know where one ends and the next begins. He concluded that there is nothing in the Directive which suggests that it was not to apply to **dynamic** databases in just the same way as it applies to ones which are built and modified in discrete, well defined steps. He found that the BHB is a single database which is in a constant state of refinement. Any attempt to split it into a series of discrete databases, besides being impossible to do, would not reflect reality. He therefore found that it was possible to have a dynamic database with a constantly renewing term of protection, and yet repetitive extractions of information from the same database so as to amount to an infringement under Article 7(5), provided that an unlicensed third party who takes older data from the database only faces a database right which runs from the date when all of that older data was present in the database at the same time.

The Court of Appeal had some trouble with the concept of a dynamic database: they could not decide whether the database which was in a constant state of flux became a new database on its term being renewed or was the same database with a new term of protection. Article 10(3) of the directive would suggest the former, but this then gives rise to the problem of deciding when the old database ends and the new one begins. This was, unsurprisingly, one of the questions which has been referred to the ECJ.

LAWFUL USERS

Article 8 of the Directive contains three paragraphs dealing with the rights and obligations of lawful users. The first paragraph states that where the maker of a database has made the contents of his database available to the public, he cannot prevent a lawful user of the database from extracting and/or re-utilising **insubstantial** parts of the contents for any purpose whatsoever. Again, the question of substantiality is to be evaluated both qualitatively and quantitatively. This provision found its way into the Regulations (paragraph 19(1)) in abbreviated form. There is, however, a proviso to the provision in the Directive which is absent from that in the Regulations, namely - where the lawful user is authorised to extract and/or re-utilise only part of the database, this provision shall apply only to that part.

What is the purpose of this provision? After all, if someone who is not a lawful user of the database uses insubstantial parts of the contents, he is not infringing the right so why should express exemption be given to a lawful user? The answer is not contained in the database, but in the Regulations, in paragraph 19(2) where it is provided that if under an agreement a person has a right to use a database, in whole or in part, which has been made available to the public, any term or

condition in that agreement which purports to prevent that person from extracting or re-utilising insubstantial parts of the contents of the database shall be void. Applying this to a concrete example: a newspaper is granted a licence by the Premier League to publish the fixture list for the forthcoming season, but the licence contains a restriction preventing the newspaper from making any use of the fixture list other than to publish it in its entirety; the newspaper will not be infringing the database right or breaching its licence by selecting a small number of fixtures from the fixture list and writing previews of those matches.

The second paragraph in Article 8 of the Directive states that a lawful user of a database which is made available to the public may not perform acts which conflict with normal exploitation of a database or unreasonably prejudice the legitimate interests of the maker of the database. This provision is wholly absent from the Regulation but its source can be traced back to the Berne Convention. Article 9 of the Convention states that

> *"Authors of literary and artistic works protected by the Convention shall have the exclusive right of authorising the reproduction of these works in any manner or form."*

Article 9(2) states that

> *"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."*

Those drafting the Berne Convention were concerned that, by allowing individual countries to permit the reproduction of copyright works (e.g. under fair dealing provisions), such permissive provisions would still be subject to an overriding requirement that they do not prejudice the interests of the author or his works. In the context of the Directive, therefore, a lawful user taking advantage of Article 8(1) by using insubstantial parts of the contents of a database without having an express licence to do so, will nevertheless be subject to this overriding principle that its use must not conflict with normal exploitation and must not unreasonably prejudice the legitimate interests of the maker of the database.

Before Mr Justice Laddie, William Hill relied on this sub-paragraph of the Directive to put forward a positive case that they were allowed by Article 8(1) to publish the lists of runners on their websites because, far from conflicting with normal exploitation or prejudicing BHB's legitimate interests, they were encouraging increased betting on horseracing for the financial benefit of the horseracing industry.

This argument did not meet with Mr Justice Laddie's favour. He took the view that the extraction and publication of details of races, horses and times for each race on a day by day basis throughout the racing season undermined the revenue earning potential of that information from other licensees. Accordingly, even if Mr Justice Laddie had held that lists of runners and details of races on each day of the racing season constituted an insubstantial part of the database as a whole, William Hill, as a lawful user, was nevertheless prejudicing BHB's legitimate interests by their activities and thus could not avail themselves of Article 8(1) of the Directive. As stated above, nor could they avail themselves of Article 7(5) of the Directive.

In the Court of Appeal, William Hill challenged the Judge's findings on this point. In the first place they stated that the lawful user's activities must not conflict with the legitimate interests of the **maker** of the database, not its owner for the time being. Weatherbys created the database on BHB's behalf and therefore they should be regarded as the maker. Secondly, they contended that, in assessing harm, the Court must assume that the activities of the defendant are otherwise lawful. It is not a good argument to say it is prejudicial to BHB because other people are paying licence fees to do what they are doing. "Prejudicial" must be construed more widely than that and it must mean something more than fairness. Accordingly, William Hill submit that the increased betting income coming through William Hill's website is neither contrary to BHB's economic interests nor contrary to their regulatory interests.

These arguments raise fundamental points of construction on Articles 7(5) and 8(2) of the Directive, but will only be determinative if the Court of Appeal find that the lists of runners constitute an insubstantial part of the contents of the database. Notwithstanding this, the Court of Appeal has

referred one question to the ECJ which has its origin in this provision, namely whether a subscriber (William Hill) to a licensed distributor of a database (Satellite Information Services), having thereby received the information lawfully, can then use that information commercially to further their business.

JURISDICTIONAL ISSUES

I would like briefly to touch on the issue of jurisdiction in relation to infringement. As you know, by virtue of the Berne Convention, the copyright work of an English national is actionable in most countries around the world by virtue of the reciprocity of treatment given to the nationals of signatories to the Berne Convention. The same cannot be said of the database right which is a new right created within the European Community which is, as far as I am aware, unique and not replicated elsewhere. It is not given the status of a species of copyright so that it comes within the provisions of the Berne Convention. Therefore, the unlicensed act of extraction or re-utilisation of a database, taking place outside the European Community, is only justiciable within the Community if there are grounds upon which a Community Court can assume jurisdiction. It will not be sufficient for the defendant to reside within the European Community, if his acts took place wholly outside the European Community, because he will not have committed an act of infringement of any right recognised in that foreign jurisdiction. However, if the contents of a database belonging to a European national are accessible to people within the European Community by virtue of unlicensed extraction or re-utilisation in a foreign jurisdiction, an infringing act would have occurred within the jurisdiction of the Community Court. A classic example of how this can occur is where the contents of a database are displayed on a website from a server located outside the European Community, but accessible to users within the European Community. Many bookmakers have located their websites off-shore by using foreign servers and ISPs but this is to avoid paying betting duty and betting levy in this country rather than to avoid the effects of the Database Regulations.

THE ROLE OF DATABASES IN DIGITAL MEDIA

With the growth in the broadcast and transmission of sport through television, the internet, mobile telephone etc., there is an inevitable increase in the consumer's appetite for statistics relating to sport. Take, for example, Formula One motor racing, reputed to be the world's most popular spectator sport, at least on television. Statistics relating to the number of points each driver, and each vehicle manufacturer has earned in the league tables are almost as important as the spectacle itself. When you add to that the increase in interactive betting through digital media, which of course involves extracting and reutilising a range of information relevant to the bets being placed, you can readily understand why it is that companies negotiating for the acquisition of rights relating to sporting events press very hard to incorporate the right to have access to and use of information in the package of rights on offer. In the recent negotiations involving Go-Racing, the racing consortium put together to negotiate the rights to cover horseracing in Great Britain over the next two years, Go Racing had to negotiate both with the Racecourse Association (for the picture rights) and BHB (for the database rights). At first, the Racecourse Association sought to exclude BHB from the negotiations by representing to Go-Racing that the picture rights were the most important part of the package and should be negotiated first, whereupon they would deliver the database rights to Go-Racing by allocating part of the financial package to BHB in return for the grant of those rights. This strategy did not work because BHB made it plain that they wanted to conduct their own negotiations directly with Go-Racing and were not prepared to delegate the licensing of their rights to the RCA as this would inevitably result in those rights being undervalued. After some acrimonious exchanges, Go-Racing was forced to negotiate directly with BHB and it is a measure of the value of BHB's information rights that Go-Racing were not prepared to conclude their deal with the Racecourse Association without also having done a deal with BHB.

EFFECTIVELY MANAGING AND ENFORCING YOUR DATABASE RIGHT

I have compiled a list of ten best practice points which owners of databases should bear in mind when compiling and licensing their databases, in order to maximise their value. I have listed them, not in order of priority, but in chronological order, having regard to the creation of the database and its commercialisation:

1. create the database through an entity which is entitled to protection under the Database Directive, namely a company or partnership incorporated under laws of an EU Member State which carries on business in the EU;
2. if you are to delegate all or part of the collection of the information, its verification or presentation to a third party, ensure that your contract provides that ownership of both the copyright and the database right vest in you, the commissioner;
3. keep a record of the investment both of time and money expended in collecting the information, verifying it or formatting it for the purposes of presenting it to your subscribers;
4. if the work is to be done by employees, ensure that your employees have contracts of employment which do not vest them with any control in the database, and which restrict them for a reasonable period of time in setting up a competitive database for a rival trader;
5. when making the database available to your licensees, ensure that the database is, as far as possible, identified as being your creation, the rights in which are owned and controlled by you: when information derived from the database is passed through a number of hands, it may no longer be recognised as being derived from your database unless there is a rights statement on all copies of the database put into circulation;, ensure that all your licences contain an obligation on your licensee to include a statement on all media containing information derived from your database that the information is licensed from you and all rights are controlled by you;
6. similarly, in relation to internet licensees, ensure that they are under an obligation to notify you of anyone linking their site to the licensee's site so as to give public access to the contents of your database through that third party's website;
7. ensure that the royalty charged for use of the information is measured against the number of users within the licensee's organisation, rather than being a blanket licence for the licensee irrespective of the number of people within that organisation who are to make use of or have access to the information;
8. with regard to internet usage, ensure that the royalty is calculated by reference to the income derived from each page upon which that information appears so as to capture sponsorship and advertising revenue as well as direct subscriber or betting turnover revenue;
9. to ensure that your database has a continually renewing term of protection, keep a record of the changes made to it by retaining copies of the database as it exists at regular intervals;
10. ensure that you police the market adequately so that unlicensed users of your database are not allowed to derive parasitical enjoyment of your labours, and thereby undermine your existing licences.

Revised version of a Paper presented at BAFSAL 9th Annual Conference, held on 18 October 2001 at Lord's Cricket Ground.

Hamish Porter, Theodore Goddard.

New Opportunities for Media Rights Exploitation

Claire Harvey

Today I am going to talk about the new opportunities for exploiting media rights to sports events. I will be examining how the media rights landscape has evolved over recent years with the development of new technologies and focusing on some of the key issues which have emerged as rights have become more and more fragmented. I will primarily be using the Premier League as a case study, as now the new season is well underway, we are beginning to be able to assess the impact of the different rights packages offered by the Premier League. I will also be looking at the opportunities for future rights exploitation to British horseracing as I have had the opportunity to advise Attheraces plc in its recent acquisition of media rights to British horseracing for the next 10 years and am currently advising UEFA in relation to a new sales policy for the UEFA Champions League. I will be examining the opportunities not only from the rights owner's perspective in licensing the various media rights but also the opportunities for the licensee in exploiting these rights.

First, I want to turn the clock back a few years and look at the rights landscape as it was then. Media rights would have basically meant TV and video rights. As far as TV is concerned, the rights would have been carved up into terrestrial, satellite and cable rights. To give an example, in the last Premier League deal for the four years ending with the 2000/2001 season, rights were divided into satellite and terrestrial rights, with Sky having the satellite rights and the BBC having the terrestrial rights. Looking at this now it seems so archaic. However, remember that this was a four-year deal and when the rights were granted back in 1996/1997, the word "digital" was not the buzzword it is now. BSkyB, the pioneer of digital television in the UK, did not launch its Sky Digital services until June 1998. Television only existed in analogue form and the only platforms that were available to exploit rights were terrestrial (i.e. BBC1, BBC2, ITV, Channel Four and Channel 5), satellite and cable.

This of course has all changed now with the development of digital technologies.

In the TV sector alone, 1998/early 1999 saw the launch of new television platforms. Sky Digital, as I have mentioned, launched its digital satellite services in June 1998 and ITV Digital, previously ONdigital, launched is digital terrestrial service in November 1998. Cable is following slowly behind and is still in the process of upgrading its systems to digital. As we have seen in the sports world, Sky has launched additional sports channels, Sky Sports Extra and Skysports.com and ITV has launched a new digital channel, ITV Sport. We have also seen new faces emerge in the TV sector as the advent of digital has led to the launch of new sports channels such as MUTV and more recently, Chelsea's new television channel, launched in August 2001. Attheraces will be launching its own horseracing channel in May next year available initially on Sky Digital, ITV Digital and on cable through ntl.

What impact has the launch of digital had on rights packaging?

The analogue terrestrial television market has evolved into a free-television market with traditional broadcasters such as the BBC and ITV having a number of additional free-TV channels available on a number of different distribution platforms including satellite and cable. The satellite television market has evolved into pay-television market (albeit that there are free channels on digital satellite) as the satellite broadcaster BSkyB increasingly now faces competition from other pay-television operators such as ntl, Telewest and ITV Digital who have acquired, or are seeking to acquire, premium sports content in order to drive up subscriptions to their main TV packages.

The launch of digital and the development of new digital technologies such as broadband, which enables data to travel at a higher speeds, which delivers a better picture quality and enables the transfer of data in both directions from the broadcaster to the viewer and back again, has created further opportunities in the TV sector - pay-per-view, video-on-demand and interactive and enhanced television opportunities in particular.

During the development of these technologies we have also seen new platforms emerge - the Internet and mobile telephony. The Internet has been around for a few years now but the growth of broadband technologies means that the Internet will be able to support more and more video content and as picture quality improves be able to compete with the TV market. The mobile telephone market is not currently capable of supporting video content but will be able to do so as 3G technologies come on stream. The key question at the moment is when and experts predict that 3G is unlikely to support video content until at least the end of 2003. It is clear that all of these platforms, perhaps apart from the Internet, require substantial investment. The infrastructure is expensive and the new media platform operators all know that in order to recoup their investment they are going to need premium content to drive subscriptions.

The desire for premium content presents a wealth of opportunity for the rights owner of a high profile attractive sport - it enables the rights owner to rethink its sales strategy by fragmenting its rights in a way that it has never done before. By breaking rights into smaller packages it may be able to maximise not only the amount of revenues it is able to extract from broadcasters but also the amount of coverage the sport receives. This raises the profile of the sport, leads to greater investment (i.e. bigger stadiums, more training programmes, better quality players) and greater sponsorship opportunities.
The Premier League, as we all know, has led the way in the UK with a new sales policy and I just wanted to take some time to examine it.

In the TV sector, ITV paid £183m for highlights, snatching the highlights package from the BBC. We know that the Premier League have offered 66 of the 380 matches played in each season to Sky for a

record £1.1bn over 3 years. The price Sky paid for these rights represents a 120% increase on the previous deal. Sky found itself faced with stiff competition for these rights as other pay-TV players, such as ntl and ITV Digital sought to acquire these rights for themselves as a means of increasing subscriptions to their own platforms.

For the first time, pay-per-view rights were offered by the Premier League. There has been a great deal of nervousness in the market about pay-per-view - would viewers be interested? Prices were high and pay-TV operators had to consider carefully whether the returns would cover the substantial investments they would need to make in obtaining more capacity to offer pay-per-view services. ntl famously sought to acquire these rights in June 2000 in a deal worth £328m. That deal fell through as the ntl board was said to have been nervous about the chances of success of pay-per-view. The rights were eventually sold at a much lower price and each of Sky, ITV Digital, ntl and Telewest have acquired the rights to show the same 40 matches on a second-pick basis after Sky has selected its 66 matches under the main pay-TV package. Critics had feared that the second-pick matches would not be an attractive prospect to viewers, but sales of "season tickets" begin to suggest otherwise. Sky's original price for these season tickets was £50. It quickly increased this price to £60 following high demand from its viewers. It seems that fans can't get enough! However the PPV story has not been the same in other European countries. Recent reports claim that Premiere World has been forced to slash its prices for its PPV live Bundesliga matches in a move which is reportedly seen as a bid to boost subscriber levels. It has abandoned its PPV tickets in favour of a season ticket approach.

Again, for the first time video-on-demand rights have been sold by the Premier League. Videonet, a London-based service which uses broadband networks is offering full coverage of 106 matches on a delayed basis. It is hoping to roll-out its service to other parts of the UK but for the moment this service is likely only to attract fans of London clubs or the larger clubs such as Man United and Liverpool who have a large fan base in London. However, I query how successful this is going to be when fans will be able to watch non-live highlights of full coverage of their team's matches on club websites or TV channels.

As far as the Internet is concerned, Premier League clubs are given the right by the Premier League (having exerted enormous pressure on the Premier League) to show up to 90 minutes of footage from their own matches on a delayed basis; for Saturday matches, from 12 midnight on Sunday; for Sunday matches, from 10pm on Monday and for Monday night matches from midnight on the same night. Manchester United are offering a highlights package of 15 minutes at £2 to £3 per game and a customisable archive service so that viewers will be able to view, for example, all of David Beckham's goals from this season and past seasons, dating back to 1992. Fans will also be able to subscribe to the whole package of Premier League highlights and archive.

In anticipation of clubs being able to exercise some media rights individually, there was an enormous amount of activity a year or so ago as broadcasters, hoping to share some of the revenues which will flow back to the clubs from the exercise of these media rights, sought to form closer alliances with clubs. We saw Sky investing in Chelsea, Manchester United and Leeds and Granada investing in Arsenal and Liverpool. ntl have also invested in Aston Villa, Celtic, Newcastle United and Rangers. Through this investment the broadcasters are able to help clubs develop the necessary broadband technologies to enable their websites to carry video content. We have already seen BSkyB launch a collaboration with Chelsea, Leeds United and Southampton and West Ham whereby Sky will provide footage and technical infrastructure for clubs to show highlights of their league games via their official club website and we expect further collaborations to continue.

As to whether or not the Internet is going to be a successful platform, lets look at a few examples. Firstly, Liverpool FC. The day after the UEFA Cup Final when Liverpool dramatically beat Deportivo Alaves 5-4, its site liverpoolfc.tv scored more than 1 million page impressions, a record for a football club. If match footage were to be made available for the site, this figure may have been even higher.

Celtic is another good example. It has led the way with live broadband Internet streaming of its pre-season friendlies against Sunderland and Fulham. 30% of their broadband subscribers watched these friendlies. Last season it streamed three UEFA Cup matches for free and this season offered its Champions League qualifier against Ajax as a pay-per-view event to fans outside the UK and Ireland.

Lastly, Attheraces plc will be launching its Internet site later this month, offering coverage of races from 49 of the 59 racecourses in the UK for the first time together with opportunities for punters to place their bets via that Internet site.

Turning finally to mobile telephony, the Premier League's deal with Hutchison has attracted enormous media interest. It is thought to have paid £32m for the right to show content and clips of goals on a near-live and delayed basis. However, as I mentioned before 3G is thought to be unable to support video content until 2003 at the earliest, two years into the deal. So why have Hutchison paid so much? Some see it as an important strategic move. Hutchison holds the largest amount of 3G mobile phone spectrum in the UK. It is a new player in the market and does not hold a second-generation licence. It needs exclusive content in order to drive subscriptions and to recoup the enormous fees that it has paid for its licence. It will also give them a foot in the door in any renegotiations with the Premier League after the current term of this deal expires.

Now that we have looked at some of the key features of the new rights packages on offer, I thought it would be interesting to touch on some of the opportunities available to the licensee in exploiting these new rights packages. We have looked at the possibilities available to Premier League clubs in exploiting their own Internet rights, being the ability to offer a season ticket of customisable highlights packages, and we have also touched on the exploitation of 3G rights. I thought that with the time available it would be useful to focus on the TV sector.

Two main opportunities emerge: the opportunity to offer multi-channel coverage and the opportunity to offer enhanced and interactive television coverage.

Sporting events such as golf and tennis lend themselves to coverage of quite a number of television channels. The BBC's coverage of the Open in July of this year enabled viewers to follow the action on holes 15 to 18 for example, or to follow one particular player or to view highlights of the day's earlier play.

Sky Sports Extra offers viewers the ability to select different camera angles and to watch action replays. Interestingly, this summer Sky Sports signed a deal with Two Way TV. The service offered by Two Way TV will be a series of pay-as-you-play enhancements. The enhancements will, for example, allow viewers to predict when goals will be scored during the match and who will score them. The move is a bid by BSkyB to boost revenues per subscriber by using interactive services. The enhancements have also been designed to protect BSkyB's viewing figures at a time when the broadcaster faces rivalry from ITV Sport.

The Attheraces TV channel, once launched, will offer subscribers the ability to place bets on races from the comfort of their own armchairs. The betting opportunities with horseracing are enormous and is one of the main reasons why the consortium of Channel Four, Sky and Arena were interested in acquiring the media rights. You only have to look at some of the deals between broadcasters and bookmakers to see how important an impact betting and gaming has and will continue to have on the interactive market. BSkyB announced a 50/50 joint venture with Ladbrokes in July of this year to create a fixed-odds interactive betting service through BSkyB's channels. The joint venture has been devised to bolster BSkyB's efforts to turn its interactive operations into one of its most lucrative revenue streams. BSkyB have already launched a television betting service, provided by Surrey Sports (part of the Sports Internet Group), which the company bought in early 2000, and as part of the deal with Ladbrokes, BSkyB would have folded Surrey Sports in with Ladbrokes' Vernons pools operation.[1]

Sports channels also lend themselves to retail opportunities, such as the sale of merchandise, season tickets and club videos. Interactive technologies enable viewers to purchase these items through the remote control and we anticipate more activity in this area.

