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BRITISH
ASSOCIATION
FOR SPORT
AND LAW
LIMITED

Sport and the Law Journal





**BRITISH
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FOR SPORT
AND LAW
LIMITED**

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Contents

Editorial	2
Inhaled Beta Agonists: Ergogenic, dangerous and against the spirit of sport: Fact or fallacy?	4
Dr Bruce Hamilton	
Anti-doping policy after The Human Rights Act: Is mandatory blood testing compatible with Article 8 of the ECHR?	12
Wendy Hiscox	
Should major league baseball adopt the WADA world anti-doping code to regulate the use of anabolic steroids?	18
Leslie A. Ross	
Football disciplinary codes – The triumph of expediency over justice	28
Mel Goldberg and Simon Pentol	
Community Amateur Sports Clubs – Important Tax Incentives!	32
Richard Baldwin	
Football's finances – never far from the headlines	36
Dan Jones and Gerry Boon	
Sports Law Current Survey	44
Walter Cairns	
Sport and the Law Journal Reports 2004	98
BASL Accounts: For the year ended 31 December 2003	112

Editorial

By Simon Gardiner

Editor

I am very pleased to have accepted the offer of the Editorship of the Sport and the Law Journal. Over the last twelve years it has grown into a highly respected Journal in the emerging discipline of Sports Law. An enormous debt of gratitude is owed to Ray Farrell in his role as editor over this period. During 2004 thanks also should be given to a number of BASL Board members including Murray Rosen and Jonathan Taylor in helping the publications of the last two editions.

But now is a time for evaluation of the future direction of the Journal. One major development planned is a web-based presence for the Journal – more about this in the future. A short questionnaire is included with this issue to help evaluate both the Journal's future form and content. Your feedback will be greatly appreciated in helping guide the Journal's future direction.

This edition of the Journal features three papers written as part of the final assessment of the KCL Postgraduate Certificate in Sports Law run by BASL Board member Jonathan Taylor at King's College London. They have a common focus on the issues of anti-doping in sport. The WADA Code, with its dual aims of harmonisation of the anti-doping procedures across sports and universality of application to all sport around the world, has been in operation for some time. Two of the articles evaluate specific issues concerning WADA from an illuminating medico-legal perspective. Dr Bruce Hamilton's article entitled, 'Inhaled Beta Agonists: Ergogenic, Dangerous and Against the Spirit of Sport: Fact or Fallacy?' examines the problem with drugs that are used for the treatment of complaints such as asthma and the application of the Therapeutic Use Exemption under WADA. Dr Wendy Hiscox's article entitled, 'Anti-Doping Policy after the Human Rights Act: Is Mandatory Blood Testing Compatible with Article 8 of the ECHR?' revisits the debate concerning drug testing and the invasion of individuals' privacy. Lastly, Leslie Ross's article entitled, 'Should Major League Baseball adopt The Wada World Anti-Doping Code to Regulate the Use of Anabolic Steroids', evaluates the resistance being shown by some sports, specifically the main north American professional leagues, to being subject to WADA.

The Journal welcomes papers from post-graduate students (and indeed outstanding papers from under-

graduate students) studying either on taught or research-based Sports Law related degrees. A further three papers from the KCL course will appear in the next edition. Further information about the KCL course can be found at www.kclsportslaw.co.uk or upon request by e-mail to annette.lee@kcl.ac.uk.

In addition, Mel Goldberg & Simon Pentol's article entitled, 'Football Disciplinary Codes – The Triumph of Expediency over Justice', examines the opportunities for challenging internal procedures in football. Richard Baldwin's article entitled 'Community Amateur Sports Clubs – Important Tax Incentives!' promotes the taxation changes that will financially benefit small sports clubs, and his colleagues from Deloitte including Gerry Boon and Dan Jones, provide some highlights of the 'Deloitte Annual Review of Football Finances' (now in its 13th year!). The regular contributions of the Sports Law Current Survey and Sport and the Law Journal Reports can also be found. Finally for the first time, the Annual Accounts of the Association up to December 2003 are published in the Journal.

The Association's Annual Conference took place at Lord's Cricket Ground on the 20th October. Congratulations to those involved in the organisation of what was again an informative and stimulating event.

The Sports Law world in the UK has developed significantly over the last twelve years. A growing body of literature has appeared in terms of books, both targeting the practice and academic analysis of Sports Law. A number of journals including this one, present topical and important debate on the incredibly wide range of issues that are to be found in this discipline. Indeed there are many intellectually rigorous, complex and contested issues that constantly emerge. The different perspectives on WADA highlighted by the articles in this edition prove this point. There continues to be considerable division within the sports world as to whether the approach of WADA is the best way to engage with the reality of drug use in sport.

The role of the Sport and the Law Journal is to inform on current developments but also to engage with these controversial issues. One strength of the Journal is to provide both theoretical and practical insights to Sports Law issues in a way that both mutually inform each other.



Left to right: Kuldip Singh QC - Board member, Ray Farrell - Former Secretary, Maurice Watkins - President & Paul Harris - Board member at Stock Restaurant, Manchester on 3rd November after presenting Ray Farrell with a token of the Association's appreciation for his long and dedicated service as Secretary, and also as Editor of the Journal, from the Formation of the Association until his resignation earlier this year.

I look forward to hearing your responses on the future development of the Sport and the Law journal.

signature to
go in

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Inhaled Beta Agonists: Ergogenic, dangerous and against the spirit of sport: Fact or fallacy?

By Dr Bruce Hamilton, MBChB, BPhEd (Dis), DTM&H, FACSP, FFSEM
Sports Physician

1.0 Introduction

1.1 Drug Use in Sport and the Formation of the World Anti-Doping Agency

Drugs and other concoctions have long been utilised to enhance sporting performance. In the ancient Olympics, the use of drugs was widespread and considered legitimate. In the early half of the twentieth century, with the increased globalisation of sporting contests, medicating with substances would often be used as a legitimate training aid¹. Following several fatal incidents involving athletes and drugs, and a change in public opinion towards the use of drugs in sport, the International Olympic Committee (IOC) instigated drug testing and a prohibited list of drugs in 1968. In the latter half of the twentieth century, both the use of drugs to enhance performance and the fight against their use became increasingly sophisticated. As a result, following the World Conference on Doping in sport in Lausanne in February 1999, the World Anti-Doping Agency (WADA) was created with the aim of harmonising and intensifying the fight against doping in sport².

WADA has in a short space of time developed the World Anti-Doping Code (the "Code"), upon which its entire anti-doping programme is based², as well as numerous International Standards for the technical management of the Code^{3,4} and several models of best practice⁵. As a result of these developments, participants in the World Conference on Doping in Sport, held in Copenhagen in March 2003, passed a resolution accepting the Code as "*...the basis for the fight against doping in sport throughout the world*", and encouraging sporting bodies and Governments to sign up to the Code. Signatories to the Copenhagen Declaration accept challenging fiscal and logistical responsibilities, with failure to fulfil those responsibilities potentially having consequences for their participation in events such as the World Championships and Olympic Games (Article 20²). Despite this, over 490 countries and sporting organisations have signed the Copenhagen Declaration, including the IOC^{6,7}.

1.2 Asthma and Inhaled Beta Agonists

Asthma is a common condition affecting up to 10% of the population⁸ and is characterised by intermittent wheeze, shortness of breath, chest tightness, and persistent cough. Exercise-Induced Asthma ("EIA") is the term used to describe the transient narrowing of the airways that follows vigorous exercise of 6-8 minutes duration^{9,10}, resulting in symptoms during or soon after exercise. EIA is now recognised as being very common, occurring in up to 23% of Olympic athletes, with a particularly high incidence in sports such as running, cross country skiing, and ice skating¹¹⁻¹⁴. It is well-recognised that asthma can impair sports performance.

Inhaled Beta-Agonists ("IBAs") are sympathomimetic agents which act to prevent the narrowing of the airways found in EIA, by inducing relaxation of Bronchial Smooth Muscle. They are one of the most commonly used means of treating all forms of asthma^{15,16}. The development of long-acting IBA medication has further enhanced its efficacy, by increasing the duration of its effect¹⁵. While there are a number of other classes of medication that may be used to treat exercise-induced asthma, either independently or in combination with IBAs (for example: Mast Cell Stabilising Medication, Corticosteroids, Leukotriene Receptor Antagonists), IBAs are still recognised as a pivotal management tool¹⁵.

IBAs have been on the IOC's List of Prohibited Substances since 1975. IBAs have also been included on the WADA 2004 Prohibited List, with sufferers of asthma subsequently required to complete a Therapeutic Use Exemption application prior to being permitted to utilise IBAs in the management of their asthma. In 2005 this position will be unchanged, except that IBAs will be prohibited both in- and out-of competition unless a prior Therapeutic Use Exemption has been granted¹⁷.

The aim of this paper is to critically review both the inclusion of IBAs on the WADA Prohibited List and the Abbreviated Therapeutic Use Exemption procedure as instigated by WADA in order to manage the legitimate use of IBAs. The author will contend that IBAs do not fulfil the requirements of the WADA Code and hence should not be included in the Prohibited List. Furthermore, the

author will argue that with regard to IBAs, the Therapeutic Use Exemption process instigated by WADA places disproportionate requirements on medical practitioners and subsequently requires further rationalisation.

2.0 The 2004 WADA Prohibited List

The Prohibited List is an annually updated WADA publication of those substances and methods whose use is prohibited in sport^{2,3}). In order for a substance to be included in this list, it is supposed to meet at least two of the following criteria²:

1. Medical or other scientific evidence, pharmacological effect, or experience that the substance or method has the potential to enhance or enhances sport performance;
2. Medical or other scientific evidence, pharmacological effect, or experience that the use of the substance or method represents an actual or potential health risk to the athlete;
3. WADA's determination that the use of the substance or method violates the "spirit of sport" described in the Introduction to the Code.

Pivotal to the first two criteria is the requirement that medical or scientific evidence be available to support the assertion of performance enhancement or health risk. As discussed below, this is a very live issue in relation to IBAs.

Whilst not wishing to debate the entire WADA Code, two key principles are relevant to the current topic. Firstly, the principle of "strict liability", whereby an athlete has absolute responsibility for what is found in his/her body (WADA Code, Article 2,²). So, for example, ignorance of the contents of a supplement or medication will not be available as a defence. Secondly, if a substance is included on the Prohibited List, it is deemed to be performance-enhancing (Code, Article 4.3.3²); and athletes can not argue to the contrary. Given these two clearly asseverated principles upon which the Code and the Prohibited List are based, it is apparent that the onus is therefore on WADA to ensure that all substances included on the list are both

justifiable and appropriate, according to WADA's own clear criteria.

2.1 Inhaled Beta Agonists and the WADA 2004 Prohibited List

IBAs are included on the 2004 Prohibited list (in-competition) under Article S6:

"All beta-2 agonists including their D- and L-isomers are prohibited except formoterol, salbutamol, Salmeterol and Terbutaline are permitted by inhalation only to prevent and/or treat asthma and exercise-induced asthma/bronchoconstriction. A medical notification in accordance with section 8 of the International Standard for Therapeutic Use Exemptions is required."³

Subsequently, medical documentation in the form of a Therapeutic Use Exemption (TUE) is required to be completed and accepted, in order for IBA use to be permitted in sport to prevent asthma. Notwithstanding the granting of a TUE, a urinary concentration of salbutamol greater than 1000ng/ml (detected either in- or out-of-competition) will continue to be considered an adverse analytical finding "... unless the athlete proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol"³. This apparently arbitrary level is included as levels of this nature are felt to be anabolic and unlikely to be reached via routine therapeutic inhalation (Section 5.31¹⁸). This latter contention has however, been successfully challenged both legally^{18,19} and academically²⁰, as explained further below.

Inclusion of a substance or method on the "Prohibited List" implies conformity with the WADA prohibited list criteria outlined above. Clearly, it is critical that the WADA inclusion criteria are met, in order to ensure fair and equitable treatment of all athletes thereby ensuring that specific athletes are not unduly disadvantaged by the WADA Code. Thus it is a worthwhile exercise to briefly review the relevant literature surrounding IBAs in order to understand the basis for its inclusion on the Prohibited List.

Inhaled Beta Agonists: Ergogenic, dangerous and against the spirit of sport: Fact or fallacy?

i. Ergogenic Effects of IBA

While there is clear evidence that the now redundant Beta-Agonist Clenbuterol has an ergogenic effect^{21, 22}, and some evidence that orally consumed and high dose Beta Agonists have an ergogenic effect^{23, 24}, there is widely accepted to be no scientific or medical evidence that inhaled IBAs have an ergogenic effect²⁵⁻³². Indeed the International Olympic Committee Medical Committee (IOC MC) recently published the same conclusion^{33, 34}.

ii. Health Risks of IBA

There have been limited studies into the potential health risks of utilising IBAs, both for asthmatic and non-asthmatic athletes. The British National Formulary lists the possible side effects as: tremor, nervous tension, peripheral vasodilatation, palpitations, tachycardia (rarely if inhaled), muscle cramps, hypokalaemia (reduced potassium), urticaria and hypersensitivity³⁵. The clinical significance of these side-effects to an athlete who may be using very low doses of IBA is questionable.

The most cited concern with regard to IBA use is the development of tolerance^{15, 36} and the associated possibility of increased airway reactivity³⁷. Experience suggests, however, that those athletes most at risk of inappropriate use (secondary to misdiagnosis), are often infrequent users utilising salbutamol only intermittently (for example: an athlete may use one or two puffs on an inhaler prior to competition or particularly hard training sessions), with the subsequent risk of tolerance being minimal³⁸.

Handley et al.³⁷, in a detailed review of beta-agonists, describe the 50:50 mix of 'R' and 'S' isomers that make up all of the current generation of IBAs. Significantly, most of the beneficial effects of IBA are a result of the activity of the 'R' isomer, while most of the side effects and negative consequences are attributed to the 'S' isomer. Researchers have now been able to develop pure isomeric 'R' forms of IBA whose existence suggests that the side effects and risks of IBA will, in the future, be minimised³⁷.

iii. The "Spirit of Sport"

The spirit of sport is a far more intangible criterion to quantify; it is defined in the WADA Code as a celebration of the human spirit, body and mind². Far from being an independent third criterion, the emotive, subjective "spirit of sport" is clearly both defined and heavily determined by the preceding two criteria. It is difficult to conclude, given the lack of ergogenic effect and the low relative health risks from consumption of low dose IBAs, that IBAs should be considered against the "spirit of sport".

As noted above, both the mode of ingestion and total dose of beta agonists are of particular concern to the WADA Code, and both have been considered in recent tribunal hearings^{3, 18, 19}. More specifically, oral consumption

of salbutamol (which may have ergogenic effects) is prohibited, while inhalation of salbutamol (which does not have ergogenic effects) is permitted to treat asthma (that is, with a TUE), and the cut-off of 1000 ng/ml is used as a threshold distinguisher between the two. However, the 1000 ng/ml is a particular crude distinguisher, and a more sophisticated approach is suggested by the work of Berges et al.²⁰. Using a series of studies comprising both healthy individuals and sufferers of asthma, the authors describe a number of relevant findings. Firstly, and casting doubt as to the validity of the 1000ng/ml urinary prohibition level, the authors found that variation in urinary volume affected the total concentration of free salbutamol, thereby making urinary concentration a poor discriminator of inhaled versus oral intake. Additionally, while a number of factors such as medications and underlying pathology may affect isomeric excretion, there was good evidence that the relative proportions of the 'R' and 'S' isomers of salbutamol present in the urine accurately indicate whether the salbutamol was inhaled or orally ingested. It is to be regretted that the Prohibited List does not even mention, let alone rely upon, this technique, but instead leans back on the unreliable 1,000 ng/ml cut-off as a rough and ready discriminator between permitted and prohibited use.

On the other hand, WADA have included IBAs on their list of "Specified Substances"³, a term referring to "substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be abused as doping agents" (10.3²). Subsequently, an adverse analytical finding may potentially result in a reduced sanction². Thus, it appears somewhat paradoxical that WADA can acknowledge that IBAs are "less likely to be abused as doping agents", whilst continuing to increase the logistical demands on athletes and National Governing Bodies (NGBs), in the form of TUE requirements, as a mechanism for permitted use.

Given the above brief assessment, one is drawn to question the inclusion of IBA on the WADA prohibited list. Inclusion of inappropriate substances and methods on the prohibited list will have a significant impact on individual athletes (in this case athletes suffering from asthma), NGBs and International Federations (IFs). Its inclusion certainly warrants further consideration.

2.2 WADA, the IOC and the Inclusion of Inhaled Beta Agonists on the Prohibited List

Prior to the formation of WADA and the development of the WADA Code, the IOC was the world's major anti-doping body, with its own prohibited list forming the basis of anti-doping procedures throughout the world. It is worth considering the history of treatment of IBAs in the Prohibited List, first by the IOC and now by WADA, and a summary is set out in Table One, opposite. The