I hope that this overview of the rights market and the opportunities available to the rights owners, the broadcasters and, in the case of football, the clubs themselves, has been interesting and thought provoking. To finish I just wanted to touch on some of the problems which have arisen with the new rights packages and some of issues which have been talked about in the media:

(i) First, the availability of many different rights packages leads to the possibility of overlapping rights and hence a potential for conflict. For example, the broadcaster of live matches will be keen to ensure exclusivity and will seek to restrict the rights owner from granting any rights to stream matches live on the Internet. For prime sporting events such as football, it is therefore highly unusual to see the same match being broadcast live on TV and the Internet. So far, the Internet is being used primarily as a means of transmitting highlights, but what kind of threat do Internet highlights pose to the highlights shown on TV? How will 3G Highlights fit into their picture? Rights owners have sought to minimise the conflict in this area through a series of

different windows and by controlling the amount of coverage available in each different highlights package.

With the potential for conflict that I have just mentioned, the rights owner must ensure that its contracts are watertight. It must have a full understanding of the new digital technologies and contracts must be as clear as possible. Without this understanding and clarity, there is a possibility that as new technologies evolve further, rights owners may find themselves having "given away" rights that, with the benefit of hindsight, they did not wish to. This requires the rights owner to pay particular attention to the definition of the rights granted, the duration of licences, the type of content licensed of and the levels of exclusivity provided.

(ii) Are sports rights in danger of becoming too fragmented? The development of new technology has seen a growth of new distribution platforms. This in turn presents enormous opportunities to the rights owner who can now consider a number of different packages as has been shown with the Premier League example. However, broadcasters will be keen to build a brand by being synonymous with the sport in question (for example, look at BSkyB with the Premier League, ITV with the Champions League and Channel 4 with cricket). Brand building helps them to attract audiences and to sell advertising and sponsorship. By having too much coverage spread across too many different and competing platforms arguably jeopardises potential for brand building. This is a concern for UEFA in relation to the Champions League. It is currently facing proceedings before the European Commission in respect of the manner in which it sells the rights to the Champions League - its existing sale policy is to sell all of the TV rights to one broadcaster in each territory. The Commission is exerting pressure on UEFA to carve up the rights into different packages. One of UEFA's concerns is that this will hamper the ability of broadcasters such as ITV to build a strong brand around the Champions League product.

(iii) Will we see more and more rights being exercised by the rights owner or the clubs themselves? Taking the Premier League as an example, clubs fought to retain Internet rights and are reported to be unhappy with the limited rights which they have retained and in particular with the Premier League's ability to show highlights of all of the matches on its own web-sites. In the case of the current proceedings in front of the European Commission regarding the UEFA Champions League, UEFA faces pressure from the European Commission to follow the example of the Premier League and to allow clubs to exercise some of the rights individually instead of collectively by UEFA. As I have mentioned, UEFA is currently in the process of revising its sale strategy and the G-14 lobby group, comprising the top European clubs is keen to have say in that strategy.

(iv) There has been criticism from some quarters that fragmentation of rights leads to too much coverage. Will viewers simply just get sick of sport? Is there a demand for increased coverage, especially coverage that has to be paid for, in the case of the Internet highlights packages and pay-per-view?

(v) There has also been much talk as to whether the high prices will continue. Look at ISL for example. This sports marketing agency was declared bankrupt in May of this year with debts of nearly US$300m. It had invested heavily in a rights acquisition programme to diversify away from its core FIFA football rights. It paid US$1.2bn for the right to show the ATP tennis tournament for a period of 10 years. Its short-term return on these investments failed to cover its minimum guarantees. It simply couldn't sell the rights for enough money. As prices have increased we have started to see broadcasters joining together to ensure value for money. A few examples are the Attheraces venture, a consortium comprising Channel Four, Sky and Arena Leisure, and Channel Four. Newscorp, Canal Plus and Octagon together share the international rights to the English Premier League. ntl, Telewest, ITV Digital and Sky bid jointly for the Premier League pay-per-view rights for $181m, almost half the amount which ntl had originally bid on its own. Once the pay television markets mature, will we see a declining need for the platforms to secure premier sports rights content to drive penetration? If so, the result of this could be downward pressure on the price of sports rights.[2]

(vi) Finally, is TV still going to be the dominant distribution platform for sports events? My view is yes, it is, despite the growth of sports coverage on the Internet. TV companies with their big budgets and their ability to aggregate largest audiences are able to keep the "live" rights to major sports events themselves and to demand that other platforms such as the Internet and 3G do not show material which has not yet been aired on TV.

For many of the questions I have posed here, much depends on the sport in question. I believe that for high-profile sports such as football, high prices will continue and TV will remain the dominant platform for the distribution of coverage of these events. However niche sports in the UK, such as basketball, extreme sports, badminton, to name but a few, the Internet presents sports such as these as an opportunity of coverage which they have never experienced before.

Revised version of a Paper presented at BAFSAL 9th Annual Conference, held on 18 October 2001 at Lord's Cricket Ground.

Footnotes

(1) The deal was scrapped on 18 October 2001 following the UK government's decision to refer it to the competition authorities.
(2) Since giving this presentation there has been much speculation in the press as to whether soaring sports rights will continue. The view of the BBC director general, Greg Dyke, is that the bubble has burst and that UK football clubs may well have to accept less the next time round and this view is shared by the consultancy, Oliver & Ohlbaum. The growth rate of sports rights may well fall and this is not helped by a contracting television industry. A knock-on effect of a possible fall in sports rights fees could be the launch by rights holders of their own television channels.

Claire Harvey, Olswang

The Right to a Fair Hearing

Tony Morton-Hooper

1. Where a governing body assumes responsibility for the management and determination of disciplinary matters, it needs to address the following among other issues:-

(a) Should it be inquisitor, adjudicator, referee or a mixture of these roles?

(b) Should the disciplinary offence be articulated as a charge?

(c) Should the charge be prosecuted and proved by the governing body, an independent prosecutor or someone else?

(d) Who bears the burden of proof and at which stage?

(e) What is the standard of proof?

(f) How will evidence be admitted?

(g) Will strict rules of evidence apply?

(f) To what extent can the case be conducted on paper or orally?

(g) What, if any, provisions will there be as to costs?

(h) What penalties are available?

(i) Is there a right of appeal?

These are largely procedural points but they have great significance and are all relevant to the question of fairness. There needs to be clarity and certainty expressed within written rules. There is also an advantage in flexibility so that the parties are allowed, even encouraged, to agree procedural points between themselves; a bit like ad hoc arbitrations.

2. But there is a far more fundamental point to consider. This is what I propose to focus on in this presentation. In the context of the disciplinary procedures of sports governing bodies, is there an entitlement to a fair hearing? Correspondingly, can that entitlement be effectively enforced? The answer may seem to be obvious but scratch the surface and some difficult issues arise.

3. We have to start with public law principles, namely the rules of natural justice, and also consider the provisions of Article 6 of the European Convention on Human Rights.

ARTICLE 6

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

Since 2 October 2000, English Courts have been obliged under the Human Rights Act 1998 to give effect to the right to a fair trial as embodied in Article 6.

4. The principles of a fair trial have long been recognised in our common law, namely principles of independence, impartiality and that biased decisions must be set aside. Back in 1952 Lord Denning confidently stated in *Lee v The Showman's Guild of Great Britain*[1] that the jurisdiction of domestic tribunals was founded in contract and that they must comply with the rules of fairness. Of course it can be said that the obligation to act fairly does not have to arise from contract. Clearly Lord Denning nailed his colours to the mast of a contractual right and corresponding obligation as regards a fair hearing before a domestic tribunal.

5. Our Courts have struggled (certainly up to 1993 and the House of Lords decision in *R v Gough*,[2]) and in my view continue to struggle with the concept of bias.

In order to make sense of the concept of a fair hearing in practice, there must be an obligation on the body responsible for the disciplinary process, most usually the national or international federation in the sports context, or a supra national body like the Court of Arbitration for Sport. If there is such an obligation, what is its nature? Is it, for example, a contractual obligation? As has been seen in Modahl, the court was most reluctant to accept that her relationship with the British Athletics Federation was a contractual one thus enabling the implication of a duty of fairness. There was however judicial support for the contract proposition, from Latham LJ and Mance L.

6. Mance LJ said, of the contractual foundation:-

> *"The (BAF) rules, in my view, contain a framework of rights and duties of sufficient certainty to be given contractual effect, with regard to the athlete's entitlement and ability to compete. Consideration exists in the athlete's submission to the rules and (BAF's) jurisdiction in (BAF's) agreement to operate the rules and to permit the athlete to compete in accordance with them, and in both parties' agreement on the procedures for resolution of any disputes contained in the rules."* [paragraph 103][3]

7. This approach was not without its precedent. In *Law v National Greyhound Racing Club Ltd* [1983][4] 3AER 300, the Court of Appeal found that the rules of that sport provided that those taking part were deemed to have submitted to the governing body's rules and jurisdiction. That voluntary submission and the disciplinary powers exercised involved a contract. In *Korda v ITF* [1999] AER 84,[5] a tennis player who had entered Wimbledon was found to be in contract with the governing body of the sport as to its disciplinary jurisdiction.

I do not propose to go into the case of Aga Khan[6] and it will be familiar to most of you. Suffice it to say, that decision of the Court of Appeal reported in 1987, pretty well stops anyone from seeking a public law remedy when challenging the exercise of disciplinary powers by a governing body, even one exercising monopolistic powers over a sport. Although such legal luminaries as Michael Beloff and Tim Kerr do not like the reasoning in Aga Khan, the fact is that Judicial Review is, at present, for all practical purposes, a non-starter. This has a bearing also on whether sports governing bodies are susceptible to review pursuant to the Human Rights Act. Public law principles as to the right to a fair hearing and the test of fairness should be the same whether a public or private law remedy is being sought.

8. If a public law remedy is out of reach, so too, in the light of Modahl, would appear to be any really practical use of a private law remedy when a person's right to a fair trial is infringed. Although there was grudging support for the contractual foundation of the claim (thus reversing the judgment at first instance on that point) it was of limited practical use to the Claimant.

9. With no public law remedy and limited chances of a claim in implied contract or tort, what is left? Well, what is left is the 1966 Denning judgment in *Nagle v Feilden*[7] in which it was held that a person's

right to work, when considered by a domestic body (in that case the Jockey Club), would be protected and even where there was no contractual relationship, the Court would grant declarations and injunctions (but significantly not damages) in order to uphold that right to work. So, as many of the cases of sportsmen challenging decisions of governing bodies concern their livelihood, Nagle can still be invoked but there is no remedy in damages. The Denning solution in Nagle did have an "improvisatory air" as Hoffman LJ put it in Aga Khan but it is still, in the light of Modahl, considered to be good law. Lord Denning seemed not to be too concerned that Nagle was a departure from the principles he stated 14 years earlier in Lee.

10. In my view, this is retrogressive. The right to a fair hearing is solidly enshrined in our law and given proper expression in our incorporation of Article 6 of the Convention. But the Courts remain reluctant to allow anyone whose right has been infringed to obtain a proper remedy which, in the case of a professional sportsman, is more likely than not going to need to be a financial remedy. Whether or not Modahl is going to be distinguishable on its own particular facts, it is still likely to represent a fairly commonplace relationship between governing bodies and professional participants in a sport who have a loose relationship where the only written provisions are in a rule book and there are no players' contracts linking the federation and the individual player or athlete. It becomes a question of giving a right with one hand and taking away a remedy with the other.

11. It could also be said that the issue has been side-stepped in Modahl. The Court of Appeal found that if there was a contract, then an implied term of fairness went no further than placing an obligation on the federation to provide fair treatment overall. In other words, even if a first hearing was unfair, a subsequent appeal which overturned the first decision would cure all defects including all consequences of the first unfair decision. The best judicial guidance on this issue came in *Calvin v Carr*,[8] a 1979 Privy Council case. Yet again, it was a Jockey Club decision, this time the Australian Jockey Club, which went under the microscope. The question was: can defects in natural justice at an original hearing be cured by an appeal which had been properly conducted? The answer was that in nearly all cases it could. The Court had to decide whether at the end of the day a fair result had been achieved. However, flagrant abuses such as corruption or bias should result in quashing the defective decision. The Court even in those cases should not be too eager to intervene. *Calvin v Carr* is therefore firmly in the non-interventionist camp.

In taking account of *Calvin v Carr*, the Court of Appeal in Modahl reckoned that, notwithstanding the fact that the Chairman of Modahl's first hearing was infected by apparent bias, there had been no breach of the obligation to act fairly. It is a narrow reading of the right to a fair hearing.

12. This is where I have the greatest difficulty in accepting the Court of Appeal's approach. It can be tested as follows. What if the bias against Modahl had not been in the manner of a Chairman expressing a presumption of guilt in the case of all athletes or recommending a further appeal when his original decision was overturned. What if the expression of bias had been even more flagrant and unattractive? What if an adjudicator expresses a racial or gender prejudice? Just how flagrant does the bias have to be (even if it falls into the category of apparent rather than actual bias) before the Courts will strike down an adjudication by such a biased person? I am not talking about actual bias, bias which is specific to the case in question, but about apparent bias. The test for apparent bias in *R v Gough*, is whether there was a real likelihood, in the sense of a real possibility of bias. It has recently been refined in re Medicaments[9] by applying a more objective test: whether a fair-minded observer would consider there was a real danger of bias. Applying those tests, the Court of Appeal held in Modahl that the Chairman's views disqualified him and yet there was no remedy because it was decided that absent bias the result would have been no different. That fails to recognise the full impact of the Court of Appeal's decision in re Medicaments. If one member of a tribunal is disqualified, then it would usually follow that the others should stand down. A decision infected by bias is no decision at all. How can an appeal cure that? Even the re-hearing of evidence, de novo, "does not provide a universal solvent" (*Calvin v Carr*). An appeal process gives a party a second chance. If the first chance is taken away the appeal becomes the first properly conducted hearing. If the scope of what can be appealed is limited then the party appealing is deprived of due process. *Calvin v Carr* does not say all defects can be cured on appeal. The way is open for the Courts to say "fair treatment eventually but not fair treatment overall".

13. Bias comes in many forms. It is an attitude of mind. What guidance can be given to governing bodies in sport in the light of these decisions? And what remedies do sportsmen now have?

As to the first, it has long been my view that there is no substitute for transparent impartiality. Given

the poor record of sports governing bodies, they need to do something radical and purposeful. That requires the bodies in question to adopt an independence of mind and to disallow any connection between the interests of its adjudicators and the interests of the parties over whom they are adjudicating. How often have you heard that the best people to adjudicate in sports disputes are those who have some background in the sport, who love the sport or who know something about the players' or athletes' perspective having once participated in the sport themselves? I would advocate erring towards disqualifying all such people. Why is there such a dread of allowing outsiders into our sports to resolve disputes? Judgment by your peers is the principle often invoked. I have little sympathy with that having seen the abuses that have taken place.

14. The CAS has at least started to set a proper example. Not a huge fan of the CAS in its early days, my own experience has been such that I am now more inclined to accept their declarations of impartiality. CAS Rule 33 provides that every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect independence with respect to any of the parties. This is an echo of IOC Charter Against Doping in Sport in what used to be annex 6. That provides for safeguards including one stating that hearings should be "thorough and impartial". I have successfully challenged the impartiality of arbitrators, recently when a party, a national governing body, tried to nominate someone as one of three CAS arbitrators who had held an official role within that body which had not been disclosed. The other arbitrators, before the case got going, were quick to accept my protestations that the third arbitrator with the undisclosed interest should go. He was promptly replaced. I was not accusing him of actual bias. I simply wanted my client to have confidence that the panel of arbitrators would act with fairness and impartiality. That is at the heart of the issue. Those who have even a tenuous connection with a case may provoke a reasonable apprehension that the process may not be clean, that is free from partiality or prejudice. It is a question of confidence. It is also a question of understanding that a person may say, and truthfully say, "I do not believe I am biased" but still his mind may be unconsciously affected by bias.

15. I detect a slowly developing trend in this country towards independent bodies adjudicating sports-related disputes. This is partly because of a recognition that professional sport is a livelihood and not a pastime or recreation as it is with those of us who hack around golf courses or only get our tennis rackets out round about Wimbledon fortnight. Cosy, committee room justice needs to be driven out of sport. There is another good reason for that: it is expensive. The more sports governing bodies try to exclude external influence and independent adjudications, the greater the risk of legal challenge and expensive arguments about the manner in which decisions have been made rather than the decisions themselves. The sense of injustice that motivates participants in sport to challenge the decisions of governing bodies through the Courts will not subside. Whether you advocate a public or private law approach, why should those participants have to put up with the response, whichever path they seem to choose, "you have no remedy". We are not out of the woods. Mrs Nagle, thirty five years ago, could not get a trainers licence just because she was a woman. She was rescued by a piece of "make it up as you go along" justice so typical of Lord Denning. The Aga Khan, eight years ago, could not get the Courts to overturn what he believed was unfair treatment because Judicial Review was unavailable. The fact that the Courts have erected obstacles in sports related cases should not be allowed to obscure the fact that the initial problems often arise because sports governing bodies have allowed adjudications to be made by people who had taken the law into their own hands and had fumbled, badly, because they did not fully embrace concepts of accountability and fairness.

16. Participants in sport, whatever area they come from, deserve enforceable guarantees of impartiality, not platitudes, and worthwhile remedies beyond mere declarations, when those guarantees are not delivered. A governing body which writes the rules and procedures, implements them and then sits in judgment when there is a challenge is asking for trouble. There is no body in this country like the CAS, which has any proper track record. The reason for this is that there is not a strong enough will to invest. Justice does not come on the cheap. A lack of understanding of and sympathy with what constitutes "fair play" in the disciplinary process still permeates many of our sports governing bodies. This may seem a strange irony since we are dealing with sporting activity and maybe even more so because this country is supposed to be the home of fair play. There may be a reluctance to reform, notwithstanding efforts by bodies like UK Sport, but sooner or later Government will intervene and impose a structure which compels sporting bodies to sign up to a uniform system of dispute resolution that kills off the "thank you, but we'll do it our way" attitudes that have held sway for too long in this as well as many other aspects of modern professional sport in this country. Why will the government intervene? Because huge amounts of money are invested in and generated by sports, self-regulation is under attack and accountability and fairness are "grown-up" concepts suited to modern day sports administration and governance.

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Footnotes

(1) *Lee .v. The Showmans Guild of Great Britain* [1952] 2 QB 329
(2) *R .v. Gough* [1993] AC 646
(3) *Modahl .v. British Athletic Federation Limited* - Court of Appeal 12 October 2001 (Transcript)
(4) *Law .v. National Greyhound Racing Club Limited* [1983] 3 AER 300
(5) *Korda .v. ITF* [1999] AER 84
(6) *R .v. Disciplinary Committee of the Jockey Club* ex parte Aga Khan [1993] 1 WLR 909
(7) *Nagle .v. Feilden* [1966] 2 QB 633
(8) *Calvin .v. Carr* [1979] 2 AER 440
(9) *Director General of Fair Trading .v. Proprietary Association of Great Britain* (In re Medicaments and Related Classes of Goods (No.2)) [2001] 1 WLR 700 (CA).

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The Financing of Professional Football and EC Competition Law: Is the Zidane Deal in an Off-Side Position?

Miquel Montañá-Mora *

1. INTRODUCTION

For many years football and sports in general seemed to operate in a sort of self-regulated vacuum where general EC principles and rules did not appear to play a significant role. However, recent developments such as the Commission's action against Formula 1, the constant debate about sports federations, the scrutiny of collective selling of TV rights and, most notably, the *Bosman* case,[1] have shown the sports community and, in particular, the football community, that they do live in the real world.[2] The Commission seems to have realised that sport is a big business which represents more than 1 % of the EU's GDP, and that, as such, it needs a transparent level playing field.[3] It is therefore not surprising that there is currently a list of some sixty sports and sport-related cases under scrutiny from the perspective of EC competition law.[4] As explained in this article, the complex financing arrangements that have allowed Real Madrid to acquire football superstar Zinadine Zidane ("Zidane") from rival Juventus may well be added to this list.

The transaction made the front page of newspapers throughout Europe,[5] due to both the talent of the player and the price paid, more than Euro 75 million. No doubt Zidane's transfer from Juventus to Real Madrid will put the latter in a privileged competitive position, particularly taking into account that last August the club acquired player Luis Figo ("Figo"), another superstar, after paying more than Euro 60 million to F.C. Barcelona.

These investments could hardly have been foreseen in June 2000, when the club was struggling against a reported debt of Euro 280 million, which forced the club's auditors to administer a warning in the audit report corresponding to the year 1999-2000 putting into question the financial viability of the club,[6] whilst UEFA was considering preventing the club from taking part in the Champion's League due to its debt.[7] The reader may be wondering what has happened since then to give a club with an

ailing economy the financial capacity to poach the world's finest football players from clubs with far healthier ones. The answer lies in a mixture of sociological, political and financial factors which have at their cornerstone a Town-Planning Agreement signed on 7 May 2001 between Real Madrid, the City Council and the Community of Madrid (the "Planning Agreement"),[8] which will provide the club with more than Euro 420 million.[9]

In short, according to the Planning Agreement, the City Council will introduce a specific modification to the General Plan of Urban Development (the "GPUD"), which governs the city's general development, so that the land where the club's current training fields are located, which according to the current GPUD is only for "sports use," may be used in the future to construct four forty-five storey skyscrapers, a sports centre and other facilities which will be described below. As mentioned, the new uses allowed after the modification of the GPUD will bring the club Euro 420 million for a piece of land which a former president of the club had agreed to sell for Euro 3 million in 1986.[10] In addition, the City Council and the Community of Madrid's Government have agreed to undertake whatever steps are necessary so that the club may build up a new sports city in the surroundings of Madrid.

In these circumstances, the club's new president has reason to congratulate himself for having been able to negotiate and obtain approval for a Planning Agreement which, in his own words, will allow the club to sweep away its mounting historical debt overnight.[11] The income generated by the modification of the urban qualification of the land will also allow the club to meet the financial obligations arising from the transfer of Figo, Zidane and other players to Real Madrid. There will even be leftovers to build up a new sports city that will cost the club around Euro 120 million.

However, the approval of the Planning Agreement has not pleased everybody. While the presidents of some rival clubs have denounced what they consider to be "scandalous" aid to Real Madrid, and there are rumours that fellow Madrid clubs such as "AtlÈtico de Madrid" or "Rayo Vallecano" might request "similar aid,"[12] the spokesman of the Socialist group at the City Council has declared that "to aid Real Madrid, which contributes to the city's good name in the world, is positive, but it cannot entail the construction of four skyscrapers in one of the most saturated street axes."[13] The editorials of newspapers published in Barcelona, the home of Real Madrid's main Spanish rival, have denounced that the Populist Party politicians who support Real Madrid, which govern both the City Council and the Community of Madrid, have authorised the club to conduct an unprecedented financial transaction.[14] The club's president has responded to these criticisms by arguing that "no matter how much they wanted to help Real Madrid, they could never pay for what this club has done for its city."[15] The purpose of this article is to make a contribution to this debate by analysing whether the Planning Agreement presents any elements that may be objectionable under Articles 87 *et sequitur* of the EC Treaty. For this purpose, part II will give a general description of the main features of the Planning Agreement and the rights and obligations which will be entailed. Part III is aimed at examining whether there are any elements in the Planning Agreement that may fit into the concept of state aid as construed by the European Court of Justice (the "ECJ" or the "Court") over recent years. In part IV, the analysis moves towards considering the compatibility of the Planning Agreement with the common market, focusing on whether it may distort competition and affect trade among Member States. In the conclusions, which are set out in part V, it is argued that there seem to be sufficient grounds to consider that the Planning Agreement contains state aid elements that are incompatible with the common market and which, therefore, have put the club in an off-side position.

2. THE HISTORY BEYOND THE PLANNING AGREEMENT

2.1 Introduction

On 21 August 1956, the Spanish Government approved a Decree authorising the Government's Urban Commission to assign a plot of land to Real Madrid so that the club could build up its so-called sports city. The land, which consists of approximately 141,960m^2, had recently been expropriated for the alleged purpose of building up rent-controlled social houses.[16] The club is reported to have paid approximately Euro 72,000 in three instalments: (i) Euro 36,000 at the date of the sale and purchase agreement; (ii) Euro 18,000 before 31 July 1970; and (iii) the remaining Euro 18,000 before the end of 31 December 1970. The sale and purchase agreement was signed before a Notary public on 6 April 1960.

The land was used to build up the club's sports city, which is mainly composed of football training fields. In 1986, the club agreed to sell the land to the Community of Madrid for Euro 3 million, although the deal was challenged by a club member and this prevented the transfer from going

through.[17] In the late 1990s, Real Madrid requested authorisation from the City Council to have the land partitioned into three plots. On 28 April 1998, the City Council's Urban Manager approved a Decree granting the authorisation requested by the club. Between 1998 and 1999, the club entered into several agreements with the City Council and the Community of Madrid, whereby the two political institutions became owners of a 30,000m² plot of the total land.[18]

When the club organised elections to choose a new president in July 2000, the urban re-qualification and sale of the land topped the agenda of Mr Florentino Pérez, the incumbent candidate, who had promised to wipe out the club's historical debt. His election marked the kick-off of a long negotiation process where he has been the leading light, culminating on 7 May 2001 with the signing of the Planning Agreement.[19]

2.2 Current urban qualification of the land

The Planning Agreement establishes that Real Madrid, the Community of Madrid, and the City Council will each contribute a plot to form a 150,678m² piece of land. In particular, the club will contribute 110,628m² (the leftovers of its original 140,628m² plot, hereinafter "Plot A"); the Community of Madrid and the City Council will contribute their respective 50% shares in the 30,000m² plot acquired from Real Madrid in 1999 (hereinafter, "Plot B"); finally, the City Council will contribute 10,050m² (hereinafter, "Plot C").[20]

The Recitals of the Planning Agreement explain that according to the GPUD approved by the City Council in 1997, the qualification, uses and construction allowed on each plot are as follows:

In Plot A, only "private sports" uses are allowed. The construction allowed is 33,188m² (the result of applying the index of construction allowed - 0.30 - to the total surface of the plot, i.e. 110,628m²). The occupancy allowed is also 33,188m² (again, the result of applying the index of construction allowed - 30% - to the total surface).

In Plot B, only "private sports" uses are likewise allowed. The construction allowed is 15,000m² (the result of applying the index of construction allowed - 0.50 - to the total surface of the parcel, i.e. 30,000m²). The occupancy allowed is also 15,000m² (again, the result of applying the occupancy index - 50% - to the total surface).

In Plot C (10,050m²) no construction is allowed, since it is qualified as "basic green."

2.3 Objectives of the Planning Agreement

The Planning Agreement, after describing the characteristics of the plots and their urban qualification, includes a section seeking to justify the purpose of the Planning Agreement and the modification of the GUDP that it will require (Section IV of the Recitals).

After noting the land has been used for "sports uses" since its acquisition by Real Madrid in 1960, as confirmed by the GUDP approved in 1985 and 1997, the Planning Agreement highlights its "privileged situation," which makes its future incorporation into the new structural growth of the Northern part of the city strategic. It then goes on to explain that the project will fit in with the new infrastructure projects devised to enlarge "La Castellana," one of the main city axes. The Planning Agreement then makes reference to Madrid's candidature to host the Olympic Games in the year 2012 and notes that the complexity of organising and celebrating an Olympic Games requires a number of sports, spectacle and high competition facilities, along with training centres.

According to the last paragraph of the Recitals,

> *"the Community of Madrid and the City Council consider the high strategic value of the land subject to this Agreement aimed at constructing a Madrid sports centre promoted by both Administrations - Multiple Use Sports Centre - incorporating high competition facilities, along with an important reservation of public land for free spaces, green zones, parking space and transport commuting, as the case may be. As a consequence, both Administrations declare their interest in reordering the plots and obtain the necessary land to achieve the aforementioned objectives, signing in this respect the present Planning Agreement jointly with Real Madrid [...]."*

2.4 The urban re-qualification of the plots

According to Clause 1, the City Council and the Community of Madrid agree to modify the 1997 GUDP regarding the uses, construction allowed, regulation and planning of this specific 150,678m² piece of land,

> *"aimed at the construction of a unique multiple-purpose sports building for high-level competition, with the current technology suitable to host large national and international sports events, the configuration of a green zone for public use and the localisation of office space."*

The following Clauses specify the technical details of the re-qualification administrative process, the analysis of which falls beyond the scope of this article. For the present purposes, it will suffice to mention that according to Clause 2, after the urban re-qualification of the 150,678m², the following uses and construction will be allowed:

A 50,000m² plot will be qualified as "public sports" use and will host the multiple-purpose sports centre. The gross construction index allowed will be 0.80m²/m², with a net construction index of 0.26m²/m².

A 30,000m² plot will be qualified as "generic tertiary" use (i.e. offices space). The gross construction index allowed will be 1.49m²/m², with a net construction index of 7.50m²/m². This is the area where the Planning Agreement foresees the construction of four forty-five storey skyscrapers, which will become Spain's tallest buildings, with an approximate height of 215 meters. This has caught the press's attention, which has noted that "the urban development plan foreseen for Real Madrid's sports city land has managed to break the Mayor's age-old rejection of skyscrapers."[21] The construction allowed will be 56,250m² for each building. Critics of the project have denounced that the construction index allowed double the construction that the City Council is willing to authorise in another development project in the same area, which has been dragged down as a consequence of the lack of agreement between the authorities and the developers on the construction index allowed.[22]

An additional 60,000m² will be qualified as a "green zone of public domain and use" whilst the remaining 10,678m² will be qualified as "public streets."

According to Clause 4, which governs the urban management of the project, the quantity of land to be contributed by each party will be as follows: (i) Real Madrid, 73.421%; (ii) the Community of Madrid, 9.955%; and (iii) the City Council, 16.624%. To calculate the coefficient of participation in the charges and benefits, the preferred criteria will be the result of dividing each party's contribution by the total surface. In any event, the City Council will be entitled to 10% of the profitable development. The City Council will assign to the Community of Madrid 25% of the urban rights over Plot C, as a consequence of its participation in the construction of the sports centre. The Planning Agreement also establishes that the City Council will be entitled to 50,000m² of "sports land," 60,000m² of "public green zone" and 10,677.68m² of "public streets." In addition, the City Council will be entitled to one of the four skyscrapers. In relation to the remaining three skyscrapers, two will be exclusively owned by Real Madrid, whereas the club and the Community of Madrid will own the fourth skyscraper jointly.

Obviously, an urban project of this magnitude will require substantial infrastructure work, such as the construction of new parking lots and other type of works. Their costs will be borne by the City Council. The Planning Agreement establishes, for example, that the City Council will construct two parking lots with respective capacities of 6,750 and 1,500 spaces and conduct various work on the surrounding streets. As to the timing, the Planning Agreement establishes that the GUDP must be approved before December 2001, which will mark the kick-off for the implementation of the project.

2.5 The new Real Madrid Sports City

As mentioned, one of the cornerstones of the Planning Agreement is Real Madrid's current sports city, since the land where it is located will form approximately 75% of the project. The club will have to leave its current sports city by 2004. Obviously, this raises the question of where the team is going to train. The answer can be found in the Planning Agreement, which foresees the creation of a new sports city ten times larger than the current one. According to the club, it will have training fields and a thematic park with a museum, restaurants, and a cinema, among other facilities. The club's

intention is to build up some sort of a pilgrimage centre for Madrid supporters, which will bring additional wealth to the club.

The authorities seem ready to help. In this regard, Clause 8 of the Planning Agreement establishes that

> *"the Community of Madrid and the City Council agree to conduct the town-planning modification and whatever dealings are necessary, through the relevant town-planning and urban management instruments, for the implantation of a new Real Madrid Football Club Sports City in the ambit of U.N.P.4.01 Airport City and Valdebebas Park, in a plot qualified as a sports plot with a surface of approximately 120 hectares."*

According to the club, the new sports city, which, as mentioned, is estimated to cost around 120 million Euro, will be financed by the income generated by the skyscrapers built on the former sports city.

3. THE PLANNING AGREEMENT AND THE STATE AID CONCEPT

3.1 The State Aid Concept

The analysis of whether the Planning Agreement or any elements thereof fits into the legal concept of "state aid" encounters a first conceptual difficulty: there is no such legal concept. The EC Treaty merely establishes that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market."[23] The concept of state aid is defined nowhere in the Treaty.

The lack of a definition is not surprising. Over the years, state aid and subsidies have proved to be one of the most untameable creatures of the domain of international trade,[24] as proved by the historical bitter disputes between the United States and the European Community before GATT and, most recently, before the World Trade Organisation ("WTO")'s Dispute Settlement Body.[25] For decades, states have been seeking to prohibit or, at least, govern the effects of this creature on international trade. However, they have been unable to define what they were seeking to regulate.

To a large extent, the difficulty of agreeing on a commonly accepted definition of "subsidy" in the context of the GATT/WTO system, lies in the different concepts traditionally maintained by the United States and the European Community. Whereas according to the former, the key element of a subsidy is the presence of "a benefit to the recipient," the latter has historically required an additional and, in its opinion, more important element, that is, "a charge" on the public Administration granting the subsidy.[26] In this respect, Article 1 of the Uruguay Round Agreement on Subsidies and Countervailing Duties (hereinafter, the "WTO Subsidies Agreement") represents a compromise between the two positions.[27]

The WTO Subsidies Agreement is enlightening in the sense that it narrowed down a concept that had resisted any characterisation attempts for decades. It is now clear that, for the purposes of the WTO Subsidies Agreement, a subsidy requires two elements: (i) a benefit to the recipient; and (ii) a charge on the public Administration. However, for the purposes of this article, this is not the end of the discussion, but rather the beginning. This is because the discussion focuses on whether the Planning Agreement fits into the concept of "state aid," which raises the question of whether the concepts of "subsidy" and "state aid" are actually different. The answer must clearly be affirmative. There is widespread agreement that the concept of "state aid" is broader and, therefore, it encompasses a number of practices that would not fit into the concept of "subsidy."[28] The ECJ has declared that "the concept of aid is thus wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect."[29] Thus the fact that a public measure may not meet the requirements to qualify as a subsidy does not relieve one from considering whether it may qualify as "state aid."

It has recently been suggested that the definition of "state aid" revolves around three elements. The first element is the benefit or financial advantage received by the recipient. The second element is the active role performed by public authorities granting or financing the aid. The third element is

determined by the beneficiary of the aid, which must be an enterprise or a group of enterprises.[30] To these three elements one may add a fourth element, that is, the distortion of competition and effects on inter-State trade.[31] Thus, from a theoretical perspective, the fact that a charge on the State is not present, which would exclude the measure at hand from the concept of "subsidy," would not necessarily exclude it from the realm of state aids.

3.2 The Notion of State aid as construed by the ECJ

The broad language used in Article 87 of the EC Treaty (*"any aid granted by a Member State or through State resources in any form whatsoever"*) has allowed the ECJ to follow a case-by-case approach when considering whether a particular measure is incompatible with the common market. Whereas, on the one hand, this has provided the ECJ with the leeway necessary to make a decision based on the specific facts of each case, on the other hand, legal certainty has suffered.[32] However, a careful examination of the ECJ case law on state aid reveals a number of recurrent elements that will be briefly examined below:

3.2.1 A financial benefit

The only undisputed assertion regarding the concept of state aid is probably that no state aid element can be established unless a financial benefit is present. Regardless of the terminology used (benefit, privilege, advantage...) it is a common acceptance that this is an essential element of the state aid concept. As already noted, this was clearly declared by the ECJ in Case C-387/92 *Banco Exterior de España S.A. v. Ayuntamiento de Valencia*.[33] In its judgment of 11 July 1996, the ECJ restated that

> *"the concept of aid thus encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect [...]. Accordingly, in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions."*[34]

Similar statements can be found in other judgments, such as those rendered on 19 May 1999 (*Italian Republic v. Commission*)[35] and 1 December 1998 (*Ecotrade v. Altiforni e Ferriere di Servola*).[36] In a recent judgment dated 14 December 2000, the ECJ stressed that

> *"[...] as the Court of Justice held in Case 78/76* ***Steinike & Weinling v. Germany*** *[1977] ECR 595, paragraph 21, regard must primarily be had to the effects of the aid on the favoured undertakings or producers and not the status of the institutions distributing the aid. It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings."*[37]

Thus this line of interpretation seems to indicate that there are cases where a "benefit to the recipient" granted by the State may suffice to find a particular measure to be state aid in the sense of Article 87.

In the case of the Planning Agreement, this is probably the requirement that is more clearly met. As explained above, the new qualification of the land will provide the club with revenue estimated at Euro 420 million, whereas in 1986 a former Real Madrid president had agreed to sell the same land, under the former urban qualification, for Euro 3 million.[38] Therefore, there would seem to be no doubt that the Planning Agreement will confer a substantial benefit to the club.

3.2.2 Granted by the State or through State Resources

A second element that invariably comes to the fore when examining concept of the state aid relates to the grantor of the aid. All the definitions proposed require the participation of public authorities in the adopting or financing of the measure. If public authorities are not involved, directly or indirectly, one way or another, the measure cannot be qualified as a state aid.[39] This is logical, taking into account that Article 87 of the EC Treaty requires the measure to have been "granted by a Member State or through State resources."

The first question that must be addressed to consider whether the Planning Agreement is a measure "granted by a Member State or through State resources" is whether the City Council and the Community of Madrid fall within the concept of "State." In the light of the ECJ case law, the answer is beyond doubt,[40] since the Court has consistently declared that any measures adopted by local authorities must be considered adopted by the State.[41] The same solution has been followed by the WTO, which comports with a general rule of international law, whereby any responsibility for acts of territorial entities such as länder, provinces or autonomous communities lies with the State.

The second question, which has a less clear answer, is whether a measure decided by the State that confers a benefit on the recipient but which is not financed through State resources, may be considered to be state aid in the sense of article 87 of the EC Treaty. In principle, two interpretations are possible. According to the first interpretation, any measure that does not entail a charge on the State falls outside the concept of state aid. This line of interpretation argues that the reference "*through State resources*" is aimed at capturing measures granted by entities other than the State but which are financed by the State. Authors defending this thesis understand that to qualify as state aid in the sense of Article 87, aid "*granted by a Member State*" must be financed "*through State resources.*"[42] Interestingly, this line of argument fits in with the interpretation maintained by the EC in GATT negotiations on subsidies, where it has traditionally maintained that no subsidy exists without a financial charge for the State.[43]

The second line of interpretation, based on the actual wording of Article 87, contends that a measure does not need to be financed through State resources to qualify as a state aid. According to this interpretation, the language used in Article 87 ("*any aid granted by a Member State or through State resources in any form whatsoever*") encompasses any type of measures granted, approved, ordered or decided by the State, regardless of whether or not the measure is financed through State resources.[44] This is, for example, the interpretation sustained by the United States over the years in relation to the concept of "subsidy" in the context of GATT.[45]

Unfortunately, the case law of the ECJ does not give a clear indication as to which line of interpretation should prevail. As will be seen below, one can easily find judgments pointing in both directions.[46] In Case 82/77 *Van Tiggele*, for example, the ECJ had to examine whether the fixing of minimum prices for the retail sale of alcoholic beverages could be construed as a form of state aid to the retailers in question. In its judgment of 24 January 1978, the ECJ found that the measure could not be considered to be state aid, after noting that the advantage was not granted, directly or indirectly, through State resources in the sense of former Article 92 of the EC Treaty.[47] The Court took a similar position in its judgments of 17 March 1993, rendered in Cases C-72 and C-73/91 *Firma Slomann Neptun*,[48] 30 November 1993, rendered in Case C-189/91 *Kirsammer-Hack*,[49] 7 May 1998, rendered in Case C-52, C-53 and C-54/97 *Viscido*,[50] and 13 March 2001, rendered in Case C-379/98 *PreussenElektra* AG.[51]

In contrast to the former decisions, in its judgment of 30 January 1985 in Case 290/83 *Commission v. France*, the ECJ embraced the second interpretation. It declared that, as results from the wording of Article 87, aid does not have to be necessarily financed through State resources to be considered state aid.[52] In its judgment of 7 June 1988 in Case 57/86 *Greece v. Commission* the Court followed the same position.[53] In its aforementioned judgment of 11 July 1996, the Court declared that

> *"in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions."*[54]

More recently, in the judgment of 14 December 2000 rendered in the aforementioned Case T-613/97 the ECJ seems to have pointed in the same direction. As already noted, in this case the Court declared that when examining whether a particular measure falls within the concept of state aid

> *"regard must primarily be had to the effects of the aid on the favoured undertakings or producers and not the status of the institutions distributing or administering the aid"* and that *"the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertaking."*[55]

This line of interpretation is easier to reconcile with the wording and purpose of Article 87 than the view that excludes the existence of state aid when a charge on the State is not present.[56] Article 87 is aimed at combating any measure

"in any form whatsoever" adopted by Member States *"which distorts or threatens to distort competition by favouring certain undertakings [...] insofar as it affects trade between Member States."*

In short, the purpose of the Article is to guarantee equal competition conditions for all the undertakings concerned.

In the light of this, the key element to determine whether a particular measure falls within the scope of Article 87 should be whether an undertaking has received an advantage or benefit thanks to an action taken by the State, regardless of whether or not such action entails a charge for the State. Requiring this second element would curtail the purpose of the Article and, in practice, would blur the border line between the concept of "state aid" and the concept of "subsidy."

3.2.3 The Measure must favour Certain Undertakings

Another of the elements which comes up when one examines the legal regime of state aid and subsidies in the international trade arena is "specificity."[57] Article 1.2 of the WTO Subsidies Agreement, for example, establishes that a subsidy, as defined in Article 1.1, will only be subject to the provisions of Parts II, III or IV when it is "specific" in the sense of Article 2.

As already mentioned, Article 87 of the EC Treaty encompasses

"any aid granted by a Member State or through State resources [...] which distorts or threatens to distort competition by favouring certain undertakings."

Thus a particular measure cannot be considered to be state aid in the sense of Article 87 unless it is specific.[58] This excludes from its scope of application the general measures approved by the State for the benefit of the generality of citizens. In recent years, the ECJ has made a flexible interpretation of this requirement, which has received expansive treatment.[59]

In the case of the Planning Agreement, in principle, the "specificity" element seems to be met, since the amendment of the 1997 GUDP will only affect the land covered by the Planning Agreement, 75% of which is owned by Real Madrid. One may object to this conclusion on the ground that the Planning Agreement does not only favour Real Madrid which, as mentioned, will receive more than Euro 420 million thanks to the urban re-qualification of the land where its current sports city is located. It will also favour the City Council, the Community of Madrid and, at the end of the day, the city as a whole, according to the supporters of the project. Nonetheless, it is doubtful whether this line of objection would have solid grounds, since the measure is clearly "specific" in the sense that it will only affect one club and a very specific plot of land. In fact, critics of the project have denounced that such a specific re-qualification of land has no comparable precedents in the city of Madrid.[60] On the other hand, it is doubtful whether the potential benefits that the project might bring to the city (a new sports centre, more space for public use, etc.) may justify, on their own, a measure which many see to favour primarily the club. According to critics, the same benefits could probably have been obtained by a measure that at the same time did not favour one particular undertaking.