Table One: Progress of Inhaled B-2 Agonists in the IOC and WADA Prohibited List

IOC List of Prohibited Substances				
Year	Status	Substance	Class	Comment
1975		Salbutamol, Terbutaline	Class 1A Stimulants	First added to list following concerns regarding Stimulant effect on CVS and CNS. Permitted only with prior notification from appropriate authority.
1992		Salbutamol, Terbutaline	Class 1A Stimulants	
		Salbutamol, Clenbuterol	Class C Anabolic agents 2. Other Anabolic Agents	Incorporated following evidence that Oral Salbutamol could have anabolic effects. Permitted by inhaler only and must be declared in writing, prior to the competition, to the relevant medical authority.
1996		Salmeterol	Class 1A Stimulants	Added to list for first time
1998		Salbutamol, salmeterol, terbutaline ...and related substances	Class 1A Stimulants	Permitted by inhaler only when their use is previously certified in writing by a respiratory or team physician to the relevant medical authority.
		Clenbuterol, fenoterol, salbutamol, salmeterol, terbutaline ...and related substances	Class C Anabolic Agents 2. Beta-2 Agonists	
Jan 2000	IC	Salbutamol, salmeterol, terbutaline ...and related substances	Class 1A Stimulants	"Permitted by inhaler only to prevent and/or treat asthma and exercise- induced asthma. Written notification of asthma and/or exercise-induced asthma by a respiratory or team physician is necessary to the relevant medical authority."
	IC/OOC	Bambuterol, clenbuterol, fenoterol, formoterol, reproterol, Salbutamol*, salmeterol*, terbutaline* ...and related substances	Class C Anabolic Agents 2. Beta-2 Agonists	*Authorised as per stimulants. For salbutamol the definition of a positive under the anabolic agent category is a concentration in urine greater than 500 nanograms per millilitre.
April 2000	IC	Salbutamol, salmeterol, terbutaline ...and related substances	Class 1. A Stimulants	"Permitted by inhaler only to prevent and/or treat asthma and exercise-induced asthma. Written notification of asthma and/or exercise-induced asthma by a respiratory or team physician is necessary to the relevant medical authority." Reporting threshold of 100ng/ml in urine.
	IC/OOC	Bambuterol, clenbuterol, fenoterol, formoterol, reproterol, Salbutamol*, salmeterol*, terbutaline* ...and related substances	Class C Anabolic Agents 2. Beta-2 Agonists	*Authorised as per stimulants. For salbutamol the definition of a positive under the anabolic agent category is a concentration in urine greater than 1000 nanograms per millilitre.
2001	IC	Formoterol, salbutamol, salmeterol, terbutaline ...and related substances	Class 1A Stimulants	"Permitted by inhaler only to prevent and/or treat asthma and exercise-induced asthma. Written notification of asthma and/or exercise-induced asthma by a respiratory or team physician is necessary to the relevant medical authority prior to competition."
	IC/OOC	Bambuterol, clenbuterol, fenoterol, formoterol, reproterol, salbutamol*, salmeterol*, terbutaline* ...and related substances	Class C Anabolic Agents 2. Beta-2 Agonists	*Authorised as per stimulants. For salbutamol the definition of a positive under the anabolic agent category is a concentration in urine greater than 1000 nanograms per millilitre.
2003	IC	Formoterol*, salbutamol*, salmeterol* and terbutaline ...and related substances	Class 1A Stimulants b. Unnamed	*Permitted by inhaler only to prevent and/or treat asthma and exercise-induced asthma. Written notification by a respiratory or team physician that the athlete has asthma and/or exercise-induced asthma is necessary to the relevant medical authority prior to competition. At the Olympics [sic] Games athletes who request permission to inhale a permitted beta-2 agonist, will be assessed by an independent medical panel.
	IC/OOC	Clenbuterol, salbutamol*	Class C Anabolic Agents 2. Other Anabolic Agents	*For salbutamol, a concentration in urine greater than 1000ng per millilitre of non-sulphated salbutamol constitutes a doping violation.
WADA Prohibited List International Standard				
Year	Status	Substance	Class	Comment
2004	IC/OOC	Clenbuterol	S4 Anabolic Agents 2. Other Anabolic Agents	
	IC/OOC	Salbutamol	S6 Beta-2 Agonists	Despite the granting of a TUE, when the Laboratory has reported a concentration of salbutamol (free plus glucuronide) greater than 1000ng/ml, this will be considered as an adverse analytical finding unless the athlete proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol.
	IC	All B-Agonists Prohibited except Salbutamol, Formoterol, Salmeterol and Terbutaline	S6. Beta-2 Agonists	All beta-2 agonists including their D- and L- isomers are prohibited except that formoterol, salbutamol, salmeterol and terbutaline are permitted by inhalation only to prevent and/or treat asthma and exercise-induced asthma/bronchoconstriction. A medical notification in accordance with section 8 of the International Standard for Therapeutic Use Exemptions is required.
		Inhaled Beta-2 Agonists (except Clenbuterol)	Specified Substances	The WADA Code (10.3) states "The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. A doping violation involving such substances may result in a reduced sanction as noted in the Code provided that the "...Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance..."
2005	IC/OOC	Clenbuterol	S1 Anabolic Agents 2. Other Anabolic Agents, including but not limited to:	
	IC/OOC	All beta-2 agonists including their D- and L-isomers are prohibited.	S3. Beta-2 Agonists	Their use requires a Therapeutic Use Exemption Formoterol, salbutamol, salmeterol and terbutaline
	IC/OOC	Formoterol, salbutamol*, salmeterol and terbutaline	S3. Beta-2 Agonists	As an exception, formoterol, salbutamol, salmeterol and terbutaline, when administered by inhalation to prevent and/or treat asthma and exercise-induced asthma/bronchoconstriction require an abbreviated Therapeutic Use Exemption." *Despite the granting of a Therapeutic Use Exemption, when the Laboratory has reported a concentration of salbutamol (free plus glucuronide) greater than 1000ng/ml, this will be considered as an Adverse Analytical Finding unless the athlete proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol.
		Inhaled Beta-2 Agonists (except Clenbuterol)	Specified Substances	"The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents." A doping violation involving such substances may result in a reduced sanction as noted in the Code provided that the "...Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance..."

IC: Prohibited in Competition; OOC: Prohibited out of Competition

Inhaled Beta Agonists: Ergogenic, dangerous and against the spirit of sport: Fact or fallacy?

IOC is now the single most significant contributor to the WADA budget, contributing 8,500,000 US Dollars, or 50% towards the budget in 2002³⁹.

In May 2001, the IOC MC convened a workshop in Lausanne, Switzerland, to review the gradual increase in number of athletes utilising IBA at the Olympics. This workshop concluded that:

"...At recent Olympic Games, there had been a large increase in the number of athletes notifying the need to inhale a beta 2 agonist..."

and

"some athletes may have been misdiagnosed and did not have asthma..."⁴⁰.

The stance of the IOC MC is supported by evidence of increasing utilisation rates for IBAs in sport over recent years⁶ and the fact that self-reported symptoms are a poor indicator as to the presence or otherwise of asthma, thereby increasing the possibility of misdiagnosis⁴¹. Some authors however, go further, suggesting that *"...Anecdotally, it is clear that there are elite athletes, who do not have asthma, who are prescribed IBA by well-intending physicians"*²³. Interestingly, one of the authors of this latter view is a member of the IOC MC.

While it is true that there has been a trend towards increasing utilisation of IBAs at the Olympic Games, it is also true that there is vast geographical variation in those utilisation rates: the highest incidence of IBA utilisation is reported in athletes from the United Kingdom, North America, Australia and New Zealand. Significantly, the geographical variation observed in IBA utilisation in the Olympics correlates highly with the prevalence of asthma in those countries²³.

As a result of this workshop, the IOC increased its own requirements for the legitimate use of IBAs by athletes, by necessitating the inclusion of clear clinical and laboratory standards in a TUE application, in order for a TUE to be granted. Presumably, the aim was a reduction in the number of inappropriate IBA users, although this is not clearly set out in formal communications^{16, 33, 40}. As a result of this lack of clarity, some authors are beginning to question the rationale for the continued inclusion of IBAs on the Prohibited List³⁴. Interestingly, the proportion of athletes utilising asthma medication competing in the British Olympic Team increased from 16.5% in Sydney to 21% in Athens, suggesting that the IOC's new requirements may not be having the desired effect⁴².

Given the critical role that the IOC MC has previously played in the fight against drugs, the fiscal relationship between the IOC and WADA, and the importance of the Olympics to WADA, it is no surprise, and not entirely inappropriate, that WADA should be significantly

influenced by the opinions of the IOC MC. It becomes problematic, however, when one considers that in contrast to the IOC MC, which seems to have a high degree of autonomy and variable degrees of accountability⁴³, WADA has very clear guidelines with which it must supposedly adhere. The inclusion on WADA's Prohibited List of substances that do not meet the criteria specified by WADA for inclusion, such as IBAs, risks undermining the bed-rock of the entire strict liability system on which the WADA Code is based.

3.0 Therapeutic Use Exemption

Notwithstanding the inclusion of IBAs on the Prohibited List, WADA does recognise that IBAs are legitimately required by many athletes for the management of their asthma. In order to assist asthmatic athletes in the legitimate use of IBAs, WADA has instigated a process known as Therapeutic Use Exemptions whereby *"4.0 ...A Therapeutic Use Exemption (TUE) may be granted to an Athlete permitting the use of a Prohibited Substance or Prohibited Method contained in the Prohibited List"*⁴.

Anti-Doping Organisations (ADOs, for example: National Anti-Doping Organisations [NADOs], IFs or the IOC) are required to establish TUE Committees ("TUEC") to manage and quality control a process whereby TUE applications from elite athletes may be appraised and approved (4.4²). While TUE application forms have been standardised, the WADA Code does allow each ADO to modify the application forms utilised for TUE consideration in order to best meet their own requirements (Article 7.2⁴). While not allowing any criteria to be removed from the standardised form, and thereby ensuring a minimum standard of TUE applications, Article 7.2 clearly permits each ADO to establish its own 'levels of proof' when it comes to TUE approval. In this single action it can be seen that rather than harmonise and standardise the anti-doping process, WADA has effectively created a process whereby no direct comparison may be made between the TUEs issued by different ADOs. With each of the ADOs able to establish its own criteria, it is unclear how this is going to add harmony to the anti-doping cause.

3.1 Inhaled Beta Agonists and the Therapeutic Use Exemption Application Process

The WADA TUE Standard Application Form requires the reporting physician to include a significant amount of clinical and laboratory detail, thereby enabling a TUEC to make an appropriate and informed decision. As mentioned above, this application form may also be modified as required.

In contrast however, when considering IBAs and non-

systemic Glucocorticoids (which will not be discussed in this paper, but as to which similar issues arise), a process known as the "Abbreviated Therapeutic Use Exemption Application Process" has been instigated⁴. This is apparently because "8.1 It is acknowledged that some substances included on the List of Prohibited Substances are used to treat medical conditions frequently encountered in the Athlete population"⁴. The latter is an interesting concession on the part of WADA, recognising that asthma is a common occurrence in the athletic population, contrasting the stance of the IOC MC, which appears to take the position that the frequency of asthma in elite sport is excessive and one of the major indications for increased vigilance.

3.2 The Abbreviated Therapeutic Use Exemption

There are two important features of the Abbreviated TUE (ATUE) which distinguish it from the Standard TUE. Firstly, approval for the Abbreviated TUE is effective immediately upon receipt of a completed notification form by the appropriate ADO. Secondly, the WADA Abbreviated TUE application does not require the inclusion of medical investigations⁴. With regard to IBAs, this latter feature distinguishes the WADA ATUE from the ATUEs of ADOs such as the IOC, the International Association of Athletics Federations (IAAF) and UK Sport. Each of these organisations has taken advantage of Article 7.2⁴ to require stringent clinical and laboratory criteria to be fulfilled and documented in the ATUE application, in order for an ATUE to be approved. These modifications have occurred as a result of ADOs recognising the limitations of the WADA ATUE application, in that an ATUE Application which does not require the inclusion of medical information

The WADA TUE Standard Application Form requires the reporting physician to include a significant amount of clinical and laboratory detail, thereby enabling a TUEC to make an appropriate and informed decision

provides no basis for a TUEC to either accept or decline an application. ADOs who have modified the ATUE Application form to require the inclusion of laboratory results and medical information are in a much stronger position to decide if an ATUE application is appropriate or not.