This leads one to consider whether a football club like Real Madrid may be considered an undertaking in the sense of Article 87 of the EC Treaty. As mentioned in the Introduction, although for many years football seemed to operate in a sort of self-regulated vacuum where general EC principles and rules did not appear to play a significant role, recent developments have shown the football community that they do live in the real world. A football club, regardless of its legal structure, is clearly a part of this real world and, as such, it is a football "company" subject to Article 87, as is any other type of company. In this regard, the ECJ has consistently considered that the concept of enterprise includes any entity which conducts an economic activity, regardless of its legal form or status.[61] Both the Commission and the ECJ have used an economic concept of "enterprise" and have stressed that the legal form of any particular undertaking is irrelevant for the purposes of applying Article 87.[62]

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Thus it may be concluded that a football club such as Real Madrid can be considered to be an "undertaking" in the sense of Article 87 and, therefore, it is subject to the EC Treaty rules on state aid.

3.2.4 Irrelevance of the Purpose

A final element which has appeared in the ECJ case law and which is worth mentioning is the irrelevance of the purpose pursued by the State when granting the aid. The ECJ case law has mirrored in this regard the practice of WTO panels, which have always favoured an "effects-oriented approach." This can be seen, for example, in the judgment of 14 December 2000 where, as mentioned, the Court stressed that "regard must primarily be had to the effects of the aid."[63] The same conclusion was reached, for example, in its judgments dated 13 June 2000 in Cases T-204/97 and T-270/97 *EPAC*,[64] 17 June 1999 in Case C-75/97 *Belgium v. Commission*[65] and 6 February 1986 in Case 310/85 *Deufil*.[66]

Thus Section IV of the Planning Agreement's Recitals, which seeks to justify the objectives of the Planning Agreement, would not appear to play a significant role for the purpose of examining the compatibility of the Planning Agreement with the common market.

4. DOES THE PLANNING AGREEMENT DISTORT COMPETITION AND AFFECT TRADE BETWEEN MEMBER STATES?

Aid granted by a Member State or through State resources aimed at favouring certain undertakings (i.e. specific), as such, is not necessarily incompatible with the common market. According to Article 87, in addition it must distort or threaten to distort competition and affect trade between Member States.

4.1 The Threat to Competition

The rules on State aid embodied in the EC Treaty are not only aimed at redressing measures that have proved to create an actual distortion of competition. They seek to have primarily a preventive effect, as shown by the obligation to notify state aid to the Commission and by the prohibition of measures that create a situation of mere risk. For a measure to be incompatible with the common market an actual distortion to competition does not need to be necessarily proved. Proof of the mere risk or threat to competition suffices.

The analysis of whether a particular measure threatens to distort competition requires a case-by-case approach, as shown by the practice of the Commission and the case law of the ECJ. The Commission has traditionally made a very broad interpretation of this requirement and has considered that state aid distorts competition *per se*. The rationale behind this position is that state aid distorts competition because it interferes with the system whereby enterprises compete on the basis of their own efforts.[67] In line with this interpretation, the Commission has often found this requirement to be met without embarking on a detailed analysis of factors such as the number and situation of players in the relevant market, the position of the beneficiary in such market or the characteristics of the investment which the aid is supposed to finance.

In contrast with the Commission, the ECJ has followed a somewhat more analytical approach. The former's approach has deserved some criticism from the latter in those cases where the likely effects of the state aid on competition had not been analysed or when the grounds on which a decision was based had not been sufficiently developed.[68] However, it is probably fair to say that the ECJ has not been extraordinarily demanding in this regard. For example, in its recent judgment of 13 June 2000 rendered in Cases T-204/97 and T-270/97 *EPAC*, the Court of First Instance declared that the Commission is not obliged to conduct an extremely detailed economic analysis with the corresponding figures. In addition, the Court found that when state aid has not been notified to the Commission, the decision that declares the incompatibility of said aid with the common market does not necessarily have to be based on evidence of the actual effect of the aid on competition. According to the Court, deciding otherwise would favour Member States that grant state aid without complying with the obligation of notifying this to the Commission pursuant to Article 87.3.[69]

Similar conclusions were reached in its judgment dated 30 April 1998 in Case T-214/95 *Vlaams Gewest*

v. Commission[70] and in the ECJ's judgment of 14 February 1990 in Case C-301/87 *France v. Commission*.[71] The gist of the ECJ's line of thinking is probably best encapsulated in its judgment dated 17 September 1980 rendered in Case 730/79 *Philip Morris Holland v. Commission*. In this case the ECJ declared that when financial aid granted by a Member State strengthens the position of an enterprise *vis-à-vis* its competitors in the Community exchanges, it must be considered that the latter are prejudiced by the aid. So, for the purposes of our analysis, the relevant question is whether the Planning Agreement, and the administrative actions that will be entailed, will strengthen the position of Real Madrid in relation to its Community competitors. To be able to answer this question, one must go back to the factual data exposed in the Introduction.

On 30 June 2000, the club had a debt of Euro 280 million which, according to *Deloitte & Touche's* Annual Account's Audit Report, had put the entity on the verge of bankruptcy.[72] Another Audit Report recently produced by Arthur Andersen that was commissioned by the new president of the club when he took the helm in July 2000 has concluded that

> *"on 30 June 2000, Real Madrid was a non-viable club, not in the hands of its members but in the hands of its creditors."*[73]

Notwithstanding the foregoing, in July 2000 the club was able to poach player Luis Figo from F.C. Barcelona, a club without reported financial difficulties, after paying the latter Euro 60 million, i.e. a figure that amounted to approximately 20% of the club's debt, and the player receiving Euro 6 million per season. More recently, the club attracted Zidane, after paying more than Euro 75 million to his former club and offering over Euro 7 million per season to the player. In the meantime, the club has devised a project to construct a new sports city, which according to the club will require an investment of Euro 120 million.

In short, the answer to whether the Planning Agreement will strengthen the position of Real Madrid in relation to its Community competitors and hence distort competition, depends on whether it is reasonable to assume that under normal market conditions a club in the described financial situation could have been able to afford such investments. From the data revealed by the club's auditors the answer appears to be negative. Thus everything seems to indicate that the Planning Agreement contains elements that may distort competition in the Community professional football market.

4.2 The Effects on Trade between Member States

The last requirement that must be met for state aid to be incompatible with the common market is to affect trade between Member States. If this requirement is not met, the state aid might still capture the attention of the authorities from Member States that have national rules on state aid, but it will fall outside the scope of application of Article 87 of the EC Treaty. Thus, in general, the beneficiary of the state aid must be an enterprise that takes part in commercial transactions which have a Community dimension.

Notwithstanding the wording of the Article ("insofar as it affects trade between Member States"), the ECJ has declared that the compatibility of state aid with the common market must be analysed taking into account not only the actual effects of the measure but also the foreseeable or potential effects.[74] In practice, the analysis requires taking into account factors such as the size of the enterprise, the volume of the aid and the exchanges between Member States in the relevant market.[75]

In the case of the Planning Agreement, it can be concluded without difficulty that this requirement is also met. To begin with, the beneficiary of the aid is one of the leading football teams in Europe. The effects of state aid on trade between Member States would be less clearly appreciated in the cases of second level clubs that do not play in European competitions on a regular basis. On the other hand, due to its amount, the aid may be construed as a real barrier to the entry of other competitors, as it has allowed the club to acquire new players from other Community clubs after paying amounts unprecedented in the Community football market. Clearly, the ability of Community clubs to be able to retain their leading figures and to acquire new leading players from other Community clubs would be influenced by an injection of cash of this magnitude. In these circumstances, it is difficult to see how one could conclude that this type of measure would not affect trade between Member States in the professional football market.

5. CONCLUSIONS

It has been noted that the dramatic increase in the number of cases concerning the application of EC competition law in the field of professional sport is not really surprising, taking into account that "sport is now big business."[76] In this context, what it is surprising is that a multimillionaire urban transaction such as the Real Madrid Planning Agreement, which has given rise to a wide array of heated debates from various perspectives, has not generated any discussion whatsoever - as far as the author is aware - from the perspective of its possible incompatibility with the common market. This piece has sought to make an initial contribution to this debate.

Although any firm conclusion would possibly be premature, as a final judgement will depend on how the project unfolds, the information available to date and, in particular, the wording of the Planning Agreement, reveals elements that would be worth coming under the Commission's scrutiny. In fact, in the past the Commission has examined the compatibility with the common market of measures that were more distant from the concept of state aid than many of the elements included in the Planning Agreement.

The analysis has shown that the Planning Agreement will bring a significant benefit to the club and, as such, it appears to fit into the concept of state aid, as construed by the ECJ in some of its judgments. In principle, it is doubtful at this stage whether the project will entail a charge for the State, since the City Council and the Community of Madrid will themselves benefit from the commercial exploitation of the re-qualified land. However, the absence of this element, on its own, should not be sufficient to exclude the transaction from the realm of state aid rules. A different conclusion would be an invitation for canny governments to devise state aid structures that do not entail a "charge to the State" element, thus circumventing the wording, spirit and purpose of Community rules on state aids. On the other hand, taking into account that the amendment of the 1997 GUDP established in the Planning Agreement will only affect the land subject to the Planning Agreement, the "specificity" requirement also seems to have been met. The fact that the aid may also benefit the City Council, the Community of Madrid and the city in general is probably not a sufficient reason to exclude the measure from the domain of Article 87. This is because the same benefits for the city could have been obtained without having recourse to a measure that appears to give specific state aid to a particular undertaking.

As regards the two other elements required to find a particular measure to be incompatible with the common market, the answer appears to be founded on even more solid grounds. First, the experience to date has shown that the Planning Agreement has distorted competition in the professional football market, by favouring one particular club whose players form one of the Community's leading teams. The fact that a club on the verge of bankruptcy has been able to spend more than Euro 135 million in poaching leading players from rival Community clubs shows the competition distorting effects of this type of state aid. Second, as far as the effects on trade between Member States are concerned, the fact that Real Madrid and the other clubs concerned take part in the European competitions on a regular basis, forms a sound basis from which to consider that this requirement is also met.

All in all, there seem to be sufficient grounds to consider that the Planning Agreement contains state aid elements that are incompatible with the common market and which, therefore, have put the club, with Zidane at the forefront, in an off-side position. What remains to be seen is whether the Commission will dare raise the flag.

Footnotes

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(1) Case C-415/93, *Bosman*, [1995] I ECR 4921.

(2) See an account of the most recent cases examined by the Commission in the field of sports in Ratliff, "EC Competition Law and Sport," 6 Sport & The Law Journal (1998), 4. See also Van den Brink, J. P., "E.C. and the Regulation of Football; Part I," in 21-8 E.C.L.R. (August 2000), 359 and "E.C. and the Regulation of Football: Part II," in 21-9 E.C.L.R. (September 2000), 420.

(3) See Blackshaw, "Boundaries for the level playing field," *The Times*, 20 June 2000.

(4) Ibid.

(5) See, for example, the front page of the *Financial Times*, 10 July 2001.

(6) The Audit Report produced by *Deloitte & Touche* included the following warning: "The situation of the debt coupled with the imbalance between the income and expenditure budgeted are factors that raise important doubts regarding Real Madrid's ability to continue its operations." *La Vanguardia*, 27 October 2000.

(7) On 23 April 2001, Mr Markus Studer, UEFA's new General Secretary, declared in *Die Welt* that "at this point in time, Real Madrid do not have any possibility of playing in Europe." http://www.estrelladigital.es, 24 April 2001.

(8) *Convenio Urbanísitico entre la Comunidad de Madrid, el Excmo. Ayuntamiento de Madrid y el Real Madrid Club de Fútbol para el desarrollo urbanístico de la parcela situada en el Paseo de la Castellana, Avenida de Monforte de Lemos y calles de Pedro Rico y Arzobispo Morcillo, Distrito*, dated 7 May 2001.
(9) "El Real Madrid vuelve a ser rico (Real Madrid is rich again)," in http://www.diarioas.es, 9 May 2001. See also *La Vanguardia*, 31 July 2001, at p. 41.
(10) *La Vanguardia*, 8 May 2001, at p. 50.
(11) See, for example, interview with the club's president, Mr Florentino Pérez, published in *El País*, 26 May 2001, at p. 44. See also *Metros2*, June 2001, at p. 6.
(12) http://www.micanoa.com/deportes, 28 May 2001.
(13) http://www.observatorioinmobiliario.com, 9 May 2001. See also *La Vanguardia*, 8 May 2001.
(14) According to an editorial published by *El Periódico* on 9 May 2001 (p. 4), "the professional football league has been altered by this decision. A club like Real Madrid, instead of having to face the pain for recent years' squandering finds itself rewarded with a financial injection that can only be understood from the Populist Party's arrogance there where it has absolute majority."
(15) *El País*, 26 May 2001, at p. 44.
(16) "No todo es blanco en el Madrid," in http://micanoa.com/deportes/ciudaddeportiva1.html
(17) *La Vanguardia*, 8 May 2001, at p. 50.
(18) The City Council and the Community of Madrid are joint owners of a 30,000m² plot pursuant to a barter agreement signed between the City Council and Real Madrid on 23 February 1999 and a sale and purchase agreement signed between ARPEGIO, S.A., a company owned by the Community of Madrid, and Real Madrid, on 10 June 1998. These transactions brought the club Euro 27 million plus some land.
(19) The spokesman of the Socialist Party's representatives at the City Council declared that "the deal has been pre-designed by Florentino Pérez" and regretted that the Populist Party "has not wished to hear other alternatives, thus not giving priority to the citizens' interests." *La Vanguardia*, 8 May 2001.
(20) According to the information available to date, these transactions appear to fall outside the general principles established in the Commission Communication on State Aid elements for sales of land and buildings by public authorities, published in the Official Journal C 209 of 10 July 1997.
(21) *El País*, 5 May 2001.
(22) *Cinco Días*, 8 May 2001.
(23) In relation to EC rules on State aid, see Arpio Santacruz, *Las Ayudas públicas ante el Derecho Europeo de la Competencia* (Aranzadi Editorial, 2000); Hancher *et altri, EC State Aids* (Sweet & Maxwell, 2nd ed., 1999); Kepenne, *Guide des aides d'État en droit communautaire* (Bruylant, 1999); D'Sa, *European Community law on State aid* (Sweet & Maxwell, 1998); Evans, *EC law of State aid* (Clarendon Press, 1997).
(24) See Bourgeois, *Subsidies and International Trade: an European Lawyer's Perspective*, Kluwer, Deventer, 1991; Wallace. *et altri, Interface Three: Legal Treatment of Domestic Subsidies*, The International Law Institute, Washington, DC, 1984; Hufbauer & Shelton-Erb, *Subsidies in International Trade*, Institute for International Economics, Washington, DC, 1984; Malmgreen, *International Order for Public Subsidies*, Trade Policy Research Centre, London, 1977.
(25) For an analysis of how the United States and the EC have shaped GATT's rules on subsidies over the years see Montañá Mora, *El Régimen jurídico de las subvenciones agrícolas a la exportación en el sistema GATT/OMC: papel de los Estados Unidos y las Comunidades Europeas en el desarrollo del marco normativo*, doctoral dissertation, Universitat Autònoma de Barcelona (1995). Montañá Mora, "International Law and International Relations Cheek to Cheek: an IL/IR Perspective on the US/EC agricultural export subsidies dispute," in 19 North Carolina J. Intl L. & Comm. Reg. (1993), at p. 1.
(26) Commission CE, *Le Bilan de Fonctionnement du Code des Subventions et des Droits Compensateurs appliqués aux produits autres que primaires*, OPOCE, Luxembourg, 1988, at p. viii and 37.
(27) Montañá Mora, "El Acuerdo sobre Subvenciones y Medidas Compensatorias de la Ronda Uruguay," in 74 Derecho de los Negocios (November 1996), at p. 13.
(28) Ross, "State aids and national Courts: definitions and other problems - A case of premature emancipation? 37 CML Rev. (2000), 401, at p. 407.
(29) *Banco Exterior de España S.A. v. Ayuntamiento de Valencia*, Case C-387/92 [1994] I-0877, at paragraph 13. See also judgement dated 29 June 1999 in Case C-256/97 *Déménagements-Manutention Transport S.A.*, at paragraph 19.
(30) Arpio Santacruz, see note 23 above, at p. 59.
(31) Ross, see note 28 above, at p. 415.
(32) According to Ross, "The regime for State aids control in Community law has hitherto lacked a visibility and clarity commensurate with its importance." Ross, see note 28 above, at p. 422.
(33) See note 29 above.
(34) Case C-39/94 *Syndicat français de l'Express International (SFEI) and others v. La Poste and others*, [1996] ECR I-3547, at paragraphs 58-60.
(35) Case C-6/97 *Italian Republic v. Commission*, at paragraph 15.
(36) Case C-200/97 *Ecotrade Srl v. Altiforni e Ferriere di Servola SpA* (AFS), at paragraphs 34-35.
(37) Case T-613/97 *Union Française de l'Express (UFEX), DHL International, Federal Express International (France), and CRIE v. Commission*, at paragraphs 66-67.
(38) See note 10 above.
(39) Arpio Santacruz, see note 23 above, at p. 93.
(40) Parejo Alfonso, "Reflexiones sobre las ayudas públicas en la España miembro de la CEE," in Información Comercial Española (October 1987), at p. 29.
(41) See, for example, judgment of 24 February 1987, Case 310/85 *Deufil v. Commission* [1987] ECR 901, at paragraph 45.
(42) See, for example, the Opinion of Adocate-General Mancini dated 15 March 1988 in joint cases 187/85 and 188/85 [1988] ECR 4155.
(43) See note 26.
(44) See Slotboom, "State Aid in Community Law: A Broad or Narrow Definition?," in 20 E.L.R. (1995) at p. 289 *et sequitur*.
(45) See note 26.
(46) Arpio Santacruz, see note 23 above, at p. 105 *et seq.*
(47) Case 82/77 *Openbaar Ministerie of the Netherlands v. Van Tiggele* [1978] ECR 25, at paragraphs 24-25.
(48) Joint cases C-72 and C-73/91 *Firma Slomann Neptun Schiffahrts AG v. Seebetriebstrat Bodo Ziesemer der Firma Slomann Neptun Schiffharts* [1993] ECR I-887, at paragraph 21. One author has noted that the gist of Advocate General Darmon in this case was "a plea to extend the notion of state aid. The requirement that the aid be financed out of state resources is, according to him, not essential. The essential element, he submits, is the fact that a certain industry is put in an advantageous position by a well-defined state measure." See Slot, 31 CML Rev. (1994) 137, at p. 138-139.
(49) In this case, the ECJ examined whether a German regulation relieving companies with less than six employees from the obligation of readmitting employees unduly dismissed could be construed as a state aid. After noting that only advantages granted directly or indirectly through State resources must be considered state aid in the sense of Article 87, the Court concluded that excluding a category of companies from the general labour protection regime does not entail a direct or indirect transfer of State resources to such companies. Case C-189/91 *Kirsammer-Hack v. Sidal*

[1993] ECR I-6185, at paragraphs 16-17.
See a comment in Horspool, 31 CML Rev. (1994), 1115.
(50) The facts of this case were somehow similar to the facts of the previous case. The ECJ considered that the fact that a single company was not subject to the general rules on indefinite labour contracts could not be considered state aid, as it did not entail a direct or indirect transfer of State resources to that company. Joint cases C-52, C-53 and C-54/97 *Epifanio Viscido et altri v. Ente Poste Italiane* [1998] ECR I-2629, at paragraphs 13-16.
(51) Case C-379/98 *PreussenElektra AG*, at paragraph 58.
(52) Case 290/83 *Commission v. France* [1985] ECR 439, at paragraph 4.
(53) Case 57/86 *Commission v. Greece* [1988] ECR 163, at paragraph 12.
(54) See note 34 above, at paragraph 60.
(55) See note 37 above. See also judgement of 27 June 2000 in Case C-404/97 *Commission v. Portuguese Republic*, at paragraph 45.
(56) According to Ross, "the emphasis upon the need to establish a burden on State funds is questionable. It restricts the effective scope of Article 87(1) to deal with selective advantages." See Ross, note 28 above, at p. 414.
(57) Other authors prefer the term "selectivity." Ross, see note 28, at p. 403.
(58) According to the ECJ, the specificity requirement is one of the characteristics of the concept of state aid. See, for example, judgment dated 19 May 1999 in Case C-6/97 *Italian Republic v. Commission*, at paragraph 17, and judgment dated 1 December 1998 in Case C-200/97 *Ecotrade v. Altiforni e Ferriere di Servola SpA* (see note 36 above), at paragraph 40.
(59) Ross, see note 28, at p. 407.
(60) For example, Mrs Matilde Fernández, a former Socialist Minister, has pointed out that the Planning Agreement "entails a re-qualification of sports land into tertiary land with no precedents in the City Council in the last 25 years" and considers that "it is an agreement that benefits the club only and not the city or its Olympic aspirations." *See Sport On Line*, 6 May 2001. The spokesman of the Socialist Group at the City Council has denounced that the Planning Agreement "entails a serious inequality with respect to other institutions" and, in addition, "it will bring between 15,000 and 18,000 additional workers and between 7,000 and 10,000 additional vehicles to the area." *El Mundo*, 8 May 2001.
(61) Judgment dated 23 April 1991 in Case C-41/90 *Höfner & Elser v. Macrotron* [1991] ECR 1979, at paragraph 21.
(62) Arpio Santacruz, see note 23 above, at p. 121.
(63) See note 37 above.
(64) Joint Cases T-204/97 and T-270/97 *Empresa para a Agroalimentaçao e Cereais, S.A. v. Commission*, at paragraph 76.
(65) Case C-75/97 *Belgium v. Commission* [1999] ECR 132, at paragraph 25.
(66) Case 310/85 *Deufil GmbH & Co. KG v. Commission* (see note 41 above), at paragraph 8.
(67) Arpio Santacruz, see note 23 above, at p. 155-156.
(68) Ibid., at p. 157.
(69) Judgment from the Court of Instance of 13 June 2000 rendered in Joint Cases T-204/97 and T-270/97 *EPAC - Empresa para a Agroalimentaçao e Cereais, S.A. v. Commission*, at paragraph 85.
(70) Case T-214/95 *Vlaams Gewest v. Commission* [1998] ECR II-717, at paragraph 67.
(71) Case C-301/87 *France v. Commission* [1987] ECR I-307, at paragraph 33.
(72) See note 6 above.
(73) *La Vanguardia*, 31 July 2001, at p. 41.
(74) Judgment of 6 July 1995 rendered in Joint Cases T-447/93, T-448/93 and T-449/93 *Associazione Italiana Tecnico Economica del Cemento y otros v. Commission*, [1995] ECR II-1971, at paragraphs 138-142.
(75) Arpio Santacruz, see note 23 above, at p. 173.
(76) Blackshaw, see note 3 above.