Unfortunately, as a result of Article 7.2, a situation may arise in which an approved ATUE application to any ADO TUEC may not necessarily meet the standards and requirements of another

ADO TUEC. Given that ADOs will be establishing TUECs throughout the world, with potentially independent and perhaps contradictory criteria, is there any possible way in which the ADOs can expect to be granting or refusing ATUEs on the basis of equivalent standards? Clearly, this is not a harmonised and standardised system and if WADA is to be the 'gold standard', why should there be any need for individual sports or ADOs to add their own requirements to the WADA ATUE?

To add a further source of potential confusion, Article 15.4 of the WADA Code states that "...subject to the right to appeal provided in article 13, the testing, TUE and hearing results or other final adjudications of any signatory which are consistent with the code and are within that signatory's authority, shall be recognised and be respected by all other Signatories...". As a result, an ATUE approved by (say) a TUEC convened by UK Sport will have to be recognised by other ADOs such as the IOC, even if the approval standards may differ.

While there is no singular standard for ATUEs, the potential for inconsistency and inequity is immense. Rather than harmonising and strengthening the anti-doping process, the ATUE process established by the WADA Code is disharmonious and unmanageable in its current format.

3.3 Impact of the ATUE Requirements upon National Governing Bodies

The spirit and intent of the unmodified WADA ATUE form allows for the rapid processing of a large number of ATUE applications by TUECs. Unfortunately it does not provide the TUEC with the appropriate information with which to make an informed decision. As noted above, the result of this is that ADOs such as the IOC and IAAF have modified the ATUE, including the requirement for documentary evidence of their asthma. This requirement will however, have a significant impact upon NGBs, as they attempt to ensure that their athletes have the appropriate documentation when applying for an ATUE for an IBA.

UK Athletics has approximately 400 athletes on its Out-of-Competition register⁴⁴. With up to 23% of athletes potentially suffering from asthma¹³, this equates to over 80 athletes requiring documentary evidence of their asthma, prior to having their ATUE form approved by the IAAF TUEC. It is generally recognised that most athletes suffer from subtle, exercise induced asthma, for which simple spirometry available in many sports medicine practices will not provide adequate evidence^{11, 38}. Recognising this, the preferred IAAF investigation is the Eucapnic Voluntary Hyperventilation (EVH) test, which at this stage is only able to be performed in a single research centre in the United Kingdom. With

Inhaled Beta Agonists: Ergogenic, dangerous and against the spirit of sport: Fact or fallacy?

approximately 10 000 athletes on the UK Sport Out of Competition Register⁴⁵, corresponding to potentially over 2000 asthmatic athletes, it can be seen that the demand on a single testing facility (a single test, without follow-up and assuming a positive result may take approximately 40 minutes) will be limiting, if not logistically improbable.

Most NGBs will employ a single chief medical officer (CMO) on a part time basis with the responsibility of ensuring the health and injury free status of their athletes, monitoring the anti-doping policies including documentation and education, and the general development of medical policies. The new ATUE requirements for an NGB such as UK Athletics, will require the CMO to ensure that all athletes, prior to competition, have the correct documentation, to the standard of proof required by its own IF, in this case the IAAF. In the past, the level of proof required has been based on the word of a Registered Medical Practitioner, requiring a minimum of paperwork and time. It is clear that the increased logistical and temporal demands placed upon the NGB CMO by the modifications imposed upon the WADA ATUE application form by independent ADOs such as the IAAF, will have a significant impact upon the ability of CMOs to perform other critical activities, including drug education and health promotion³⁸. This should be of great concern to WADA.

Just as one must ask if a sanction is proportionate to the doping offence, one can equally question whether the logistical requirements of the ATUE for IBAs are proportionate to the rationale for the inclusion of IBAs on the Prohibited List. Clearly from the preceding argument, it would appear that the medical and scientific justification of IBA inclusion on the Prohibited List is at best weak and at worst completely inappropriate and not in conformity with WADA's own guidelines. By comparison, the impact upon an NGB medical officer as illustrated above is immense. In a world of severely limited resources both in terms of time and in terms of medical and scientific expertise, this will impact heavily upon the ability of NGBs to counter the illegitimate use of more sinister drugs such as Anabolic Steroids, Erythropoietin and their newer and increasingly sophisticated derivatives. The author would argue that this is an unfortunate position in which NGBs find themselves and which, by virtue of the time and logistical demands placed upon NGB anti-doping and medical staff, will ultimately impair the ability of NGBs to assist in the fight against drug use in sport.

4.0 'European Rugby Cup Limited versus Frankie Sheahan': Implications for the WADA code

Frankie Sheahan is an Irish rugby player who was discovered to have elevated levels of urinary salbutamol (1644 ng/ml and 1764 ng/ml in the 'A' and 'B' samples

respectively) following an 84 minute game of rugby in the European Rugby Cup competition. Although he was able to demonstrate that he had been prescribed salbutamol to alleviate his asthma, he had not made the proper filings with ERC, and in any event the levels were so high that therapeutic use was doubted. The first instance tribunal therefore upheld the doping charges brought against him for use of a Prohibited Substance, and rejected his contention of therapeutic use. On appeal, however, his contention of therapeutic use was upheld, essentially as a result of further scientific analysis of the urine sample, based on the isomer research alluded to earlier²⁰. The R:S isomer analysis found that Sheahan's salbutamol ratio was consistent with inhaled salbutamol, thereby obliging the tribunal to accept that salbutamol levels of 1000 ng/ml in the urine can be achieved with an inhaled therapeutic dose. Furthermore, it was accepted that inhaled salbutamol does not have an ergogenic effect. As a result, his sanction was reduced from two years to three months, based on his failure to notify properly his therapeutic use of salbutamol^{18, 19}.

While both the first instance tribunal and the appeal tribunal applied the September 2001 IOC List of Prohibited Classes of Substances and Prohibited Methods, their findings would appear to have profound implications for the current WADA Code. As noted above, under the WADA Code, an in- or out-of-competition urinary level of salbutamol greater than 1000ng/ml is considered an adverse analytical finding, due to its implied anabolic effect, unless "...*the athlete proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol*"³. Significantly, on the basis of expert scientific opinion, the tribunal agreed that levels greater than 1000ng/ml could be achieved by inhalation, casting doubt on the scientific validity of the current WADA Prohibited List. As was evident from this tribunal finding, the failure of WADA to conform to the highest scientific standards may result in both false positive analytical findings and subsequent charges being pursued. Despite this tribunal finding, similar cases elsewhere⁴⁶ and enhanced laboratory techniques²⁰, WADA has failed to include guidelines recommending the utilisation of isomers in the assessment of those urine samples which contain levels of salbutamol greater than 1000 ng/ml in either its 2004 or 2005 Prohibited List and Laboratory Standards^{3, 17, 47}.

It would appear more rational for WADA to specify those isomeric findings that are consistent with permitted use of beta-agonists, and those that are consistent with prohibited use of beta-agonists, rather than relying solely on an arbitrary urinary salbutamol level, prior to declaring an adverse analytical finding. The author would recommend an approach whereby isomeric assessment of those samples found to contain

greater than 1000 ng/ml of salbutamol is mandatory. In so doing, the necessity for evidence-based TUEs (as developed by ADOs such as the IAAF and IOC) would be negated, as it would not be inhaled Beta-Agonists that would be prohibited, but rather its oral and intravenous forms. Subsequently, those athletes wishing to gain an unfair advantage from using oral or intravenous beta-agonists would be detected, those asthmatic athletes wishing legitimately to utilise IBAs would not be disadvantaged, and NGB Medical Officers would be able to concentrate on those doping issues worthy of inclusion on the WADA Prohibited List.

5.0 Conclusion

From the preceding discussion it is clear that the inclusion of IBA in the WADA Prohibited List appears at odds with WADA's own stated methodological practice. The Abbreviated TUE system instigated to cope with the volume of legitimate IBA users has been undermined by the inclusion and application of Article 7.2, creating the potential for inconsistency and disharmony between Anti-Doping Organisations. The author would recommend that WADA consider both the removal of IBAs from the Prohibited List, and Article 7.2 from the International Standard for Therapeutic Use Exemptions. In addition, the author recommends that all screened urine samples which return a level of salbutamol greater than 1000 ng/ml be further assessed using isomer ratios prior to the reporting of an adverse analytical finding. This should be incorporated into future WADA Prohibited Lists and Laboratory Standards.

While the altruistic intentions of WADA and the IOC MC with regard to IBAs may in many ways be admired, the administrative, fiscal and logistical difficulties that inclusion of IBAs has created may have more far reaching and sinister consequences downstream.

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Anti-doping policy after The Human Rights Act: Is mandatory blood testing compatible with Article 8 of the ECHR?