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Tottenham for the Cup?

Edward Broome

Having considered elsewhere the participation of various English Football Clubs in the UEFA[1] club competitions and in particular the UEFA Champions League, I now turn to the question of Tottenham Hotspur.

As before the question centres on the applicability of the UEFA the rule entitled, 'Integrity of the UEFA Club Competitions: Independence of the Clubs' - also known hereafter as the 'Contested Rule'. For ease of reference I have repeated the rule in full below.

"A. General Principle
It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition.

B. Criteria
With regard to admission to the UEFA club competitions, the following criteria are applicable in addition to the respective competition regulations:

1. No club participating in a UEFA club competition may, either directly or indirectly:
   (a) hold or deal in the securities or shares of any other club, or
   (b) be a member of any other club, or
   (c) be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or
   (d) have any power whatsoever to influence the management, administration and/or sporting performance of any other club participating in the same UEFA club competition.

2. No person, may at the same time, either directly or indirectly be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA club competition.

3. In the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it:
   (a) holds a majority of the shareholders' voting rights, or
   (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or
   (c) is a shareholder and alone controls a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club in question.

4. The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition."

Whereas in the case of Manchester United and Leeds United I was concerned with the application of rule B.1 and B.2 and the clubs' common 'media advisors', BSkyB, here I am concerned with the rule against common ownership - B.3.

Recently Sir Alan Sugar sold his interest in the club to Enic. Enic purchased 27.4 million shares, thereby increasing their shareholding from 3% to 29.9%. In addition they have an option to purchase a further 13.2% at a later date.

On its face the acquisition may not appear to contravene Rule B.3 if one assumes that the 'majority' referred to in the rule as defining 'control' means having a 50% share in the club.

However, I would argue that in any event, if a company or individual has the largest single shareholding in a club, even if this is a minority shareholding i.e. less than 50% there must be a point where that minority shareholding brings with it de facto control. For example a shareholding of somewhere between 20 and 30% might well suffice.

This latter argument has in any event now been overtaken in the case of Tottenham Hotspur, with the recent managerial sackings and appointments. Having decided to sack George Graham, Enic have now introduced Glenn Hoddle as Tottenham Hotspur's new manager. Furthermore, given the way in which David Pleat, a board member, was asked to look after first team matters until a new manager could be appointed, clearly demonstrates who 'appears' to be in control of the overall management of Tottenham Hotspur.

UEFA have had dealings with Enic before in relation to problems with common ownership. The issue went to arbitration in the case I have already considered in my article relating to English Football clubs and their media agents: *AEK Athens and Slavia Prague-v-UEFA.*[2]

In that case the Court of Arbitration for Sport (hereafter 'CAS') considered the legality and applicability of the Contested Rule in relation to two football clubs 'owned' by Enic. Both AEK Athens[3] (hereafter 'AEK') and Slavia Prague[4] (hereafter 'Prague') were due to play in the UEFA Cup in the 1997/98 season. When the UEFA Cup reached the quarter finals stage both teams were still in the competition and UEFA then decided to consider the implications of this.

The result was the contested Rule. On 25th June 1998 UEFA informed AEK that they could not compete in the following year's competition - 1998/99. This led to the legal challenge considered by CAS. Although the clubs were eventually allowed to compete, this was only because CAS decided that the rule was introduced at too late a stage during that season's UEFA competition. The rule itself was

deemed by CAS to be lawful and has been in effect from the beginning of the 2000/2001 season.

In the case itself, UEFA argued that the Contested Rule was motivated by their specific duty to protect the **integrity of the game.** One of the central issues of the case was how the **integrity of the game** needed to be defined and characterised in the context of sports in general and football in particular.

CAS decided that **integrity of the game** was crucially related to the authenticity of results, which had at its core the **public's perception** that clubs try their best to win and, in particular, that clubs make management or coaching decisions based on the single objective of their club winning against any other club. This public perception of the authenticity of results then had to be tested against the question of multiple ownership of clubs competing in the same competition.

CAS decided that multiple ownership within the same football competition could be publicly perceived as affecting the authenticity of sporting results.

(i) CAS concluded that one of the relevant ways of influencing the outcome of a match between commonly owned clubs might be connected with insider information. If for example, one of the two clubs was doing particularly well, then the common executives could have access to special knowledge or information about the other team, thereby giving that team an unfair advantage. CAS said that there was clearly a relevant difference between widely available information and confidential information e.g. unpublicised injuries, training sessions, planned line-up, match tactics;

(ii) A more obvious problem would be if there were two Enic clubs in the same competition and only one had the chance of progressing through to the next round. The other team, without a chance of progressing themselves, could in certain circumstances, positively affect the other team's progression.

Under the Contested Rule, UEFA would then have the power to impose an automatic ban on a club taking part in a UEFA club competition, which was under common ownership with another club in the same competition.

Breach:

In the case of *AEK Athens and Slavia Prague -v- UEFA*, the two claimant football clubs argued that common ownership did not offend against the principle of the **integrity of the game.** However, CAS decided that, when commonly controlled clubs participate in the same competition, the **public's perception** would be that there is a conflict of interest potentially affecting the authenticity of results. This was so fundamental that UEFA had acted lawfully by adopting the Contested Rule and in particular rule B.3.

Clearly, Enic would find it very difficult to overcome the perception that they are running Tottenham Hotspur:

Implications of a Breach

Under the Contested Rule, UEFA have the power to impose an automatic ban on a club taking part in a UEFA club competition, which was under common ownership with another club in the same competition.

The problem for Tottenham would be where one or more other Enic controlled football clubs qualified for the same UEFA Club competition.

Only one of the clubs would be allowed to compete. Pursuant to Rule B.4 of the Contested Rule the UEFA Committee for Club Competitions decided that the following criteria would determine which of two or more commonly owned clubs would be admitted:

(i) the club with the highest club coefficient, based on the club's results of the previous five years;

(ii) if the coefficients were the same, the club with the highest national association coefficient, based on the previous results of all the teams of a national association;

(iii) lastly, in the case of equal national association coefficients, lots would be drawn.

At the time of writing this article, UEFA have already begun to voice their concerns over Enic's takeover of Tottenham Hotspur and given the present superstitions surrounding Tottenham winning the FA Cup when the year ends in one, it may not be very long before UEFA have to consider applying the Contested Rule.

Footnotes

(1) Union des Associations Europeennes de Football.
(2) CAS 98/200, decision 20 August 1999.
(3) AEK is owned as to 78.4% by ENIC Hellas S.A - a company wholly controlled, through subsidiaries, by the English company ENIC plc. It is now 46%.
(4) Prague is owned as to 53.7% by ENIC Management Sarl - a company wholly controlled, through subsidiaries, by the English company ENIC plc. It is now 96.7%.

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Employment of Coaches in Youth Sport Development

Stephen de Wint

INTRODUCTION

For years many people have claimed that sport in the United Kingdom (UK), and England in particular has been underpinned by a massive voluntary sector. In 1995 it was estimated that the total annual value of the UK sports volunteer market was over £1.5 billion, that there were just under 1.5 million volunteers in UK Sport, and that these volunteers invested on average 125 hours of their time each year.[1] Since this period however there have been some remarkable changes in how sport is run within the UK.

In June 1998 amendments to Lottery legislation meant that the Lottery Sports Fund were able to change their emphasis from principally supporting capital build schemes to soliciting lottery bids from areas of greatest need and supporting a greater range of projects requiring revenue funding (a minimum of £60 million per annum over the next ten years to revenue projects[2]). Added to this large amount of new money for sport is the significant amount of funding about to be allocated through the New Opportunities Fund (£750 million for school sport facilities and related programmes over the next three years). In addition there are currently massive exchequer funding streams pouring into sport from the former Department for Education and Employment (£250 million earmarked for school sport over the next five years across the UK) and the Department for Culture, Media and Sport.

This amount of investment is having a massive impact in an area of activity formerly dominated by a volunteer workforce, transforming many of these 'volunteers' into employees, workers and the self-employed. Much of this investment will and has ended up directly funding new posts within schools (School Sports Co-ordinator Programme), Local Authorities, local clubs and other partnership organisations, supplementing over 400,000 paid jobs in sport.[3] One in five new jobs created is in sport and leisure and between 1971 and 1996 consumer spending on sport alone increased by 193%, with this figure set to increase another 14% by the end of 2002.[4]

It is set against this background of expansion that youth sport development in Greater Manchester has started to look at how people are 'employed' in sport in the area. In particular focusing on the key deliverers of sport to young people - sports coaches. This work is in no way supposed to be an exhaustive account of all the issues facing employment in this area. Many issues will be sufficiently dealt with in a pure employment law setting, however there are a number of issues which are pertinent to those engaged in sport and require clarification. This work in particular will attempt to state **why** analysis of these issues is becoming increasingly important with regard to the changing nature of the workforce and changes in legislation, both domestic and European. It is hoped that this assessment will lead to further practical work in this area, developing a better approach to employment of coaches.

There is a distinct lack of specific domestic caselaw in this area and a plethora of, what to the non-employment law specialist can seem, conflicting authority from other areas of activity. There are some useful sport-specific cases from other common law jurisdictions, which can offer useful guidance as to how we might proceed in the future, and some of these will be looked at in more detail throughout the work.

BACKGROUND TO THE WORK IN GREATER MANCHESTER

In August 1999 the Association of Greater Manchester Authorities and Sport England established the Greater Manchester Sports Partnership (Greater Sport), a company limited by guarantee with charitable status, with the aim of co-ordinating and developing certain youth sport development activities across the ten metropolitan authorities of Greater Manchester. Within the remit of this organisation was co-ordination and enhancement of coach management and development. This is currently achieved through a working group of officers from each of the ten authorities led by a member of Greater Sport. The majority of activity, policy and practices is currently dictated by a national sports programme, the Sport England Active Sports programme, which is the main focus for joint work between the local authorities at the present time.

This programme provides the group (and subsequently its constituent local authorities) with minimum operating standards for coaches and programmes, a national system of profiling and databasing coaches and guidelines on activities to be undertaken by coaches in certain sports. The programme places certain pre-requisites on levels of qualification, registration, commitment to further training and adherence to child protection procedures as part of the minimum operating standards within the sports involved in the programme.

Whilst operationally this all seems very comprehensive there are still substantial issues surrounding the 'employment' of coaches that can only be resolved locally. Initial investigations with this working group have revealed a number of significant issues, principally based around status of 'workers', qualifying conditions, applicability of 'internal' procedures prevalent within Local Authority and the impact of vicarious liability in a variety of situations.

Whilst many of the issues revolve around internal (local authority, for the most part) employment procedures it is useful to identify all these areas and establish which of them have a ready solution at law and which of them solely require a policy change within internal structures.

Neither is it desirable in this work to take each one of these issues point by point as most of them have been brought up in response to specific scenarios facing operational staff at this particular time. What follows will deal with why sport should be interested in the key issue of employment status and the possible areas of difficulty within certain classifications.

EMPLOYMENT STATUS

> *'It is not unusual to find that sporting bodies employ the services not only of true employees, (ie. those that work under a contract of employment) but also engage the services of self-employed individuals or volunteers'*[5]

Added to the categories mentioned above is now the wider construction of 'worker', more common to those engaged in pure European Law. But with the blurring of distinctions between employment and self-employment for a variety of laudable reasons (protection of a third party, protection of the employee) this area has become highly complex.

The importance of distinction

There are several important legal consequences that may arise, depending upon status and it is usually in investigating these issues that the status of employment comes to the legal arena:

TAX & NATIONAL INSURANCE - There is a legal duty on all employers to deduct income tax and national insurance (NI) contributions in relation to employees under Schedule E.[6] If the worker is self-employed, the employer has no-such duty and the payment of tax and NI is the responsibility of the independent contractor (under Schedule D[7]).

VICARIOUS LIABILITY - The employer will be responsible for the negligent acts of their employee, acting within the course of their employment. With set timescales for activity under specifically planned sports programmes, recognised and defined areas for activity (i.e a sports hall) and established curriculum for delivery of activity it is difficult to see how an employee might be deemed to be acting outside of their employment as to give rise to any exemptions from liability for the employer.

Courts have sometimes drawn a distinction between the 'authorised province of operation' and subsequent events. Therefore in *Daniels v Whetstone Entertainments*[8] a dance hall steward struck an unruly customer in the dance hall and the employer was liable (in battery). But when the steward continued by going outside and hitting the customer again, the employer was not liable. It was, said the court 'a private act of retaliation'.

This case should be contrasted with the situation when Eric Cantona kicked Crystal Palace fan Matthew Simmons. As Simon Gardiner argues,

> *'if a participant commits a tort when making a tackle, whether or not that tackle is within the rules of the game, the employer will be vicariously liable for the damage as the act is for the benefit of the employer and within the course of the employment.....If on the other hand a participant simply punches or kicks an opponent, he will be acting outside of the scope of his employment.'*[9]

The question raised here is when might a coach be considered to have stopped working, as whilst in youth sport the case of hitting a child would be a clear case for dismissal on grounds of abuse, this area of law is not restricted to personal injury. There are sections within the Race Relations Act,[10] the Sex Discrimination Act[11] and the Disability Discrimination Act[12] which all acknowledge the liability of an employer for an employee committing a tort under any one of these acts in relation to discriminatory behaviour or actions.

COMMON LAW IMPLIED TERMS - If the relationship is one of employer/employee, a number of obligations are implied onto both parties at common law such as, for example, the duty of the employee to take reasonable care in work, and to obey lawful and reasonable orders: and the duty on the employer to pay wages, and to indemnify for reasonable expenses.

Of particular interest here is the concept of collective agreements in the trade union sense.[13] Whilst it is not suggested that the registration of all coaches onto a national database fully constitutes a trade union, the 'closed shop' concept and the minimum standards operating within the scheme would suggest that there is a 'rule book' for an identifiable group of persons working within a particular field. Should a coach working on schemes for various local authorities, who knows that there are standards of training and education set by a national programme within a nationally agreed timescale, fail to attend requisite courses, although not explicitly named in any contract, be able to continue working within the programme?[14]

This may simply be regarded as a rule of work, which the employer (by whatever means) is entitled to make and not part of the contract at all,[15] as in *Dryden v Glasgow Health Board*, although the example given above would not seem to fit neatly into the facts of the Dryden case.

STATUTORY BENEFITS AND PROTECTION - Nothing in the work of the Greater Manchester Coach Development working group is intended to undermine the rights of 'workers' nor any protection they might be afforded. Part of the problem with the transformation of a volunteer workforce into a professional workforce is that many of the coaches do not know nor care whether their new role affords them particular benefits. In some cases the 'professionalising' of the particular role causes many people to lose interest in doing the work, which they previously saw as a 'little bit of fun', detached from their everyday lives. Issues such as taking leave, filling in pension forms and monitoring working hours leave most former volunteers cold. The advent of new European and domestic legislation in relation to part-time workers[16] and soon to be formalised fixed-term workers,[17] requires that youth sport acknowledges these issues and clarifies them, so that future employees will be clear from the outset about what they should receive and what they will not (see below)

It is also important that in an area of funding where positive action to redress historical imbalances in gender, ability and ethnic bias is commonplace procedures for appointing people from particular social groups needs to be carefully developed. Any such actions should be in line with the exceptions afforded within the Race Relations Act[18] and Sex Discrimination Act[19] on grounds of genuine

occupational qualifications, when considering the recent changes in legislation which prescribe no qualifying period of employment and no upper limit for damages claimed for discrimination.

The tests for status

The courts have come up with a variety of tests to apply in determining whether a person is an employee or an independent contractor: the control test (*Walker v Crystal Palace Football Club*[20]); the organisation test (*Cassidy v Minister of Health*[21]); the 'economic reality' test (*Hall v Lorimer*[22]); the multiple test (*Ready Mix Concrete Ltd v Minister of Pensions and National Insurance*[23]); The mutual obligations test (*O'Kelly and others v Trusthouse Forte plc*[24]), dealing especially with the case of 'casual workers'.

The Canadian case of *Puri v MNR*[25] puts similar tests into a recent sports context and highlights how complicated this situation can become. Whilst the intricacies of Canadian tax, pensions and national insurance regulations may not be applicable the key issue in the case revolved around the employment status of two ice-skating coaches, Rae Anne Hesketh and Janninne Puri. Both worked for the Campbell River Skating Club, which is an incorporated, non-profit society, run by volunteers. Both provided services to the Club agreeing to teach skating, during sessions designed for students at various levels of skill, and to be paid the sum of $40 per hour. They each signed a contract each year regarding the provision of services. The Club collected fees from the students in order to permit them to participate in a particular type of skating program such as Learn-to-Skate, Power Skating, Canfigure Skate and other instructions at varying skill levels. The sessions took place in the municipal arena and, provided enough people signed up for a particular program, the sessions would begin. The skating season started in September and ended in March, depending on the availability of ice. The appellants worked on average four days a week and, during 1995, taught lessons one or two hours per day invoicing the Club on a monthly basis and receiving a cheque based on the number of hours billed.

Individuals wanting private lessons rented ice-time from the Club at the rate of $52 per hour and paid for it directly. The private students paid the appellants for the coaching time and the Club was not involved except for allocating a period during which the ice could be used and collecting the fee from the student renting the ice. As for running the particular program for which they were under contract to the Club, in 1995, they billed out an average of 20 hours per month each - at a rate of $40 - $45 per hour - for a total of $900. The method of providing services to the Club had not changed since 1987 (in Rae Anne Hesketh case) and annual contracts had been entered into on the basis they were not employees but were providing special skills as figure-skating and speedskating instructors as independent contractors. Both appellants stated they operated out of offices in their own residences and carried out a business of teaching and coaching figure-skaters, much of the work flowing as a result of work for the Club teaching sessions of the various programs. The times for each session of a particular program were set by the coaches and the other coaches in consultation with the Club Co-ordinator.

The Canadian Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.*,[26] approved subjecting such evidence to the following tests, with the admonition that the tests be regarded as a four-in-one test with emphasis on the combined force of the whole scheme of operations. The tests are:

1. The Control Test
2. Ownership of Tools
3. Chance of Profit or Risk of Loss
4. The Integration Test

The four tests are similar to the control, economic reality and organisation tests of our own courts and the emphasis on taking them as a four in one test is similar to the approach advocated by Mackenna J. in *Ready Mix Concrete.*[27] In interpreting the four tests Rowe D.J.T.C.C., used another Canadian Tax case *Whistler Mountain Ski Club v. M.N.R.*[28] as a parallel. In coming to its conclusions the court felt that both appellants were employed whilst they were engaged by the club. Much credence was given to the fact that employment is very flexible in the modern era and the concept that a person can be employed part-time by several employers or even part-time employed and self-employed in their own enterprise the rest of the time was wholly consistent with that. The deciding factors seem to focus on the 'economic realities' of employment,

"the coaches were told who they would instruct, when and where the instruction was to be given.

They were not able to come and go as they pleased. It is an entrepreneur who takes risks, not an employee. An entrepreneur may say: "If I work hard and long, my efforts will be rewarded". He will say: "The more people I coach, the more I will earn"... Here, the coach cannot earn more than his per diem or per month rate. If his group shrinks because of non-attendance of athletes, his rate is not reduced. Here, no matter how few or how many hours worked, no matter how few or how many athletes he coached, he earns the same amount. The coaches are assigned groups and told when to coach them. He may not include outsiders into his group. He risks no loss."

Whilst this may seem like a strict interpretation of the 'economic reality' test the court was at odds to stress the need to look at the whole picture and not focus on the one issue, and therefore also looked at the role of the club in developing the sport and the provision of ice-time to the coaches.

This case is of great use when considering the issue of employee or self-employed status within the concept of Active Sports and the work in Greater Manchester. All the courses are promoted by the Local Authorities or Greater Sport, the number of attendees is incidental to the amount earned by the coach, fees and venues are arranged by local authorities or Greater Sport, standards of supervision and conduct are set by the programme but supplemented by local authorities or Greater Sport. Whilst the same coaches may be employed elsewhere or run their own businesses this scenario is not very different from that faced by the court in *Puri*.

Within a club context the role played by local authorities and Greater Sport is taken on in most cases by the club committee, as very rarely in the sports covered by the Active Sports programme are coaches charged with finding their own customers, providing their own facilities, charging their own negotiated fees or setting their own standards of care and supervision.