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Introduction

The use of performance enhancing drugs is conspicuous throughout the history of sport. Estimates of current drug use among elite athletes vary considerably. Many observers, however, believe doping has reached "epidemic"¹ proportions. While drug use to enhance performance appeared to have been tacitly accepted within the international sporting community prior to the 1960s,² there now seems an international consensus that robust doping control is essential. Indeed, the fight against doping in sport has noticeably intensified throughout the world, culminating in the World Conference on Doping in Sport in March 2004 in Copenhagen.³

Doping not only puts an athlete's health and safety at risk, but it undermines the spirit and essence of sport. Anti-doping policies seek to safeguard what is inherently valuable about sport. This intrinsic value is often referred to as 'the spirit of sport'; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterised by the following values: ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage; and community and solidarity.⁴

The introduction of blood testing for the first time at the 2000 Olympics in Sydney was considered to be a "breakthrough in the anti-doping battle."⁵ Until the Sydney Games, drug screening at the Summer Olympics had been limited to urine testing.⁶ There are, however, some drugs – including the peptide hormones such as erythropoietin (EPO) and human growth hormone – "for which establishing a reliable urine test has proven a major obstacle."⁷ In all likelihood, blood testing will become widely used as a primary test in sport.⁸ Indeed, there appears to be an international consensus emerging that blood sampling and testing for doping control is now "viable, dependable and a necessary element"⁹ of any comprehensive anti-doping programme.

The crucial issue, however, concerns whether blood testing is absolutely necessary for effective doping

control. There are, undeniably, patent advantages of blood testing. Some of the known advantages include: the procedure for sample collection is relatively rapid; it is a minimal requirement for the detection of homologous (infusion of whole blood or blood products from another person) blood doping; it provides the best medium for detecting autologous blood doping (i.e. the use of EPO or one's own blood that was previously withdrawn and stored); it reduces the possibility of sample manipulation; and it provides advantages in identifying the presence of certain peptide hormones such as rHGH or rIGF-1.¹⁰

However, compulsory blood testing policies present obvious legal concerns,¹¹ some of which have been brought sharply into focus with the passage of the Human Rights Act 1998 ('HRA'), which came into force on 2 October 2000.¹² The HRA incorporated into English law the fundamental rights and freedoms safeguarded by the European Convention on Human Rights 1950 ("ECHR"), making human rights issues justiciable in English courts for the first time.¹³ As a result, courts now are obliged to construe legislation as far as possible as being compatible with the ECHR, and public authorities similarly have a duty to act in a manner which is compatible with the rights set out in the ECHR.¹⁴

It remains to be seen whether the incorporation of the ECHR into British law will have an impact on sport generally,¹⁵ or whether, more specifically, it will call into question the legitimacy of mandatory blood testing for sports competitors. There do seem to be several possible Convention rights implicated in this context.¹⁶ This paper, however, restricts its focus to a consideration of the ECHR's Article 8 implications of mandatory blood testing in sport: are the two compatible?

I. Article 8 of the ECHR: Right to Respect for Private and Family Life

Article 8 provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The scope of the privacy rights covered by the article is broad.¹⁷ Indeed, Article 8 has been said to cover such diverse interests as: the ‘right to be let alone;’¹⁸ an individual’s dignity or moral integrity;¹⁹ and the control of personal information;²⁰ to name but a few. In order for a particular individual to mount a human rights challenge under Article 8, the body under challenge must be a ‘public authority,’ and the impugned action of the public authority must be incompatible with the individual’s Convention right.²¹

This is not, however, the end of the investigation. Article 8(2) sets out the grounds for justifying an interference with an individual’s privacy rights. Thus, even where it has been shown in a particular case that a public authority has failed to respect the privacy of an individual, there remains a second stage of inquiry – namely, whether such failure is justified as being ‘in accordance with the law,’ ‘for a legitimate aim,’ and ‘necessary in a democratic society.’²² The test for necessity as contemplated by the section involves determining whether there is a ‘pressing social need’ for the interference, as well as deciding whether there is proportionality between the means used and the legitimate aim pursued.²³

II. Threshold Issue: Are Sports Governing Bodies Subject to the HRA?

As a threshold matter, whether or not sports governing bodies will be deemed to be subject to the provisions of the HRA remains to be seen.²⁴ The HRA expressly binds ‘public authorities’, making it unlawful for them to act incompatibly with Convention rights.²⁵ Therefore, the preliminary hurdle facing an athlete hoping to sustain an Article 8 challenge against a particular sports governing body is whether the body involved can be adjudged to be a ‘public authority’.

In English case law determining the proper mechanism for challenging the actions of sports governing bodies, sports bodies are considered ‘private’

bodies, and as such are not currently amenable to judicial review.²⁶ The Courts are not, however, bound by the judicial review precedents in applying the HRA.²⁷ Moreover, the functions of sports bodies do evidently impact on the public, and this feature may bring sports bodies within the scope of the HRA.²⁸ There seems a persuasive argument that sports governing bodies are bound by the provisions of the HRA.²⁹

This view is strengthened by the remarks made by the Rt. Hon Jack Straw MP to the Standing Committee during the legislative debates on the Human Rights Bill. Referring to the Jockey Club as one body which could be regarded as a ‘quasi public authority’ for the purposes of the new legislation, Mr Straw observed:

“There will be occasions – it is the nature of British society – on which various institutions that are private in terms of their legal personality carry out public functions ... I would suggest that it ... includes the Jockey Club ... The Jockey Club is a curious body: it is entirely private, but exercises public functions in some respects, and to those extents, but to no other, it would be regarded as falling within [this classification]” .³⁰

For the purposes of this analysis, it will therefore be assumed that sporting bodies are bound by the provisions of the HRA.³¹

III. Article 8(1) – A Prima Facie Interference?

The legality of mandatory blood testing in the sporting context has not been specifically adjudicated upon in the English courts.³² However, it is well established in European case law in related areas that ‘private life’ covers the physical and moral integrity of the person. Moreover, individuals have the right not to be forced to undergo mandatory physical interventions, including blood tests³³ and urine tests.³⁴ Although there are clear factual differences, the cases could nonetheless have implications within the sporting context.³⁵

Could an athlete who is required to give a blood sample as part of an anti-doping policy conceivably claim an interference with his or her Article 8 rights?³⁶ Any sort of compulsory medical examination would appear to constitute a prima facie infringement of an

Anti-doping policy after The Human Rights Act: Is mandatory blood testing compatible with Article 8 of the ECHR?

individual's right to privacy. Whilst there is no case law directly on point in the sporting context in this country, there is a substantial body of case law which considers the constitutionality of random drug testing policies in various factual contexts in the United States. For the purposes of the analysis here, some instructive analogies may therefore be drawn from the American constitutional position of mandatory drug testing.

However, it first bears considering whether for this context specific inquiry there is any distinction to be drawn between urinalysis and blood testing. Beloff & Beloff argue that a "clear distinction" exists between the two on the basis that the former (urinalysis) "requires no violation of an athlete's body, in effect only sampling waste products," whilst the latter (blood testing) does.³⁷ The collection of blood certainly seems a more invasive procedure, and therefore harder to justify on an Article 8 analysis.

However, it could be argued that any distinction between the two tests is one of 'form' rather than 'substance'. No distinction is drawn in Canadian courts,³⁸ and, similarly, courts in the United States have consistently concluded that the process of urine collection and testing equally implicates concerns about bodily integrity, and that an athlete has a right to privacy with regards to urinalysis. For example, in *Schail v Tippecanoe*³⁹ the Seventh Circuit found a high expectation of privacy with regards to urination, and emphasised that the fact that urine is voluntarily discharged from the body and treated as a waste product does not eliminate the expectation of privacy which an individual possesses in his or her urine.⁴⁰

Moreover, the United States Supreme Court described the compelled collection and testing of urine as "particularly destructive of privacy and offensive to personal dignity," and recognised that although the collection and testing process does not entail any intrusion into the body, it nonetheless clearly "intrudes upon expectations of privacy that society has long recognised as reasonable."⁴¹ In any event, at least compulsory blood testing requires the violation of an individual's body⁴² and, crucially, amounts to a battery if done without lawful excuse – a fact explicitly noted by English, Canadian and American domestic courts.⁴³

Case law from other jurisdictions provides further insight. In the United States, the Fourth Amendment of the Constitution protects the right of the individual "to be secure in their person ... against unreasonable searches and seizures" and that this right shall not be infringed without probable cause.⁴⁴ In cases where athletes are compulsorily drug tested, the Fourth Amendment protections against unreasonable searches and seizures are engaged. A "search" occurs within the meaning of the Fourth Amendment when an expectation of privacy that society is prepared to

consider reasonable is infringed.⁴⁵

It has long been recognised in American jurisprudence that "compelled intrusion into the body for blood to be analysed"⁴⁶ must be deemed a Fourth Amendment search. Emphasising that compulsory blood testing compromises bodily integrity, courts consistently have concluded that an intrusion beneath an individual's skin, coupled with subsequent chemical analysis of any samples obtained, is an invasion of the individual's privacy, and thus a search implicating the Fourth Amendment.⁴⁷

In Canada, section 8 of the Canadian Charter of Rights and Freedoms⁴⁸ similarly has been found to guarantee a reasonable expectation of privacy in one's own bodily fluids. The Canadian Supreme Court has stressed that the right to privacy with respect to "physical integrity, including [one's own] bodily fluids, ranks high among the matters receiving constitutional protection."⁴⁹

From these authorities (albeit from other jurisdictions), it may be reasonable to conclude that anti-doping policies which require an athlete to submit to a compulsory blood test implicate the athlete's privacy interests, and therefore trigger the Article 8 analysis. However, this is not determinative of the issue. The right to private life under Article 8(1) is not absolute, but exists prima facie and may be derogated from where justified in accordance with the matters set out in Article 8(2). Thus whether or not compulsory blood testing schemes pass muster under the HRA will likely hinge on their being brought within the Article 8(2) exceptions.

IV. Article 8(2) – Justification?

Once the engagement of Article 8(1) has been established, it falls to the particular sporting body to demonstrate that such interference was justified under Article 8(2). It is here that the essence of the debate takes shape.

As in the United States, where the state may interfere with an individual's Fourth Amendment interests if the state establishes "reasonableness,"⁵⁰ an anti-doping policy will withstand scrutiny if it can be justified by the particular sporting body under the Article 8(2) exceptions.

Although there is no case law (domestic or European) directly on point in the sporting context, Parliament in this country has expressly provided for the compulsory collection of blood samples in specific contexts for the purposes of road traffic and family legislation.⁵¹

There have, too, been several decisions by the European Commission in related areas which provide additional guidance.⁵² For example, in *X v The Netherlands*,⁵³ the Commission found that a blood sample taken in order to ascertain the amount of alcohol in the individual's bloodstream for the purposes of road traffic legislation did not contravene Article 8 on the

basis that "the infringement upon the privacy of the individual was justified by the need to protect the rights of others."⁵⁴ A blood sample taken in order to establish paternity was justified on the same basis in *X v Austria*.⁵⁵

American courts have held in similar contexts that blood extraction without a warrant aimed at detecting intoxication in motorists suspected of impaired driving is constitutionally permissible.⁵⁶

Would the taking of a blood sample for the purposes of an anti-doping policy be justifiable on comparable grounds? Beloff and Beloff suggest it "seems likely" that compulsory blood testing of athletes could be justified on the basis of 'the protection of health or morals' or 'the protection of the rights and freedoms of others' in particular.⁵⁷ Boyes, however, believes that the matter "remains questionable," and notes that the Strasbourg institutions have been particularly keen to see that any infringement upon the rights protected meet the Convention requirement of being 'necessary in a democratic society' and that their interpretation of this principle has been particularly restrictive.⁵⁸

Nonetheless, a sporting body would likely have little difficulty in identifying a 'legitimate aim' in relation to its particular anti-doping policy. Seemingly without exception, anti-doping measures have as their stated objectives: the preservation of the well-being of sport, the preservation of the integrity of competition, and ensuring the health of athletes.⁵⁹ It seems beyond doubt that these are all laudable and legitimate purposes designed either 'to protect health or morals' or 'the rights and freedoms of others', and would be deemed to be so for the purposes of the HRA.

However, the "pursuit of a legitimate objective" is not by itself sufficient to justify an interference with an individual's Article 8 rights. Rather, any such limitation must be "proportionate to the legitimate aim pursued."⁶⁰ It is possible to glean some insight on the issue of proportionality from the substantial body of European case law on the meaning of the term in relation to the EC Free Movement rules.⁶¹ In this context, in determining whether a restriction is proportionate the court will consider whether: the restriction is an appropriate method for the attainment of a legitimate objective; the means employed are limited to what is necessary for the attainment of the legitimate objective; and the disadvantages caused or restrictions imposed are unacceptable given the objective pursued.⁶²

American jurisprudence similarly is helpful, where the ultimate measure of constitutionality under the Fourth Amendment is "reasonableness."⁶³ Whether a particular search satisfies the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of

legitimate governmental interests."⁶⁴ The state interest must be important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.⁶⁵

There are four factors to be balanced in evaluating constitutionality: (1) the nature of the privacy interest on which the search intruded; (2) the nature and character of the intrusion; (3) the nature and immediacy of the governmental interest at issue; and (4) the efficacy of the scheme for meeting that concern.⁶⁶ Some of the factors weighed in the balance in the American case law may prove equally relevant for the purposes of an Article 8 analysis.⁶⁷

Perhaps surprisingly, the United States Supreme Court has found repeatedly that the extraction of blood, although clearly qualifying as a Fourth Amendment search, is "minimally intrusive"⁶⁸ when weighed against a compelling government interest. Similarly, the Court has concluded that the invasion of privacy occasioned by the collection of samples for urinalysis is, on balance, "not significant."⁶⁹ Factually, it is the latter body of case law which is particularly relevant to the sporting context, and therefore warrants further analysis here.

American courts have in recent years been called upon to determine the constitutionality of certain mandatory drug testing programs initiated in high schools nationwide in response to perceived drug use by their students – by student athletes in particular. The Courts have, after balancing the governmental interests against the individual's privacy interests, consistently upheld the testing programs on the basis that they constitute 'reasonably effective' means of addressing schools' legitimate concerns in providing fair competition, protecting the health and well-being of athletes, and deterring and detecting student drug use.⁷⁰ The courts have identified a number of determinative factors. For example, in *Vernonia v Acton*, the Supreme Court emphasised that student athletes have a "reduced expectation of privacy" on the basis that school sports are "voluntary" and "require 'suing up' before each practice or event, and showering and changing afterwards."⁷¹

Similarly, in *Brennan v Board of Trustees*,⁷² a mandatory urine testing scheme was upheld on the basis that any invasion on the athletes' privacy was reasonable considering the diminished expectation of privacy in the context of intercollegiate sports and there being a significant interest by the state university and NCAA [namely, in ensuring fair competition in intercollegiate sports as well as in protecting the health and safety of student-athletes] that outweighs the relatively small compromise of privacy under the circumstances.⁷³

The "degree of intrusion" on an individual's privacy

Anti-doping policy after The Human Rights Act: Is mandatory blood testing compatible with Article 8 of the ECHR?

caused by sample collection may “depend upon the manner in which production of the ... sample is monitored,”⁷⁴ and the collection method may therefore be a significant factor in considering whether a testing scheme is justified under the HRA. Indeed, dicta in some of the American case law alludes to drug-testing procedures that would tend to increase the likelihood of a scheme being adjudged unconstitutional.⁷⁵

Other factors to bear in mind in considering whether a blood testing policy is justifiable include: the integrity and accuracy of the testing,⁷⁶ and the existence of alternatives. The following questions might therefore arise: Is there a strict chain of custody? Are there re-testing procedures? Is quality assurance inherent in the testing scheme? Finally – and this seems fundamental to the debate – is an equally effective but less intrusive means to the same end available?⁷⁷

Certainly it is arguable, given the considerable improvement in detection methods since the mid-1990s, that blood sampling is not only a legitimate aspect of doping control, but an essential one as well. As noted earlier,⁷⁸ some drugs such as EPO elude detection by urine test alone. Thus blood testing is distinctly superior to urinalysis, in this respect at least, in terms of reliability and efficacy. Significantly too, athletes themselves have a growing confidence in the validity of blood testing, and as a group appear firmly to believe that blood sampling is vital for doping control.⁷⁹

Thus although sports governing bodies may find their policies and drug testing regimes rigorously scrutinised as a result of the passage of the HRA,⁸⁰ it seems unlikely that blood tests introduced as part of anti-doping policies will be deemed to be incompatible with Article 8.⁸¹ There seems a persuasive argument that the genuine and pressing concerns of sports governing bodies worldwide in defeating, deterring and detecting drug use in athletes, and in preserving the integrity of sport as a whole outweigh any individual privacy concerns presented by compulsory blood testing policies.