'Casual' employees

There are numerous issues across youth sport development surrounding the procedure for employing coaches. In some cases arrangements are as informal as a telephone request to coach at a certain time and venue for a certain number of weeks, to a complete selection process which mirrors that of a full-time permanent employee. In addition many employees are considered as 'casual' workers in the sporting context, and therefore not employees, based on a lack of mutuality of obligation to offer work as put forward in *O'Kelly et al. v Trusthouse Forte plc*.[29] What is interesting within the context of work in youth sport in Greater Manchester is the need for all coaches to come from a registered pool of 'profiled' coaches before employment can begin. This may allow *O'Kelly* to be contrasted with *McMeechan v Secretary of State for Employment*,[30] where McMeechan worked for an employment agency which provided that he was self-employed on the basis that there was no obligation for the agency to offer him work nor for him to accept. The Court of Appeal agreed with the EAT that McMeechan was an employee but not on the same general grounds as the EAT. It distinguished between the status of agency workers in two situations: first, having the status of employee in relation to a particular engagement; and second, the lack of status under the general terms of his agreement with the 'employer', because of a lack of mutual obligation.

The more likely scenario within youth sport at this time for the sake of proper control required by other areas of the law such as negligence and child protection is that the majority of coaches are working under a part-time, fixed-term contract.

PART-TIME AND FIXED-TERM - ANY ISSUES?

Within the scope of the Active Sports programme many coaches will be working for an eight to twelve week period for no more than one to two hours per session. The coaches must have been profiled, registered on database, and either have or agreed to obtain within a specified period certain child protection and equal opportunities training.

There is no specific dividing line in law between full and part-time workers in terms of the number of hours. The new Part-time workers (prevention of less favourable treatment) Regulations 2000 came into force on 1 July 2000. They protect individuals with a contract of employment or those with any other contract (written or oral) whereby an individual undertakes to personally perform any work or services. Minister for Competitiveness, Alan Johnson introduced the Regulations explaining the aim of the regulations was to ensure

"that part-timers have a right to receive the same treatment as comparable full-timers: the same hourly rate of pay, the same access to occupational pension schemes, the same access to training, the same entitlement to annual leave as well as parental and maternity leave on a pro-rata basis as comparable full-timers."[31]

Herein lies the problem for coaches and for youth sport - no reference to associated employers, such as other local authorities and registered clubs within the partnership is included in the UK regulations (which implement the EC Part-time Workers Directive). The part-time worker must find an actual, real (not hypothetical) full-time comparator, in the employ of the same employer, under the same contract, under the same broadly similar work. With the plethora of employment arrangements in place for coaches within Greater Manchester it is possible that there are coaches working part-time without the benefits of their full-time colleagues, but nobody seems to know what terms and conditions are standard and should be adhered to. The danger is that in an area of work involved in personal development the scandal of being labelled a 'bad employer' could do serious damage. With more people being employed time should be taken to analyse and formalise such arrangements.

The issue of part-time workers is eased somewhat when considering the fact that the majority of coaches 'employed' will be on fixed-term contracts of no more than 12 weeks. Many employment rights depend on varying levels of continuous service, which would be defeated in most cases of fixed-term contracts of less than 13 weeks. This 13 week barrier applies in particular to holiday pay entitlements according to the Working Time Regulations 1998, but all these issues are currently under review as part of the governments consultation on the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2001.[32] The method of protection proposed is similar to the Part-time Workers regulations above, in that the employees would have to find a comparator on a permanent contract, although the regulations differ in two significant issues. First, the scope of protection is limited to employees, excluding independent contractors (whether or not the work is to be performed personally). Second, the regulations have expressly excluded any reference to pay and pensions. Confusingly it does include other benefits such as sick and holiday pay.

While it may seem that the short nature of the contracts in question for coaches in Greater Manchester still defeats much of this new legislation the emphasis is clearly on fair treatment of employees. The constant use (1 scheme in the winter school term and 1 scheme in the spring school term) of particular coaches on particular 8 - 12 week schemes may give rise to arguments for continuous service for that coach. Seasonal workers have successfully argued that such breaks were merely a temporary cessation of work and not the end of an employment relationship.[33]

CONCLUSION

In view of the importance of accurately identifying the status of staff and the implications that flow from such status (in relation to tax and National Insurance, health & safety legislation, and general employment law issues) it would be thought that this area of work would be of the utmost importance. With the growing trend towards expanding the protection given to individuals within the modern working environment this issue will come to the fore.

There are huge sums of money being pumped into youth sport and whilst it is held to be a cynical view, where there is financial reason to do so more people will seek redress through the courts for wrongs they feel they have suffered. The numerous cases of professional football coaches and managers going before the courts should teach those who are now starting to employ on a larger scale that this area is not without its problems.[34] Whilst these cases rely mainly on interpretation of contracts the principle that people working in sport have rights which can be protected, sometimes seems to evade administrators and organisers.

New legislation will take account of more flexible ways of working. More people will be looking to turn what was once a pastime into an enjoyable, yet realistic way of making a living. We have looked at some of the key factors that underpin this change, and the importance of clear understanding when it comes to defining the status of employment. The tests carried out by the courts will no doubt change in emphasis to reflect the new legislation and its purpose, possibly leaving us closer to *Puri v MNR* than we are at present. The new regulations will have a significant impact on the way we think about employing people on a 'casual' basis, even if they do not significantly change them in practice in the short-term (for lack of comparable workers within the field).

Overall youth sport has a commitment to develop people within sport and within the community as a whole. It cannot be left to others to work out what is best in the important area of work but should be taken on board by coaches and administrators within the field. Nobody can afford to be labelled a 'bad employer' and in a field of work, such as youth sport and sports development, that is so sensitive to the needs of individuals it may now be an opportune time to seek more formality in the approach taken in the employment of such key deliverers as sports coaches.

Footnotes

(1) Source: Leisure Industries Research Centre, *Valuing Volunteers in UK sport: a sports council survey into the voluntary sector*, London Sports Council; October 1996
(2) Source: *Investing in our sporting future: Sport England Lottery Fund Strategy 1999-2009*, Sport England; May 1999
(3) Source: *English Sports Council, Policy Briefing 2, The Economic Impact of Sport in England*
(4) Source: *Transforming the Future: Rethinking free time and work*, Leisure Consultants 1998
(5) Lynne Anderson, *Employment issues: Minimum Wage*; Sports Law Administration and Practice, Vol. 5 Issue 5, Sept/Oct 1998
(6) Income and Corporation Taxes Act 1988 s.203
(7) Income and Corporation Taxes Act 1988 s.203
(8) [1962] Lloyds Rep
(9) *Sports Law*, Gardiner, Felix, James, O'Leary & Welch (1998) Cavendish
(10) Race Relations Act 1976 s.32
(11) Sex Discrimination Act 1975 s.41
(12) Disability Discrimination Act 1995 ss.55-58
(13) Trade Unions & Labour Relations (Consolidation) Act 1992 s.179
(14) See further *Goring v British Actors Equity Association* (1987) & *Nagle v Feilden* (1966) linked to the 'Right to work'
(15) *Dryden v Greater Glasgow Health Board* (1992) EAT
(16) The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
(17) The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001 - Draft
(18) Race Relations Act 1976 s.5
(19) Sex Discrimination Act 1975 s.7
(20) (1910) CA
(21) (1951)
(22) (1994) CA
(23) (1968) HC
(24) (1983) CA
(25) (1998-03-06) TCC 962519-UI
(26) 87 DTC 5025
(27) See above
(28) unreported, 95-1723(UI), August 2, 1996
(29) as above
(30) (1995) CA
(31) DTI Compliance guidance www.dti.gov.uk/er/ptime.htm
(32) Part of implementation of EC Fixed-term Work Directive 99/70
(33) See *Ford v Warwickshire County Council* [1983] IRLR 126
(34) See further *Beck v Lincoln City FC (1998) Unreported 21 August IT case no. 2600760/98 and Macari v Celtic Football and Athletic Co. Ltd First Division [1999] IRLR 787*

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'They Think It's All Over, ...It Is Now!'- How 'Extra-Time' was required to Finally Settle Football's Transfer Saga

Matthew Bennett

When FIFA received the European Commission's 'Statement of Objections' in December 1998, football had been served with notice that its regulations governing the international transfer of players required revision or faced being ruled illegal under EC law. The Commission identified two core issues whose legality it considered to be questionable and contrary to Article 81(1) of the EC Treaty. Firstly, it pinpointed FIFA's prohibition of the unilateral termination of contracts as being inimically wrong and inconsistent with the fundamental principle of the free movement of workers. Certain members of the Commission were of the view that footballers should be treated in the same manner as all other workers and that national labour laws should govern the employment relationship between a footballer and his club. Therefore, once a player had satisfied the financial obligations he owed to his club from his unilateral breach of contract, he should be free to move to a new club without the imposition of any obstacles such as his club continuing to hold his registration.

The second area highlighted by the Commission concerned 'agreed' transfer fees between buying and selling clubs which they considered to be excessive, arbitrary and anti-competitive. Agreed fees they argued impeded the free movement of players in the European Economic Area ('the EEA'). They submitted that 'transfer fees' should be objectively justifiable 'compensation' payments, which correspond directly to the actual training and development costs, incurred by the selling club.

These objections struck at the heart of football and required resolution to ensure that football could develop in a manner which would maintain a balance between its own needs and traditions but also comply with EC Law. The challenge was there for all to see but there was also a real drive and determination within football's various governing bodies and representative organisations to meet this challenge and to work together to deliver an appropriate solution to secure the long term health of the game. The much heralded 'threat' to the future of football actually serving to reinvigorate and reinforce traditional communication channels within football as well as introducing new ideas from all quarters of the game. The so called 'doomsday' scenario which filled many column inches was never a realistic assessment as all parties involved had the same goal; delivering a mutually acceptable framework to maintain football's place as the world's most popular game.

FIFA SELECTS A STRONG TEAM

Engaged in discussions with football's worldwide governing body FIFA, were its own Confederations including UEFA as a lead participant, representatives of various professional leagues predominantly those in Europe and their member clubs, and certain player representative bodies and unions including FIFPro, the international association of players Unions. FIFPro's Chairman Gordon Taylor, was a member of the 'Transfer Task Force' appointed by FIFA which was lead by UEFA Vice President Per Omdal to enter into dialogue with the Commission. The other members of the Task Force were Gerhard Aigner (UEFA Chief Executive), Michel Zen-Ruffinen (FIFA General Secretary), Pedro Tomas (Spanish League General Secretary) and Gerhard Mayer-Vorfelder (German FA Vice President).

The Task Force was charged with considering the finer issues of the Commission's objections and proposing principles to deal with them such as the categorisation of players depending upon their age when they sign a particular contract and the mechanism for calculating training compensation for players transferred up to the age of 23. Such issues had to be construed through the prism of national labour law both within and outside the EEA.

Other key areas of discussion included the proposed distribution of training compensation through a 'cascade system' to compensate all clubs who were involved in a player's training during the ages of 12-23, striking a balance between freedom of movement and contractual stability, devising appropriate objective tests for justified contractual terminations and the creation of a new dispute resolution system.

THE 'NEGOTIATION DOCUMENT'

During the process of consideration and consultation, FIFA attempted to draw together the ideas receiving support throughout football with the intention of building a structure whose central foundations would be mutually acceptable. As a result it submitted its 'Negotiation Document' to the Commission in October 2000 which ultimately lead to the joint statement of the Commission and the Presidents of FIFA and UEFA of 14th February 2001. This statement served evidence that progress had been made and highlighted areas of common ground.

Strands of agreed principles emerged including the operation of fixed transfer windows, minimum and maximum duration of contracts, the creation of a solidarity mechanism to redistribute income and certain principles to structure training and compensation fees. The statement also set out the areas where further discussion would be required including the protection of young players and how the unilateral termination of contract could be brought into the game without harming the need for stability of competition.

Unfortunately, at this stage FIFPro had withdrawn form the consultation process as it did not consider sufficient weight was being attached to its proposals and adopted a negative view to the Negotiation Document. As will be outlined below it would take more time to resolve their concerns.

'THE SPECIFICITY OF SPORT'

The Commission attempted to reassure a sceptical public that it was not intent on a wholescale revision of football but had in mind something more akin to cosmetic surgery to create greater harmonisation between the workings of football and EC law. The Commission's approach had been set out in the 'Helsinki Report on Sport' of 1st December 1999 where the concept of the 'specificity of sport' was demonstrated. The report stated that certain practices would more than likely be exempt from the competition rules:

> *"The Bosman judgment mentioned above recognised as legitimate the objectives designed to maintain a balance between clubs, while preserving a degree of equality of opportunity and the uncertainty of the result, and to encourage the recruitment and training of young players. Consequently, it is likely that agreements between professional clubs or decisions by their associations that are really designed to achieve these two objections would be exempted. The same would be true of a system of transfers or standard contracts based on objectively calculated payments that are related to the costs of training, or of an exclusive right, limited in duration and scope, to broadcast sporting events. It goes without saying that the other provisions of the Treaty must also be complied with in this area, especially those that guarantee freedom of movement for professional sportsmen and women."*[1]

The Helsinki Report reaffirmed principles which had been established in the jurisprudence of the European Court of Justice ('ECJ') in cases such as Lehtonen.[2] This was a preliminary ruling from the Belgian Courts where specific sporting rules were respected when tested against EC Law, subject to the overriding factor of proportionality. The so-called 'specificity of sport' principle was thus already antecedent in ECJ jurisprudence.

'THE END IN SIGHT?'

It is evident therefore that behind the rhetoric both FIFA and the Commission were adopting pragmatic approaches. This was signalled in the statement of the President of the Commission, Romano Prodi:

> *"I am delighted that we have been able to find a satisfactory and workable outcome with FIFA on international player transfers in the European Union that not only respects the special needs of sport but also Community Law. Europe has risen to the occasion and won the match, ensuring a great victory both for football and for Europe. Club football represents much of what we are striving to achieve in Europe in terms of exchanges of players, fans and ideas. Together, European football is stronger, more dynamic and more entertaining than if each national league played in its own corner. We have managed to achieve an outcome that will preserve the legitimate rights of players to move from one country to another whilst ensuring European football will be able to go from strength to strength."*[3]

Matters culminated in an exchange of correspondence on 5th March 2001 between Mario Monti, Competition Commissioner, and FIFA President Sepp Blatter. The correspondence confirmed that FIFA's proposals as enshrined in its document entitled 'Principles for the amendment of FIFA rules regarding international transfers' were acceptable to Mr Monti who no longer had the intention of proposing that the Commission adopt a negative decision in the proceedings that it had initiated against FIFA. The Commission's pending infringement proceedings would be withdrawn.

THE PLAYERS HAVE THEIR SAY

Having received the green light from the Commission, FIFA's Executive Committee approved the text of the amended rules in Buenos Aires on 5th July 2001 and it appeared that the transfer saga had been satisfactorily concluded with governing bodies, national associations, leagues and clubs all having signalled their approval of the rules. Unfortunately, one more hurdle remained to be cleared in that FIFPro still held a number of specific objections to the proposed wording of the regulations. Gordon Taylor voiced his concerns in respect of the provisions dealing with proposed lengths of contracts, the nature of sanctions to be imposed upon players who breached their contracts and the workings of the concept 'supporting just cause' which he hoped would assist players in situations where they (in his opinion) had no option but to unilaterally terminate their contract.

The proposed regulations stated that there be a minimum length of contract of three years for players who sign a contract prior to their 28th birthday and two years for those who sign on or after that date. FIFPro had called for shorter contractual periods and felt that unilateral termination pursuant to applicable national labour law was not sufficiently protected. There was also disagreement about the minutiae of the calculation of compensation for transfers. FIFPro also argued that the imposition of two 'transfer windows' during the season where transfers of players could take place was a hindrance to freedom of movement even though the Commission had signalled its satisfaction with the proposal. FIFPro also wanted greater representation within FIFA's dispute resolution mechanism which would sit and rule upon disputes between clubs and players.

FIFPro adopted a 'two pronged' approach to both delay and influence the implementation and final wording of the regulations. Not only did FIFPro continue to engage in discussions with FIFA they also attempted to strengthen their bargaining position by initiating legal proceedings in Belgium challenging the legality of the rules themselves. Proceedings were filed against FIFA and the Belgium Football Association on behalf of FIFPro, two French Trade Unions and a further twenty individual players mainly from France and Belgium. FIFPro were the key participants in the legal proceedings and the other plaintiffs may have been added to demonstrate that it was individual football players who would be affected by the rules and therefore who needed to be heard. It was also perhaps no coincidence that FIFPro instructed Luc Misson, the Belgian lawyer who had represented Jean Marc Bosman in his landmark legal action regarding out of contract players.

The writ served by FIFPro sought relief by way of an injunction to prevent FIFA from implementing the new regulations. The legal arguments advanced were constructed upon numerous legal sources including Belgian labour law, the European Convention of Human Rights, the Convention of the Independent Labour Organisation and various provisions of EC law including Article 39 (free movement of workers) and Articles 81 and 82 (competition law).

The writ also questioned the manner in which the Commission had simply 'dropped' its formal proceedings against FIFA and suggested that formal resolution of the Commission's infringement proceedings was required and as no such step had been taken, national judges retained jurisdiction over cases involving interpretation of Articles 81 and 82 EC.

A key thread within FIFPro's argument was that national labour law should apply to govern cases of unilateral termination of contract. In this respect FIFPro cited the French Charter of Professional Football and its 'National Collective Convention on Football Related Professions' which provides that professional footballers contracts can be unilaterally terminated in accordance with the French Employment Code. This would theoretically treat footballers as traditional workers who could simply leave their employment by serving notice on their own club.

THE VOLUNTARY INTERVENTION

UEFA and thirteen professional European Leagues voluntarily intervened in the court proceedings brought by FIFPro. The intervening Leagues being the Belgian Professional League, the F.A. Premier League, the Football League, the Scottish Premier League, the Hellenic (Greece) Football League, the Spanish National Football League, the Portuguese Professional Football League, the Danish Football League, the Swedish Elite Football League, the German Football League, the Italian League, the Austrian League, and the Dutch League. It was the first time that there had been co-operation on such scale between the major European Leagues and its significance should not be underestimated as an example of how separate and competitive footballing institutions can work together. The Leagues felt very strongly about certain elements of FIFPro's arguments and a union of mutual interest helped engineer close co-operation.

The intervention of the Leagues into the Belgian national proceedings principally served two purposes. Firstly, it arose from a uniform vision of how the Leagues envisaged the draft regulations to work on a practical basis and a desire to articulate these views in court. Secondly, it was also vital to intervene so the Leagues would be 'parties' to the national proceedings. This was important as it was highly likely given the substance of FIFPro's submissions, that the Judge hearing the case in Brussels would be faced with questions requiring the interpretation of EC law. This would in turn necessitate the drafting of a 'Preliminary Reference' to the ECJ under Article 234 EC.

In such situations, national courts are empowered to in effect seek the advice of the ECJ as the

ultimate judicial body of the EU which interprets and enforces EC law. The Belgian court could therefore stay the proceedings before it and draft a Preliminary Reference to the ECJ. Although the ECJ would not itself rule on the dispute between FIFPro and FIFA, it would provide a definitive interpretation of EC law which would bind the Belgian Court when the matter was handed down for judgment. It would therefore be in the interest of the parties to attempt to influence the deliberations of the ECJ as its ruling would ultimately be the template for the decision of the Belgian Court. The parties are therefore entitled to submit representations to the ECJ and participate in any oral hearings. Such a right is however confined by Article 20 of the Statute of the Court of Justice to the parties to the proceedings before the national court and certain other limited entities such as Member States and the Community institutions. Consequently, the Leagues needed to be within the class entitled to intervene so they would be entitled to submit representations to the ECJ.

If they had not intervened and although clearly an 'interested onlooker', the case law is clear:

> *"Participation in cases of the kind referred to in Article 177 (now 234) of the Treaty is governed by the first two paragraphs of Article 20 of the EC Statute, which limits the right to submit statements of case or observations to the parties, Member States, the Commission and, where appropriate, the Council, the European Parliament and the European Central Bank. By the term "parties", that Article refers solely to the parties to the action pending before the national court..... Consequently, a person who has not sought or been granted leave to intervene before the national court is not entitled to submit to this court under that provision."*[4]

The thirteen Leagues and UEFA were consequently under no illusions as to the importance of obtaining leave to intervene in the national proceedings and duly obtained such leave.

Once the 'voluntary interveners' were party to the proceedings, all parties made submissions and a final hearing was set for 27th July 2001 in Brussels. However, in the week preceding the hearing, FIFPro after having originally stressed the urgency of the matter, requested a postponement on the basis that it had not had time to consider the full text of the rules adopted by FIFA in Buenos Aires on 5th July 2001. It was submitted by Mr Misson on behalf of FIFPro, that the regulations adopted in Buenos Aires differed from the agreement concluded between the Commission and FIFA on 5th March. Therefore, FIFPro had not officially seen the final text of the rules until 25th July 2001 when FIFA had filed its submissions in the Belgian legal proceedings. FIFA refuted this and argued that it was purely a tactical move to delay matters further and that FIFPro had seen the text prior to this date. On hearing these arguments the President of the Brussels Court sitting before numerous lawyers and journalists in the Brussels Palace, concluded that he had no option but to adjourn the case and rule that the pleadings had not closed as new documents had been produced and referred to by FIFA after FIFPro had filed its submissions.

Commentators again predicted defeat for FIFA in its attempt to settle the matter as protracted court proceedings would further prolong the implementation of the new rules. However, once again the journalists were proven wrong as FIFPro were also simultaneously involved in advanced talks with FIFA. It appears that the underlying court proceedings served to refocus efforts to resolve the final outstanding areas of disagreement as neither FIFA nor FIFPro had any real desire for the matter to be resolved in court. FIFPro also realised that it would face a tough legal battle due to the interventions of UEFA and the thirteen professional Leagues. This pressure ultimately resulted in FIFPro being satisfied with the clarification it received from FIFA in respect of the detail of the calculation of training and compensation fees, the circumstances where unilateral termination would operate. FIFPro also achieved greater representation in FIFA's Dispute Resolution Chamber.

FIFPRO ENDS ITS CHALLENGE

The joint press release of FIFA and FIFPro of 31st August 2001 signalled the end of the court proceedings and therefore the final instalment of the long story. FIFA's 'Regulations for the Status and Transfer of Players' became effective on 1st September 2001. Football's various constituent interest groups had been successfully fused together in the light of the legal challenge of the EU to ensure that it was football which set its own rules and agenda.

The whole episode has set a new tone for the governance of football and demonstrated how co-operation between traditionally insular groups can be achieved. The collaboration of the professional Leagues in the voluntary intervention was for example, unprecedented.

The Commission's requirement for a review of the transfer system in two years time will provide a further opportunity for football to demonstrate that it now has taken a giant step forward to a situation where lively debate is welcomed and FIFA President Sepp Blatter can build on his desire

"to include all the members of the family of football..."[5]

Maurice Watkins, Senior Partner at James Chapman & Co, was a member of the UEFA Panel of External Legal Experts, Chairman of the FIFA/UEFA Task Force Juridical sub-Committee dealing with the EC challenge to the transfer system and advised the thirteen professional Leagues on their intervention in the legal proceedings brought by FIFPro.

Footnotes

(1) Extract from the Report from the Commission to the European Council - 'with a view to safeguarding current sports structures and maintaining the social function of sport within the community framework' - 'The Helsinki Report on Sport' December 1999.
(2) Jyri Lehtonen (1) Castors Canada Dry Namur-Braine ASBL (2) v. Federation Royale Belge des Societes de Basket-ball ASBL (FRBSB) - CASE C-176/96 - 13 April 2000.
(3) Statement of Romano Prodi - Brussels, 6th March 2001.
(4) Extract from the Order of the President of the Court of 26 February 1996 in Biogen Inc. v. Smithkline Beecham Biologicals SA - Case C-181/95
(5) Extract from the Joint press release of FIFA and FIFPro of 31st August 2001

Matthew Bennett, James Chapman & Co., Solicitors, Manchester.

FIFA Circular - Status and Transfer of Players

To the national associations affiliated to FIFA

Circular no. 769

Zurich, 24 August 2001
GS/gmo/oon

Revised FIFA Regulations for the Status and Transfer of Players

Dear General Secretary,

As you know, last March FIFA reached agreement with the European Commission on the main principles for the amendment of FIFA's rules regarding international transfers. Thereupon, FIFA drafted amendments to its regulations on the status and transfer of players, taking into account these principles. The new regulations, including a set of Application regulations, were adopted by FIFA's Executive Committee on 5 July 2001 in Buenos Aires. I am pleased to send you herewith the text of these regulations in FIFA's four official languages. This circular will summarise and explain the main points of the new regulations.

In this Circular as well, for simplicity's sake, the male gender applies to both the male and female gender.

1. PROTECTION OF MINORS

The new regulations set forth strict conditions for the international transfer of minors (i.e., players under the age of 18), in order to provide a stable environment for the training and education of players. The abuses to which minors have been exposed in the past must be curbed.

Minors cannot transfer internationally, unless they move to another country with their family for family reasons.[1] National associations shall not register minors who have transferred without their family, or with their family in case the family's move was prompted by the transfer of the minor to another football club.[2] National associations or, by default, FIFA's Players' Status Committee, may also impose disciplinary measures on clubs wishing to register minors who have transferred improperly.[3] In addition, FIFA's Player Status Committee or the national associations may impose disciplinary measures on players agents who have been involved in the improper transfer and/or registration of a minor.[4]

Within the EU/EEA, players younger than 18 but above the minimum working age can move from one member country to another country on their own, on condition that their sporting training and academic training is guaranteed by the new training club.[5] FIFA, in cooperation with UEFA, will establish a Code of Conduct which should be followed by national associations, leagues and clubs.[6] FIFA is committed to issuing this Code in due course. Where a club does not comply with the Code, its national association shall not register the player, and may impose disciplinary measures on the non-observant club.[7] National associations can carry out on the spot investigations at clubs to verify compliance with the Code of Conduct, and may if they encounter violations impose sanctions such as the annulment of wrongful registrations of minors.[8] FIFA's Players Status Committee may impose disciplinary measures on clubs in case of default by a national association.[9] In addition, FIFA's Players Status Committee may impose sanctions on players agents, and on other third parties subject to FIFA's jurisdiction, who are implicated in registrations of minors where the Code of Conduct has not been respected.[10]

The same principles apply for the first registration of players under 18 who have a nationality other than that of the country in which they first request to be registered.[11]

Any disciplinary measures envisaged here can be appealed against to the Arbitration Tribunal for Football.[12]

2. TRAINING COMPENSATION

The new regulations create a detailed system for the payment of training compensation. This system is designed to encourage more and better training of young football players, and to create solidarity among clubs, by awarding financial compensation to clubs which have invested in training young players. At the same time, care has also been taken to ensure that the amounts of training compensation do not become disproportionate, and unduly hinder the movement of young players.

For the application of these principles, all clubs are to be classified in one of four categories, depending on their training costs:

Category 1 (top level, e.g. high quality training centre):
all clubs of first division of National Associations investing as an average a similar amount in the training of players.

Category 2 :
all clubs of second division of the National Associations of category 1
all clubs of first division of all other countries having professional football

Category 3:
all clubs of third division of the National Associations of category 1
all clubs of second division of all other countries having professional football

Category 4:
all clubs of fourth and lower divisions of the National Associations of category 1
all clubs of third and lower divisions of all other countries having professional football
all clubs of countries having only amateur football.[13]

Within the EU/EEA, National Associations will determine the four categories to which their clubs belong every year, having heard the representatives of players and clubs. These National Associations will submit their findings to FIFA in a timely manner, allowing FIFA to communicate the final categorisation by the start of the mid-season registration period every year to the National Association concerned. FIFA will publish this categorisation on FIFA's internet site as well. The categorisation shall be valid for 12 months or 2 registration periods.[14]

National Associations outside the EU/EEA may propose other ways to categorise their clubs and to calculate their training costs.[15] Such categorisation should be reviewed from time to time, as the need arises.

A. When is training compensation due?

As a general rule training compensation is due whenever a player, who is not yet 23:

(i) signs his first non-amateur contract with a club different from the club from which he received his training; or
(ii) transfers as a non-amateur from one club to another club which he joins in the same capacity.[16]

Yet, by way of exception, no training compensation is due:

- if a player transfers from a non-amateur club to an amateur club, unless the player once more becomes a non-amateur player within a period of three years after his transfer to amateur status and he is still younger than 23.[17]
- though, within the EU/EEA more broadly, if a player transfers from a higher category club to a club in category 4.[18]
- if a club with which a player has signed his first non-amateur contract unilaterally terminates a player's contract without just cause, this club shall not be entitled to training compensation. Previous training clubs, as they are not responsible for the unjustified termination, shall however be entitled to their share in the training compensation that would have been due but for this termination.[19]
- in cases of subsequent transfers before a player has reached 23 years of age, training compensation shall not be due to the club who unilaterally terminates the player's contract without just cause. Previous training clubs will however benefit from a cascade principle, as outlined below.[20]

Furthermore, within the EU/EEA, in case a player younger than 23 years does not receive a contract from the club where he has trained, and this player moves to another non-amateur club, this factor must be taken into account when deciding whether any training compensation shall be due, and what the amount of this compensation should be.[21] As a matter of principle, the player's training club will not be entitled to receive training compensation unless this training club can demonstrate to the Dispute Resolution Chamber that it is entitled to training compensation in derogation of this principle. This possibility to derogate is not applicable where national collective bargaining agreements do not envisage it.

In case a player younger than 23 having come to the end of his contract does not receive a new contract from a non-amateur club which is equivalent in remuneration to his previous contract with the club, this club will be deemed not to have offered a contract to the player for purposes of calculating training compensation.

B. How is training compensation calculated?

Whenever training compensation is due, it is calculated as follows. Compensation will be based on the training and education costs of clubs. For transfers within the EU/EEA, the costs taken into account shall be the costs in the country of the National Association of the former club.[22] For all other transfers, the costs taken into account shall be the costs of the National Association of the new club.[23]

In order to render the system manageable and to ensure predictability as to the amount of training compensation due, the training and education costs to be compensated will not be calculated for each individual club. Instead, all clubs will be classified into categories (four categories in the EU/EEA) as indicated above, and the training and compensation costs will be determined nationally per category, as follows.

Within the EU/EEA, National Associations will determine the relevant training compensation cost criteria, having heard the views of club and player representatives. That is to say, the National Associations will thus determine for each of the four categories of clubs within their association the training and education compensation costs per category of clubs, taking into account a player factor,

i.e. the ratio between the number of players who need to be trained to produce one professional player. These amounts may be reviewed after 24 months or 4 registration periods.[24]

Outside the EU/EEA, National Associations may define the relevant training compensation costs according to different methods. Such compensation costs may be reviewed from time to time, as the need arises.[25]

FIFA will acknowledge the training and education criteria defined by National Associations, subject to their proportionality. FIFA will communicate the applicable training and compensation cost criteria by mid-season at the latest every year to each National Association, and publish them on FIFA's internet site as well.[26]

On the basis of experience with the assessments of training and education costs by National Associations, FIFA will set out from time to time guidelines for assessing such costs in a Circular.[27]

Once the training and education costs of a club category have been established, the compensation amount which is due in an actual case can be calculated as follows: by multiplying the amount corresponding to the category of the training club for which the player was registered by the number of years of training which the player effectively received from this particular club. The maximum number of years of training to be taken into account is 10. While training is deemed to occur between the ages of 12 and 23, such training is only payable for training incurred through the age of 21.[28] Furthermore, only years of effective training may be taken into account.[29] Thus, if it is evident that a player has terminated his training period before the age of 21, fewer years than 10 shall be taken into account, i.e. only those years between the age of 12 and the age when it is established that the player effectively completed his training.[30]

Thus, if a player has stayed with the same club from the time he was 11 years old and decides to transfer to another non-amateur club when he is 22 and 6 months old, his training club is entitled to the annual training and education costs of the category to which it belongs x 10, even though the club arguably has trained this player 12 and a half years. In fact, in case this club belongs to a higher category than category 4, its training costs will only be multiplied by a factor of 7, as for the first 3 years, until the player was 15 years old, the annual training costs of club in category 4 of the same National Association will be used.[31]

If a player changed clubs more often between the ages of 12 and 23, different calculations will have to be made.This is illustrated with four examples:

Assume a player signs his first contract at the age of 19 with club C, in category 1, in Germany. From 12 until 16 the player trained with club A in category 3, in Portugal. From 16 through 19 the player trained with club B, in category 2, in Portugal as well. Club C is to pay for 7 years training, which shall be distributed pro rata according to full years of proper and proven training, and in relation to the category to which the training clubs belong: i.e., 3 years at category 2 level to club B (assuming the player left club B during his 4th year of training); and 1 year at category 3, plus 3 years at category 4 level[32] to club A (assuming the player left club A after 4 full years of training).[33]

Assume a player has been effectively trained from the age of 15 in club A, a category 4 club, in Norway. At 18, club A offered the player a non-amateur contract. At 19 the player signs a non-amateur contract with a Swedish club B, in category 3. The Swedish club pays the Norwegian club B an amount of y, which represents five years of training compensation at club category 4 level.[34] In Sweden, the player receives effective training until the age of 20, when he starts playing regularly in the first team of club B. At 21 the player transfers to club C in England, which plays in the third category as well. Club C is to pay non-amateur club B 1 year of training at category 3 level, plus the amount of y which club B paid to club A.[35]

Assume a player has been effectively trained from the age of 12 to the age of 18 in club A, in France. The player then transfers to non-amateur club B in Italy, of category 2, where he continues to receive training. At age 22 the player transfers to non-amateur club C, of category 1, in Spain. The training compensation which Club C will need to pay to club B, shall correspond to the training costs of club B for the years 18 to 21.[36]

Assume a player has been effectively trained from the age of 13 to 19 by amateur club A in Venezuela, and moves to non-amateur club B in Mexico. Training compensation due by club B to club A will be

calculated according to the category established by the Mexican national association times 6. Note that the relevant category for the player's training between the age of 13 and 15 will, in any event, be the lowest category.[37]

(i) Calculation principles outside the EU/EEA area

As seen above, to arrive at the actual training and compensation fee which is due in a particular case, different calculation rules apply depending on whether a transfer occurs within the EU/EEA area or not. Thus, in case of (i) a transfer of a player from a country outside the EEA to a country of the EEA, (ii) a transfer of a player from a country outside the EEA to a country outside the EEA, or (iii) a transfer of a player from a country inside the EEA to a country outside the EEA, whenever training compensation is due it shall be based on the costs of the country of the new club, in order to stimulate solidarity within the world of football.[38] In other words, while taking the category of the club which has effectively trained the player, the new club will pay according to the cost standards prevailing in its own country.

In this way, clubs will be discouraged from hiring young players from clubs in other countries merely on the grounds that training costs in these other countries are lower. Rather, all clubs should be encouraged to invest in training themselves. Furthermore, clubs which have the resources to hire football talent abroad, will be paying a foreign club according to their own standards.

(ii) Calculation principles within the EU/EEA area

Within the EU/EEA area compensation shall, in principle, be based on the training costs of the country of the former, training club.[39] This principle is to be applied as follows:

- if the player moves from one club to another of the same category, the relevant cost is the costs of this category
- if the player moves from a lower to a higher category: the relevant cost is the average of the training costs for the two categories;
- if the player moves from a higher to a lower category: the relevant cost is the training costs of the lower category club
- if the player moves from a club in category 1, 2 or 3 to a club in category 4: no compensation for training is payable.[40]

Moreover, within the EU/EEA area training compensation fees should, in any event, not exceed a ceiling. These ceilings are to be established annually by National Associations for every club category, having heard the views of representatives of players and clubs. Such ceilings shall be acknowledged by FIFA subject to their proportionality. FIFA shall communicate the ceilings before the mid-season registration period via a circular to the national associations, and publish them on its internet site.[41]

In FIFA's view, the most logical formula to calculate the ceiling would be to divide the average costs of training per club in a certain category by the average number of players being offered a non-amateur contract by the training clubs in that category. Accordingly, FIFA recommends the national associations to include this principle in setting a ceiling per category of training clubs.

(iii) Disputes as to training compensation

If in a particular case there is a dispute about (the level of the) training compensation fees, any party can submit this dispute to FIFA's Dispute Resolution Chamber. The Chamber will rule on this dispute within 60 days. It has discretion to adjust the training compensation fee resulting from the application of the principles outlined above, if the Chamber finds that the fee is clearly disproportionate in the individual circumstances of the case. Any ruling of the Chamber regarding training compensation can be appealed against to the Arbitration Tribunal for Football.[42]

C. How are training compensation amounts distributed?

Training compensation should benefit all clubs which have contributed to the training of a young player who transfers as a non-amateur player. With this in mind, the regulations provide that amounts paid for training compensation shall be distributed as follows:

In case training compensation is due to be paid when the player signs his first non-amateur contract, the amount must be distributed on a pro rata basis according to full years of proper and proven training, and in relation to the category to which the training clubs belong.[43]

In cases of subsequent transfers from clubs belonging to the third or the fourth categories, the new club is to pay the former club the costs which the latter incurred in training the player as well as the training compensation costs which the latter paid when registering the player.[44] In case of a transfer from clubs belonging to the first or the second category, the new club is to pay the former club only the costs which the latter incurred in training the player.[45] However, portions of these amounts may have to be allocated among different clubs in the following circumstances:

(a) For any transfer of a player from a club in the third or fourth categories to a club in a higher category, 75% of the amount exceeding the costs of the category of the "old" club, shall be redistributed on a pro-rata basis to all the clubs having trained the player from the age of 12 onwards.[46]

(b) For any transfer of a player from a club in the second category to a club in the first category, 50% of the amount exceeding the costs of the category of the "old" club, shall be redistributed on a pro-rata basis to all the clubs having trained the player from the age of 12 onwards.[47]

(c) For any transfer between two clubs of the same category, 10% of the training compensation, corresponding to the training costs of the former club for the transfers which take place inside the EU/EEA or to the training costs of the new club in all other cases, shall be redistributed on a pro-rata basis to all the clubs having trained the player from the age of 12 onwards.[48]

(d) If the career of the player cannot be traced back to the age of 12 any "missing years" will be based on category four for the purposes of determining training compensation and the amount will be distributed to the national association of origin of the player and be earmarked for the training of young players.[49]

D. Payment of the training compensation fee

The amount to be paid as compensation for training and education pursuant to the above rules shall be paid by the new club to the training clubs at the latest within 30 days of the signature of the first non-amateur contract, or, for any subsequent transfer, within 30 days from the new registration of the player.[50] It is the responsibility of the new club to calculate the amount of the compensation for training and education and the way in which it should be distributed to the different clubs where the player played previously. The player shall, if so requested, assist the new club in discharging this obligation.[51]

The FIFA Players Status Committee may impose disciplinary measures on clubs or players who do not observe these payment-related obligations.[52]

E. Scope of the training compensation system

Finally, it bears emphasis that this entire system of training compensation only applies to international transfers of players younger than 23 years. In other words, these rules do not apply to national transfers, although in this respect National Associations shall adopt rules on transfers which must be in conformity with the principles of the FIFA Regulations.[53] Moreover and regardless of the nationality of a player or the status or location of any club involved in an international transfer, no training compensation is due when a player aged 23 years or more changes club.[54]

3. CONTRACTUAL STABILITY

Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public. The relations between players and clubs must therefore be governed by a regulatory system which responds to the specific needs of football and which strikes the right balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition.

Accordingly, the new Regulations seek to ensure that, in the event a club and a player choose to enter into a contract, this contract will be honoured by both parties. Unilateral termination of such

contracts particularly during the first three, or depending on the age of the player two, years is to be discouraged. On the other hand, the rules also reflect the recognition that players may have sportive justification ('sporting just cause'), which can go beyond just causes found in regular employment law and the previous FIFA Regulations on the Status and Transfers of Players, to terminate a longer term contract unilaterally.

A. Contractual breaches

(i) Sportive sanctions

The Regulations stipulate that a club wishing to hire a player who is still under contract with another club is obliged to inform that club and the player before commencing negotiations with either of them. The club and the player will have to be so informed simultaneously. Failure to observe this obligation will result in a fine of at least CHF 50.000.[55]

In addition, sportive sanctions apply in case a breach of contract actually occurs. Thus, a club inducing another club to actually break its contract with a player, without the latter's consent, will be subject to sportive sanctions. Similarly, sanctions will be imposed on a club inducing a player to actually break his contract with a club, without the latter's consent. Furthermore, the club, or player, having breached a contract will be subject to sportive sanctions as well. These sanctions are spelled out below.

A player who breaches his contract during the first or the second year (or during the first year only, in the case of a player who signed his contract after he turned 28) risks a restriction on his ability to play in official football matches for his new club in that club's new season. This suspension cannot be longer than 4 months, unless there are aggravating circumstances, in which case the suspension cannot last longer than 6 months.[56] This is a maximum, and the Dispute Resolution Chamber must take into account all relevant circumstances, be they factual or legal, in fixing the duration of the sanction, in accordance with general principles of law.

Note that a player who breaches his contract during the third year, or second year when he signed at the age of 28 or more, normally will not be suspended from playing for his new club, unless he fails to observe the proper notice period.[57]

A club which induces a player to breach his contract risks being prohibited from registering new players, either domestically or internationally, for a period of up to 12 months following the inducement of the contractual breach. When a club seeks to register a player who has breached his contract during the 'protected period' of three, or two, years, it will be presumed to have induced the contractual breach, and will therefore normally be subject to sportive sanctions, unless this new club can rebut the presumption.[58]

Furthermore, a club which breaches a contract with one of its players during the protected period, risks being prohibited from registering new players, either domestically or internationally, for a period of up to 12 months following the contractual breach.[59]

Finally, sanctions may also be imposed on players' agents who are involved in a breach of contract.[60]

Contractual breaches occurring after the first three, or two, protected years normally no longer provoke the sanctions described above on a player or on clubs. Exceptions are:

- in respect of a player, if the player has unilaterally terminated his contract without giving proper notice,[61]
- in respect of a club,
- likewise, if the club has unilaterally terminated the contract without giving proper notice,[62] or
- if the new club is actually proven to have induced the player's breach with his former club, as there is no presumption that the new club hiring the player induced the breach in such a case.[63]

In other words, the mere fact of contacting a player who is under contract (while respecting the provisions described above[64]) and subsequently registering this player who has unilaterally terminated his contract after the 'protected period' of three, or two, years does not constitute the inducement of a breach of contract by his new club and, hence, does not expose his new club to

sportive or financial sanctions (other than the financial compensation due by virtue of the present regulations).

Players' agents who have induced a contractual breach after the 'protected period' of three or two years may also be subject to sanctions.[65]

In any event, contractual breaches during the season are prohibited, and can therefore only take effect at the end of the season, unless the contract is terminated with just cause.[66]

Any sportive sanction envisaged here shall be imposed exclusively by FIFA's Dispute Resolution Chamber, which is composed of representatives of both clubs and players, except for sanctions against players agents which shall be imposed by FIFA's Players Status Committee.[67] The Dispute Resolution Chamber's decision on the sanction to be imposed must be taken within a maximum of 60 days from the moment the dispute was brought before the Dispute Resolution Chamber, or a national sportive arbitration tribunal, as the case may be.[68]

Interested parties can appeal any decision of the Dispute Resolution Chamber to the Arbitration Tribunal for Football, which in such cases will be composed of members chosen by players and clubs.[69] Sanctions imposed by the Players Status Committee can be appealed to the Arbitration Tribunal for Football.