- 1 Michael Bahrke, 'The Future of Performance-Enhancing Substances in Sport', (2002) 30 *The Physician and Sports Medicine* 1. See also, 'A history of international anti-doping initiatives', at www.asda.org.au. 'Doping' is defined in the Olympic Movement Anti-Doping Code, Ch.II, Art. I, as "the use of an expedient substance or method which is potentially harmful to athletes' health and/or capable of enhancing their performance, or the presence in the athlete's body of a prohibited substance" As early as school, some athletes use drugs to enhance their performance, whether at the urging of coaches, peers, or based on an individual desire to excel. See Charles Knapp, 'Drug Testing and the Student Athlete', (1990) 76 *Iowa L.R.* 107. See also, Brian Lee, 'Drug Testing and the Confused Athlete: A Look at the Differing Athletic Drug Testing Programs in High School, College and the Olympics', (2001) 3 *Florida Coastal LJ* 91.
- 2 'A history of international anti-doping initiatives', *ibid*. The impact of anti-doping programs was relatively minimal until the televised death of cyclist Tommy Simpson (due to the illegal taking of amphetamines) in the 1967 Tour de France. *Ibid*.
- 3 In Copenhagen "all major sports federations and nearly 80 governments gave their approval to the first World Anti-Doping Code by unanimously backing a Resolution that accepts the Code as the basis for the fight against doping in sport." See www.wada-ama.org. The Code is "the first international instrument to harmonise rules regarding doping across all sports and all nations." *Ibid*. Several sporting organisations already have formally adopted the Code, a move which reflects the anti-doping momentum. *Ibid*.
- 4 World Anti-Doping Code, version 3.0 (20 February 2003), 8.
- 5 M Beloff and R Beloff, 'Blood Sports – Blood testing, the common law and the Human Rights Act' [2000] 2 *ISLR* 43.
- 6 Brian Corrigan and Ray Kazlauskas, 'Drug testing at the Sydney Olympics', (2000) 173 *MJA* 312. Limited blood testing has been conducted at Winter Olympics since 1994. *Ibid*.
- 7 *Ibid*. Widespread use of EPO is suspected among endurance cyclists and runners as it "artificially increases red blood cell count allowing more oxygen to be transmitted to the tissues." Beloff and Beloff, *supra*, n.5, at 43. See also, 'Common Questions About EPO', at www.drugfreesport.com.
- 8 Beloff and Beloff, *ibid*.
- 9 'Doping-Free Sport: Blood Sampling', at www.cces.ca. An 'International Standard for Testing' was approved by WADA's Executive Committee on 7 June 2003. See www.wada-ama.org.
- 10 Alistair Browne et al., 'The ethics of blood testing as an element of doping control in sport' (1999) *Medicine & Science in Sports & Exercise* 497.
- 11 *Ibid*. As Mark Gay suggests, a blood test "represents a much greater intrusion on the physical integrity of the athlete." 'Dope testing techniques in the dock', (4 September 2003) *The Lawyer*, at 13. See also, Beloff & Beloff, *supra*, n.5, at 43.
- 12 For discussion, see Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (Oxford: OUP, 2000), at 5-6.
- 13 *Ibid.*, at 5.
- 14 *Ibid.*, at 5.
- 15 Indeed, this is a hotly debated subject. See for example, David Pannick & Jane Mulcahy, 'The Human Rights Act 1998 and Sport', in Adam Lewis & Jonathan Taylor, *Sport: Law and Practice* (London: Butterworths, 2003), chapter A4, at 231. See also Beloff & Beloff, *supra*, n.5, at 45.
- 16 These could include: Article 6 ('Right to Fair Trial'); Article 9 ('Freedom of Thought, Conscience and Religion'); and Article 14 ('Prohibition of Discrimination'). See Beloff & Beloff, *ibid*.
- 17 There is a vast body of literature on the right to privacy generally. See for example, David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon Press, 1993), Part III: R Wacks, *The Protection of Privacy* (Sweet & Maxwell, 1980); and A Westin, *Privacy and Freedom* (Bodley Head, 1967).
- 18 See S Warren and L Brandeis, 'The Right to Privacy' (1980) 4 *Harvard Law Review* 193.
- 19 See David Feldman, 'Secrecy, Dignity or Autonomy? Views of Privacy as a Social Value' (1994) 47 *CLP* 41.
- 20 See R Wacks, *supra*, n.17.
- 21 See Pannick & Mulcahy, *supra*, n.15, at 231.
- 22 See Clayton & Tomlinson, *supra*, n.12, at 811. See also Pannick & Mulcahy, *ibid.*, at 251.
- 23 Pannick & Mulcahy, *ibid.*, at 251. See also Lester & Pannick, *Human Rights Law and Practice* (London: Butterworths, 1999), paras 3.15 and 3.16. Lester & Pannick emphasise at 3.15 and 3.16 that the "nature, context and importance of the right asserted and the extent of the interference must be balanced against the nature, context and importance of the claimed public interest." It bears mentioning, too, that the tests contemplated by the HRA are very similar to those tests applied when reviewing the actions of sports governing bodies in other contexts – for example, in relation to competition law, free movement and the restraint of trade. See Lewis & Taylor, *supra*, n.15, chapter A3.
- 24 See Pannick & Mulcahy, *supra*, n.15, at 233, where the authors agree with the "prevailing opinion" that "the majority of sporting bodies will satisfy this criterion, at least in relation to some of their functions." See also, Simon Boyes, 'Regulating sport after the Human Rights Act 1998' [2001] *New Law Journal* 444.
- 25 HRA, section 6(1). See Clayton & Tomlinson, *supra*, n.12, at 186; and Pannick & Mulcahy, *ibid.*, at 236-237.
- 26 There have been a number of unsuccessful judicial review applications against the Jockey Club (See *R v Disciplinary Committee of the Jockey Club*, ex p Khan (1993) 1 *WLR* 909 (CA); *R v Jockey Club*, ex p Massingbird-Mundy [1993] 2 *All ER* 207; and *R v Jockey Club* ex p RAM Racecourses Ltd [1993] 2 *All ER* 225) and the Football League (See *R v Football Association of Wales*, ex p Flint Town United Football Club [1991] *COD* 44; and *R v Football Association Ltd*, ex p Football League Ltd [1993] 2 *All ER* 833). Traditionally, the fact that relationships between sporting bodies and their members are usually created and governed by contract has been the "decisive factor for English courts in deciding that sporting bodies are not susceptible to judicial review." Pannick & Mulcahy, *ibid.*, at 237.
- 27 For discussion, see Clayton & Tomlinson, *supra*, n.12, at 202-203; and Pannick & Mulcahy, *ibid.*, at 237.
- 28 'The Human Rights Act and Sport' www.ccp.org.uk/campaigns/content/human.html. Simon Boyes observes, however, that English courts have consistently demonstrated a reluctance to intervene in the internal operations of sports governing bodies. *Supra*, n.24, at 444.
- 29 It bears mentioning that UK Sport has recommended that sporting bodies ensure that their procedures are compatible with Convention rights on the basis that they may be adjudged to be 'public authorities' for the purposes of the HRA. See UK Sport, 'Human Rights Act – Implications for Sport' (vol.3) (14/12/2000) (cited in Pannick & Mulcahy, *supra*, n.15, at 236). Even if sports governing bodies are not considered to be 'public authorities' for the purposes of the HRA, Pannick & Mulcahy highlight, at 236-237, two additional reasons why a sporting body may nonetheless be required to take account of Convention rights: either because its disciplinary procedures (or aspects of them) may constitute "tribunals" for the purposes of s.6 (the Act applies not only to 'pure' public authorities but also to the public functions of 'quasi' public authorities); or because a court as a public authority deciding a case involving a sporting body may have to take account of Convention rights even as between private parties. See also, *Sjerna v Finland* (1994) 24 *EHR* 194; Clayton & Tomlinson, *supra*, n.12, at 202-203; and Beloff & Beloff, *supra*, n.5, at 44.