(ii) Compensation

Contractual breaches, whether inside or outside a 'protected period', also give rise to compensation claims.[70] The compensation amount may be stipulated in the contract, or shall be calculated in accordance with objective criteria, of which the regulations list several.[71]

Apart from bringing claims before national courts, compensation claims can be brought before FIFA's Dispute Resolution Chamber. The Chamber will decide within 60 to 90 days after the date on which the claim has been submitted to it.[72] In arriving at its decision, the Chamber will, as in other cases, also take account of all relevant arrangements, laws and/or collective bargaining agreements, which exist at national level, as well as the specificity of sport.[73] Interested parties can appeal any decision of the Dispute Resolution Chamber to the Arbitration Tribunal for Football.

Note that any amount of compensation awarded by FIFA's Dispute Resolution Chamber following a breach of contract is payable within one month after notification of the Chamber's decision.[74] Appeals to the Arbitration Tribunal for Football do not have suspensive effect.[75] FIFA's Players Status Committee may impose disciplinary measures on the party responsible for the breach who has missed the one month deadline for payment.[76] Moreover, if a player is responsible for the breach, and has not paid the compensation awarded by the Chamber within one month, the new club (whether or not it is found to have induced the breach) shall be deemed jointly responsible for payment of the compensation award.[77] Again, if this new club has not paid the compensation amount within one month after having become jointly responsible with the player, the new club may also be subject to disciplinary measures from the Players Status Committee.[78]

B. Justified contractual terminations

The unilateral termination of a contract can on occasion be justified. Either a club or a player may have a just cause, within the meaning of regular employment law or existing FIFA rules,[79] for such termination. In addition, however, the regulations have envisaged specifically for players the possibility to terminate a contract for a valid sporting reason ('sporting just cause').[80]

Sporting just cause shall be established on a case by case basis, depending on the individual merits of the case and taking into account all relevant circumstances.[81] One ground establishing sporting just cause would be if the player can show, at the end of the season, that he has been fielded in less than 10% of the official matches played by his club.[82] Whether a player has sporting just cause to break his contract with his club will only be determined at the end of a season, and before the expiry of the relevant registration period in the country of the former club.[83]

Nevertheless, a player can ask the Dispute Resolution Chamber whether he has just cause to terminate his contract immediately, before the end of the season. Furthermore, when assessing the

players' claim, the Dispute Resolution Chamber may find, on the basis of the particular circumstances of the case, that in fact the club's behaviour amounts to a breach of contract by the club. In that case, the player would have the option to leave this club immediately, and the club responsible for the contractual breach may be subject to sportive sanctions and liable to pay financial compensation to the player. The Chamber will assess the contractual elements of the players' claim within 30 days after the date on which the player has submitted his case; The Chamber will determine any sportive sanctions or financial compensation within another 30 days at the most. Interested parties can appeal the decision of the Dispute Resolution Chamber to the Arbitration Tribunal for Football.[84] An appeal does not have suspensive effect.[85]

When sporting just cause is established, it shall be determined whether compensation is payable and the amount of any such compensation.[86] In the event it is determined that compensation is payable, the amount must obviously be less than the compensation due in the case of an unjustified contractual breach, since the club is at least in part responsible for the breach, and should, in principle, not exceed the salary remaining until the end of the contract.

Of course, no compensation shall be due by the player, if he is found to have just cause for terminating his contract. Compensation may however be due to the player by his former club, if the latter's behaviour must be interpreted as amounting to an unjustified breach on its part of the contract with the player.

4. SOLIDARITY MECHANISM

If a non-amateur engages in an international transfer during the term of his contract, his previous club may receive financial compensation, either because the player's departure constitutes a breach of contract or in the context of an agreement between the left club, the new club and the player concerned. In those circumstances, and regardless of the age of the (non-amateur) player, the new club concerned is to distribute 5% of this compensatory amount to all the clubs where this player has played between the age of 12 and 23. This distribution of monies is meant as a solidarity contribution to the clubs involved in the training and education of the player.[87]

The solidarity contribution shall be apportioned between clubs as follows, depending on where the player played at a certain age:

- 12 - 13 years: 5%
- 13 - 14 years: 5%
- 14 - 15 years: 10%
- 15 - 16 years: 10%
- 16 - 17 years: 10%
- 17 - 18 years: 10 %
- 18 - 19 years: 10 %
- 19 - 20 years: 10 %
- 20 - 21 years: 10 %
- 21 - 22 years: 10%
- 22 - 23 years: 10%.[88]

If the career of the player cannot be traced back to the age of 12, the amount for any "missing years" will be distributed to the national association of origin of the player and be ear- marked for the training of young players.

Payment of the solidarity contribution must be effected within 30 days from registration of the player by the new club.[89] It is the responsibility of the new club to calculate the amount of the contribution and to effect the necessary payments. If so requested, the player shall assist the new club in calculating the appropriate amounts and in identifying the beneficiary clubs.[90] The FIFA Players' Status Committee may impose disciplinary measures on clubs or players who fail to observe these payment-related obligations.[91] Decisions of the Players Status Committee regarding disciplinary measures can be appealed against to the Arbitration Tribunal for Football.

5. THE ADMINISTRATION OF INTERNATIONAL TRANSFERS

Players transferring internationally, to a club in another country, are only eligible to play for the new club in any official match upon registration by the national association to which the new club belongs.[92] Registration must be requested by the player's new club in a timely manner, i.e. during one of two registration periods established by its national association.[93] In order to register a player coming from another country, the national association must request an international registration transfer certificate from the national association to which the player's old club belongs.[94]

The national association from which this certificate is requested will immediately contact the player and his old club to confirm whether (i) their contract has expired, (ii) early termination was mutually agreed, or (iii) a contractual dispute exists.[95] In the first two scenarios, the national association will deliver the international registration transfer certificate within 7 days to the requesting association, with copy to FIFA. However, in the third scenario, the national association will either deliver the international registration transfer certificate to the requesting association:

(a) upon being notified of the decision on the sanction imposed in case of unjustified breach,[96] or
(b) upon being notified of the decision that the unilateral termination was justified, in which case there would not be any decision forthcoming on a sanction on the player.

The player's eligibility to play for his new club in any official matches may be temporarily restricted in case the player is subject to disciplinary measures or sportive sanctions that have been imposed in connection with his previous employment.[97] This is meant to avoid that a player would change clubs in order to avoid a sanction which had been imposed on him for past misconduct.

Note that a player can request FIFA's Dispute Resolution Chamber to award financial compensation and/or impose disciplinary measures on his former club, if it is determined that this player terminated his contract with this club with just cause or sporting just cause and the player as a result of application of the present Regulations has been suspended from playing in the national championship of his new club, pending a decision on the justified character of the breach. The Chamber must rule on this request within 60 days after the date on which the player has submitted to it by the player.[98] A decision of the Chamber can be appealed to the Arbitration Tribunal for Football, but this appeal shall not have suspensive effect.[99]

6. RELEASE OF PLAYERS FOR NATIONAL ASSOCIATION REPRESENTATIVE MATCHES

Within the scope of the revision of the rules for international transfers of players, some adaptations were also made to the chapter of the Regulations dealing with the release of players for national association representative matches, with the aim of improving the system with due consideration of the interests of all of the parties directly concerned by the release of a player. The following remarks concern the main alterations in this connection.

A. Compulsory release of players

As a general rule, the number of matches for which a player has to be released, has been reduced from seven to five games per calendar year. This provision shall come into force on 1 January 2002. On the other hand, after five matches have been played, the compulsory release of the player shall be extended to any additional games which a national association is required to play during the same calendar year in the FIFA World CupTM preliminary competition as well as - and this is new - in the Olympic Football Tournaments preliminary competition and/or in the preliminary competition of confederation championships for "A" national teams.

Furthermore, we would like to draw your attention to the provision concerning national association's representative teams, which have qualified ex officio for a final competition. For these teams, the compulsory release shall comprise eight international matches (previously five) per calendar year. This provision shall also come into force on 1 January 2002.
Another key clause, which has been added to the relevant provisions, explicitly stipulates that it is not compulsory to release players for friendly matches scheduled on dates outside the coordinated

international match calendar (CIMC). As a matter of form, we wish to emphasise that the CIMC will enter into force on 1 January 2002.

B. The period of release

A slight modification concerns the extent of the period of preparation for which a player has to be released. As a general rule, in the case of a summons for a qualifying match for an international competition, the period of compulsory release has been reduced from 5 to 4 days, including the day of the match. However, this period shall be prolonged to 5 days if the match in question is held on a different continent from that on which the club is domiciled.

C. Responsibility of the national associations

Moreover, the new provisions confer more responsibility on the national associations calling a player for national duty in ensuring that the player respects the timeframes set out in the Regulations. In particular, the national associations shall ensure that the player returns to his club on time after the match.

In this respect the club, with which the player is under contract, shall be notified in writing of the player's expected outward and return journey ten days before the match.

Furthermore, not only the player but, at the same time, his club shall also be informed in writing about the summons at least 15 days before the date of the match for which the player is required. In turn, the club shall confirm the release of the player to the national association concerned within the ensuing six days.

D. Non-observance of the release provisions

So as to ensure that the imposed deadlines are respected, the new Regulations provide for a series of sanctions. In particular, it has to be pointed out that if a player does not resume duty with his club by the timeframes stipulated in the relevant article, the period of release for his national association can be shortened for the subsequent summons. The extent of the reduction will depend on the kind of match concerned.

Furthermore, and in case of recurrent breach of the applicable provisions, the FIFA Players' Status Committee will have the authority to impose appropriate sanctions, such as fines, additional reduction of the period of release or interdiction of a summons to the subsequent match/matches.

If a player reports late for duty more than once, in addition to the above described consequences the FIFA Players' Status Committee may, ex officio or at the request of the player's club, impose supplementary sanctions on the player and/or the national association.

7. DISPUTE SETTLEMENT

The key to the new dispute settlement provisions are the following elements:

a. Players and clubs have the choice to submit the triggering, contract-related elements of their disputes to national courts or to football arbitration.[100] Whatever the choice they make, the sportive sanctions envisaged in the present regulations can only be imposed by FIFA bodies, notably the Dispute Resolution Chamber. Decisions of this Chamber are subject to appeal to the Arbitration Tribunal for Football.

b. FIFA's Dispute Resolution Chamber will be composed of members chosen in equal numbers by players and clubs, as well as an independent chairman.[101] The same is true for the Arbitration Tribunal for Football whenever it hears appeals from decisions taken by FIFA's Dispute Resolution Chamber.[102]

c. If a party chooses to have its dispute resolved through football arbitration, the triggering, contract-related elements of the dispute will be handled by FIFA's Dispute Resolution Chamber at the request

of this party, unless both parties have agreed in writing or it is provided in a collective bargaining agreement not to submit this part of the dispute to FIFA's Chamber but rather to a national sportive arbitration tribunal. However, for this agreement or this provision to be recognized by FIFA, the national arbitration tribunal must also be composed of members chosen in equal numbers by players and clubs, as well as an independent chairman.[103]

d. Whenever a dispute between a player and a club is put to football arbitration, and an unjustified contractual breach is found, FIFA's Dispute Resolution Chamber is exclusively competent to establish the consequences of this finding (notably, sportive sanctions, financial compensation), subject to appeal to the Arbitration Tribunal for Football. The same is true for disputes relating to training compensation.[104]

e. Whenever a dispute between a player and a club arises, FIFA will offer low cost, speedy, confidential conciliation facilities available to the parties. The parties are free to accept mediation by an independent mediator. Any such conciliation will not delay or interfere with the formal dispute settlement procedures.[105]

f. Before reaching any decision in the matters discussed here, FIFA's Dispute Resolution Chamber will ask the national association which held the registration of the player before the dispute arose to give its opinion on the dispute.[106]

8. TRANSITIONAL ARRANGEMENTS

The new regulations shall come into force on 1 September 2001. Contracts between players and clubs concluded before this date continue to be governed by the previous version of these regulations, which entered into force on 1 October 1997, unless the clubs and the players expressly agree to subject their agreements signed after 5 July 2001 to the present regulations. In any event, disputes arising in connection with contracts governed by the earlier version of these regulations will be settled according to the procedural provisions[107] of the present Regulations.

To conclude, it is clear from the above that the national associations will have an important role to play in the new system, and we look forward to working with you. In order to complete the necessary preparations FIFA requests your input in accordance with the following calendar.

September 1, 2001: Entry into force of the new Regulations.

As from October 2001: FIFA will hold a series of information sessions for national associations and affiliates which express an interest.

By 15 October 2001: Please indicate the type of costs your association believes should be taken into account in calculating training and compensation fees. Please consult representatives of clubs and players in your association. To the extent their views diverge, please indicate this, together with your own view. On the basis of your responses FIFA will prepare a Circular containing guidelines on which costs are to be taken into account in the calculation of training and compensation fees.

By 31 October 2001: Those National Associations which presently allow players to be registered throughout the year and do not have registration periods are requested to establish such registration windows and communicate them to FIFA. Until then, they are free to register players.

By 15 November 2001: Assuming FIFA has received a sufficient number of responses by 15 October 2001 FIFA intends to issue a first Circular with guidelines on the types of costs to be taken into account by national associations in calculating training and compensation fees

By 15 December 2001: Please indicate by this date:
- the classification of your clubs as indicated above
- the training and education criteria for each of the relevant club categories.

National Associations within the EU/EEA area are requested by this date as well to indicate a ceiling per club category on training and compensation costs for which they should consult representatives of clubs and players. To the extent their views diverge, please indicate this, together with your own view.

By 15 January 2002: For those national associations which have communicated the necessary information to FIFA, FIFA will establish the final categorisation of the clubs as well as the respective training and education costs, communicate these to the national associations concerned, and publish them on FIFA's internet site.

We thank you in advance for your valuable co-operation and for informing your clubs and players of the above.

Yours faithfully,
FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION
Michel Zen-Ruffinen
General Secretary
Encl.
cc: - Executive Comittee
- Players' Status Committee
- Confederations

Footnotes

(1) See Art. 12.(a) of the FIFA Regulations for the Status and Transfer of Players (hereafter referred to as 'Basic Regulations').
(2) See Art. 4.1 and 4.2 of the Regulations governing the Application of the Regulations for the Status and Transfer of Players (hereafter referred to as Application Regulations).
(3) See Art. 4.3 and 4.4 of the Application Regulations.
(4) See Art. 3.7, 4.5 of the Application Regulations; Art. 15 of the Players' Agents Regulations.
(5) See Art. 12.1.(b) of the Basic Regulations.
(6) See Art. 3 of the Application Regulations.
(7) See Art. 3.4 of the Application Regulations.
(8) See Art. 3.6 of the Application Regulations.
(9) See Art. 3.5 of the Application Regulations.
(10) See Art. 3.7 of the Application Regulations.
(11) See Art. 12.2 of the Basic Regulations.
(12) See Art. 3.8 of the Application Regulations.
(13) See Art. 6.2 of the Application Regulations.
(14) See Art. 6.4 of the Application Regulations.
(15) See Art. 6.3 of the Application Regulations.
(16) See Art. 14 and 15 of the Basic Regulations.
(17) See Art. 5.3, first indent of the Application Regulations.
(18) See Art. 7.4.(c) of the Application Regulations.
(19) See Art. 5.3, second indent, in combination with Art. 5.4.(b) of the Application Regulations.
(20) See Art. 5.3, second indent, in combination with Art. 5.4.(c) of the Application Regulations.
(21) See Art. 5.5 of the Application Regulations and Art. 42.1 (b) (iv) of the Basic Regulations.
(22) See Art. 7.4 of the Application Regulations.
(23) See Art. 7.3 of the Application Regulations.
(24) See Art. 6.5 of the Application Regulations.
(25) See Art. 6.3 of the Application Regulations.
(26) See Art. 6.4 of the Application Regulations.
(27) See Art. 6.5 of the Application Regulations.
(28) See Art. 13 of the Basic Regulations; Art. 7.1 of the Application Regulations.
(29) See Art. 13 of the Basic Regulations.
(30) Note that for the first years of implementation, it shall be necessary to use the same amount of training compensation for all years of training prior to the enforcement of these Regulations within the same club category. This is unavoidable as no costs have been established in previous years. However, as costs for the seasons as from 2001-2002 become available, these shall have to be used to calculate the costs for these years of training.
(31) See Art. 7.2 of the Application Regulations.
(32) Recall that the amount for players aged 12 to 15 will always be based on the training or education costs for category 4. See Art. 7.2 Application Regulations.
(33) See Art. 5.4.(b) of the Application Regulations.
(34) See Art. 5.4. (c) of the Application Regulations.
(35) See Art. 5.4.(c) of the Application Regulations.
(36) See Art. 5.4.(f) of the Application Regulations.
(37) See Art. 7.2 of the Application Regulations.
(38) See Art. 7.3 of the Application Regulations.
(39) See Art. 7.4 of the Application Regulations.
(40) See Art. 7.4 of the Application Regulations.
(41) See Art. 7.5 of the Application Regulations.
(42) See Art. 42.1(b).(iv) of the Basic Regulations.
(43) See Art. 5.4.(b) of the Application Regulations.
(44) See Art. 5.4.(c) of the Application Regulations.
(45) See Art. 5.4.(f) of the Application Regulations.
(46) See Art. 7.4.(a) and 8.(a) of the Application Regulations.
(47) See Art. 7.4.(a) and 8.(b) of the Application Regulations.
(48) See Art. 7.3 and 7.4 and Art. 8.(c) of the Application Regulations.
(49) See Art. 8.(d) of the Application Regulations.
(50) See Art. 9.1 of the Application Regulations.
(51) See Art. 9.2 of the Application Regulations.
(52) See Art. 9.3 of the Application Regulations.
(53) See Preamble to the Basic Regulations.
(54) See Art. 20 of the Basic Regulations.
(55) See Art. 13.2 of the Application Regulations.
(56) See Art. 21 of the Basic Regulations.
(57) See Art. 23.1.(b) of the Basic Regulations.
(58) See Art. 23.2.(c) of the Basic Regulations.
(59) See Art. 23.2.(a) of the Basic Regulations.
(60) See Art. 23.3 of the Basic Regulations. These sanctions are listed in FIFA's Players Agents Regulations.
(61) See Art. 21.2.(c) of the Basic Regulations. This provision defines the notice period as being 15 days following the last official match of the national season of the club with which the player is registered.
(62) See Art. 21.2.(c) of the Basic Regulations.
(63) See, a contrario, Art. 23.2.(c) of the Basic Regulations.
(64) See Art. 13.2 of the Applications Regulations.
(65) See Art. 21.2(a) of the Basic Regulations.
(66) See Art. 21 of the Basic Regulations.
(67) See Art. 42.1.(b)(ii) of the Basic Regulations.
(68) See Art. 42.(b)(i) and (ii) of the Basic Regulations.
(69) See Art. 42.(c) of the Basic Regulations.
(70) See Art. 21 of the Basic Regulations.
(71) See Art. 22 of the Basic Regulations.

(72) See Art. 42.1.(b)(iii) of the Basic Regulations.
(73) See Art. 43 of the Basic Regulations.
(74) See Art. 14.1 of the Application Regulations.
(75) See Art. 42.1.(c) of the Basic Regulations.
(76) See Art. 14.2 of the Application Regulations.
(77) See Art. 14.3 of the Application Regulations.
(78) See Art. 14.4 of the Application Regulations.
(79) Thus, FIFA's Players Status Committee developed case law under the previous version of the present Regulations that a player who had not been paid his contractual salary for several months had just cause to terminate the employment contract with his club.
(80) See Art. 24 of the Basic Regulations.
(81) See Art. 24 of the Basic Regulations.
(82) See Art. 12 of the Application Regulations.
(83) See Art. 24 of the Basic Regulations.
(84) See Art. 42.1.(b)(i) of the Basic Regulations.
(85) See Art. 41.1.(c) of the Basic Regulations.
(86) See Article 24 of the Basic Regulations.
(87) See Art. 25 of the Basic Regulations.
(88) See Art. 10 of the Application Regulations.
(89) See Art. 11.1 of the Application Regulations.
(90) See Art. 11.2 of the Application Regulations.
(91) See Art. 11.3 of the Application Regulations.
(92) See Art. 11.1 of the Basic Regulations.
(93) See Art. 6.2 of the Basic Regulations; Art. 2 of the Application Regulations. For those national associations which presently allow players to be registered throughout the year and do not have registration periods, they are requested to establish such registration windows by the end of October 2001. Until then, they are free to register players.
(94) See Art. 6.1 and 6.2 of the Basic Regulations.
(95) See Art. 6.3 of the Basic Regulations.
(96) See Art. 6.5 of the Basic Regulations.
(97) See Art. 11.2 of the Basic Regulations.
(98) See Art. 42.1.(b)(v) of the Basic Regulations.
(99) See Art. 42.1.(c) of the Basic Regulations.
(100) See Art. 42.1 of the Basic Regulations.
(101) See Art. 42.1.(b)(i) of the Basic Regulations; Art. 15 of the Application Regulations.
(102) See Art. 42.1(c) of the Basic Regulations.
(103) See Art. 42.1.(b)(i) of the Basic Regulations.
(104) See Art. 42.1(b)(ii)-(v) of the Basic Regulations.
(105) See Art. 42.1.(a) of the Basic Regulations.
(106) See Art. 42.3 of the Basic Regulations.
(107) See Art. 42-44 of the Basic Regulations; Art. 15-17 of the Application Regulations.

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