- 30 Hansard HC, 20 May 1998, Col 1018.
- 31 For a detailed discussion of the meaning of 'public authority' for the purposes of Section 6, see Pannick & Mulcahy, *supra*, n.15, at 236-241.
- 32 See Beloff & Beloff, *supra*, n.5, at 43.
- 33 *X v Austria* (1979) 18 DR 154, EComm HR. In this case, a blood sample extracted for a paternity suit was found to be justified by the need to protect the rights of others. For discussion, see Pannick & Mulcahy, *supra*, n.15, at 250. See also, *X v Netherlands* (1979) 16 DR 184, 189 EComm HR (taking blood in connection with determining blood alcohol level for the purposes of road traffic legislation was justified on similar grounds).
- 34 *Peters v Netherlands* (1994) 77-A DR 75, EComm HR (prisoner's complaint concerning compulsory random drug testing by urine sample in prisons unsuccessful because fell within Art 8(2)). See Clayton & Tomlinson, *supra*, n.12, at 812; and Pannick & Mulcahy, *ibid.*, at 250.
- 35 See Simon Boyes, 'The regulation of sport and the impact of the Human Rights Act 1998' [2000] 6(4) EPL 517 [hereinafter "Boyes #2"].
- 36 It bears mentioning that Article 8 could have at least one other implication for sport – namely, high profile athletes could seek to invoke the right to privacy to protect themselves from unwanted media and press intrusion. See 'The Human Rights Act and Sport', www.cpr.org.uk/campaigns/content/human; and Pannick & Mulcahy, *supra*, n.15, at 249 n2.
- 37 *Supra*, n.5, at 43.
- 38 See for example, *R v Colarusso* [1994] 1 SCR 20 (discussing the constitutionality of compulsory blood and urine testing).
- 39 864 F.2d 1309 (7th Cir. 1988).
- 40 *Ibid.*, at 1312. The Court continued, "even though [urine] is excreted from the body, it is not knowingly exposed to the public; instead the manner in which an individual disposes of his or her urine is a highly private matter. This demonstrates that urine is not intended to be inspected or examined by anyone" (at 1312).
- 41 *Skinner v Railway Labor Executives' Ass'n* 489 U.S. 656 (1989). See also, *Lovvorn v City of Chattanooga*, 846 F.2d 1539, 1543 (6th Cir. 1988) ("There are few other times where individuals insist as strongly and universally that they be left alone to act in private"); and Charles Fried, 'Privacy', (1968) 77 Yale LJ 475, at 487 (noting that "in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem").
- 42 Blood testing raises a further significant potential for the invasion of privacy – namely, other health problems will be detected, and unauthorised testing may be conducted for other conditions such as HIV. Browne et al., *supra*, n.10.
- 43 See for example, *S v McC* (1972) AC 44, at 73 (per Lord Reid: "there is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will"). See also the U.S. cases *Bednarik v Bednarik* (1940) F.2d 80, 90 ("To subject a person against his will to a blood test is an assault and battery, and clearly an invasion of his personal privacy"); *Winston v Lee*, 470 U.S. 753 (1985) (forced blood extraction intrudes on the private personal sphere and infringes upon an individual's "most personal and deep-rooted expectations of privacy"); and *Schmerber v California* 384 U.S. 757 (1966) (compulsory blood test "plainly involves ... a search and seizure under the Fourth Amendment"); and the Canadian cases *Colarusso*, *supra*, n.37; *R v Pohoretsky* [1987] 1 SCR 945; and *R v Dymnt* [1988] 2 SCR 417. It is important to note that in England, there are broadly two areas where Parliament has legislated that compulsory blood tests may justifiably be taken: Road Traffic (i.e. Road Traffic Act 1988 ss. 7 and 11, aimed at preventing drivers being under the influence of alcohol or prohibited substances) and Family Law (i.e. Family Law Reform Act 1969, ss. 20-22, aimed at establishing paternity in the child's best interests). It may be that the underlying statutory justifications for allowing compulsory blood testing in these contexts may similarly apply in the sporting context (i.e. justified by the need to protect the rights of others, or on the basis of the protection of health or morals). See also Beloff & Beloff, *supra*, n.5.
- 44 U.S. CONST. amend. IV. See *Boyes #2*, *supra*, n.35, at 517. A Fourth Amendment search is considered "unreasonable" if it unjustifiably intrudes upon the privacy of an individual: *Terry v Ohio* U.S. 1 (1968).
- 45 Schall, *supra*, n.39, at 1311-1312 (quoting *United States v Jacobsen*, 466 U.S. 109, 113 (1984)).
- 46 See for example, *Skinner*, *supra*, n.41, at 616.
- 47 James McCray, 'Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities', (2000) 53 Vand. L. Rev. 387, at 397. See for example *Skinner*, *supra*, n.41, at 616; and *Schmerber v California*, *supra*, n.43. McCray notes, at 397, that "the possibility that ... blood and urine testing may reveal numerous extremely private medical facts ... coupled with the possibility of the tested subject being visually or aurally monitored while he or she produces the sample, triggers the Fourth Amendment search analysis."
- 48 Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11.
- 49 See *R v Colarusso*, *supra*, n.38; and *R v Dymnt*, *supra*, n.43.
- 50 The Fourth Amendment does not proscribe all searches and seizures but only those that are "unreasonable". *Skinner*, *supra*, n.41, at 619.
- 51 See discussion above, n.43.
- 52 See the discussion in *Boyes #2*, *supra*, n.35, at 517.
- 53 *Supra*, n.33.
- 54 *Boyes #2*, *supra*, n.35, at 517. See also, Beloff & Beloff, *supra*, n.5, at 46.
- 55 *Supra*, n.33, at 157 (discussed in *Boyes #2*, *ibid.*, and Beloff & Beloff, *ibid.*). See also, *Peters v Netherlands*, *supra*, n.34, where a scheme of compulsory random drug testing by urine sample in prison was held to be justified under Article 8(2).
- 56 See for example, *Breithaupt v Abram*, 352 U.S. 432 (1957); *State v Bohling*, 173 Wis.2d 529 (1993); and *Schmerber v California*, *supra*, n.43.
- 57 *Supra*, n.5, at 46.
- 58 *Boyes #2*, *supra*, n.35, at 517.
- 59 See for example the USADA's Mission, located at www.usantidoping.org/what_is/mission. As Corrigan & Kazlauskas, *supra*, n.6, aptly observe at 313, the use of performance-enhancing drugs "demeans both sport and the athletes who use them."
- 60 *Handyside v UK* (1976) 1 EHRR 737 (discussed in Beloff & Beloff, *supra*, n.5). See also, *Dudgeon v UK* (1981) 4 EHRR 149; and Clayton & Tomlinson, *supra*, n.12, at 831.
- 61 See for example *C-331/88 R v MAFF*, ex p Fedesa [1990] ECR I-4023 at para. 13; *Joined Cases T-466/93 and others O'Dwyer v Council* [1995] ECR II-2071 at para. 107; and *Joined Cases C-254/94 and others Fattoria Autonoma Tabacchi* [1996] ECR I-4235 at para. 55. See discussion in Mark Hoskins & Margaret Gray, 'EC Free Movement Rules and Sport', in Lewis & Taylor, *supra*, n.15, chapter B3.
- 62 *Hoskins & Gray*, *ibid.*, at 445.
- 63 *Vernonia School Dist v Acton*, 115 S.Ct. 2386 (1995). In Canada, section 8 of the Charter similarly guarantees the right to be free from unreasonable search and seizure. The right to privacy has been espoused by the Supreme Court as the rationale for this guarantee, and the 'reasonable expectation of privacy' approach from American case law has been adopted. See for example, *R v Edwards* [1996] 1 SCR 128; and *Hunter v Southam* [1984] 2 SCR 145.
- 64 *Skinner*, *supra*, n.41, at 619.
- 65 *Vernonia v Acton*, *supra*, n.63.
- 66 *Ibid.*
- 67 *Boyes #2*, *supra*, n.35, notes at 517 that in the US, "breaches of the right to privacy must be justified by reference to the promotion of compelling government interests – similar to the 'pressing social need' test utilised in the context of the [Convention]."
- 68 See *Skinner*, *supra*, n.41 (blood tests do not "infringe significant privacy interests"); *Winston v Lee*, *supra*, n.43 (not an "unduly extensive imposition"); and *Breithaupt v Abram*, *supra*, n.56 ("routine" and "would not be considered offensive by even the most delicate"). With respect, there are few procedures that are much more intrusive than the compulsory administration of a blood test.
- 69 *Vernonia v Acton*, *supra*, n.63. See also, Schall, *supra*, n.39 at 1319.
- 70 *Boyes #2*, *supra*, n.35, at 517. See for example, *O'Halloran v University of Washington* 679 F.Supp 997 (1988).
- 71 *Supra*, n.63. See also, Schall, *supra*, n.39, at 1319 (student athletes possess a diminished expectation of privacy because of both the extensive athletic regulations and the "communal undress" intrinsic in athletic participation). McCray, *supra*, n.47, observes at 403 that in upholding drug testing schemes, courts have found it particularly relevant that students could avoid the policy entirely by choosing not to participate in athletics. The "voluntary" nature of sport may also be considered a weighty factor on an Article 8 analysis. It bears mentioning that in *Board of Education v Earls* 122 S.Ct. 2559 (2002) the principles established in *Vernonia* were extended to cover the random drug testing of students participating in competitive, non-athletic extracurricular activities.
- 72 691 So. 2d 324 (La. Ct. App. 1997).
- 73 *Ibid.*, at 329-330.
- 74 *Vernonia v Acton*, *supra*, n.61, at 658.
- 75 Robert Roshkoff, 'University of Colorado v Derdeyn: The Constitutionality of Random, Suspicionless Urinalysis Drug Testing of College Athletes', (1996) 3 VIII. Sports & Ent. L.J. 361. For example, it has been suggested that the direct observation of urine sample collection may be unreasonably invasive of an athlete's legitimate privacy expectations: Charles Knapp, 'Drug Testing and the Student Athlete: Meeting the Constitutional Challenge' (1990) 76 Iowa L. Rev. 107 at 135 (citing *National Treasury Employees Union v Von Raab*, 489 U.S. 656 (1989), at 672 n2; *Skinner*, *supra*, n.41, at 626; and Schall, *supra*, n.39, at 1318). Similarly, Knapp, *ibid.*, suggests at 135 that conducting mandatory drug tests in the off-season may indicate that a particular program is "overbroad" (citing *Iowa High Sch. Athletic Ass'n*, 197 N.W. 2d 555 (Iowa 1972)). However, as long as a given drug testing scheme is adjudged to be limited to what is absolutely necessary for the attainment of the legitimate objective, it should pass constitutional – and Convention – muster.
- 76 There has been considerable progress in, and refinement of, blood sampling procedures since the 1990s in order to ensure that: the health and safety of the athlete and officials are not compromised; the blood sample is of a quality and quantity that meets laboratory guidelines; the blood sample is clearly identified; the sample is securely sealed in the athlete's presence; and the sample is accurately documented. See 'Doping-Free Sport: Drug Sampling', *supra*, n.9; and WADA's 'International Standards for Testing', at www.wada-ama.org.
- 77 In *Vernonia v Acton*, *supra*, n.63, it was argued that suspicion-based drug testing was a "less intrusive means to the same end." However, US courts have held that individual suspicion of drug use to be tested is not a necessary pre-requisite to urine testing, and that it is not only the "least intrusive" search practicable which can be reasonable under the Fourth Amendment. *Ibid.* Moreover, in this context, the Supreme Court has observed that suspicion-based testing "entails its own substantial difficulties." In *Earls*, *supra*, n.71, the Supreme Court questioned whether "testing based on individualised suspicion in fact would be less intrusive." *Breyer J* noted that a requirement of "individualised suspicion" could lead schools "to push the boundaries of 'individualised suspicion' to its outer limits, using subjective criteria that may 'unfairly target members of unpopular groups.'" See Martin Belsky, 'Random v Suspicion-Based Drug Testing in the Public Schools – A Surprising Civil Liberties Dilemma', (2002) 27 Okla. City U.L. Rev. 1, at 20-21.
- 78 *Supra*, n.7.
- 79 'Doping-Free Sport: Blood Sampling', *supra*, n.9. In fact, athlete pressure was a critical motivating factor in the recent initiation of the International Swimming Federation (FINA) blood sampling scheme. *Ibid.*
- 80 *Boyes #2*, *supra*, n.35, at 517.
- 81 Beloff & Beloff, *supra*, n.5, suggest at 46 that as long as the procedures are "significantly superior in terms of their efficacy to other forms of testing in regard to any particular banned substance" they should satisfy Convention requirements.

Should major league baseball adopt the WADA world anti-doping code to regulate the use of anabolic steroids?

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A: Introduction

The World Anti-Doping Code (the "WADA Code") came into force on 1 January 2004. To date, it has been accepted¹ by 154 national governments and 477 sports organisations worldwide,² including the National Olympic Committees of both the United States and Canada and their respective national anti-doping agencies, the United States Anti-Doping Agency and the Canadian Centre for Ethics in Sport. The WADA Code has not, however, been accepted by any of the four major North American professional sports leagues, despite the fact that some athletes in each of those leagues have long been suspected of using performance-enhancing substances including anabolic steroids. The World Anti-Doping Agency has encountered significant resistance from these leagues, particularly Major League Baseball ("MLB"), in its efforts to persuade them to conform to the WADA Code's international standards of doping offences and sanctions. In light of this resistance, this paper will (a) provide a brief history of the WADA Code; (b) provide a brief descriptive and legal overview of anabolic steroids and the introduction of testing for their use; (c) compare the MLB Testing Program for anabolic steroids with the protocols envisioned by the WADA Code; (d) consider certain related issues which will affect the potential adoption of the WADA Code by MLB; and (e) conclude that MLB should adopt the WADA Code but is currently unlikely to do so due to the powerful influence exerted on MLB by both the owners and the players, the lack of international incentive and the lack of meaningful leverage capable of being exerted on MLB by WADA.

A1. A brief history of the WADA code

Chapter 1 of the Olympic Charter (the "Charter") provides that, among numerous other roles, the International Olympic Committee (the "IOC") "... leads the fight against doping in sport and participates in the international fight against drugs."³ It was in this role that the IOC convened the World Conference on Doping in Sport in Lausanne in 1999 which led to the formal establishment of the independent World Anti-Doping

Agency ("WADA") on 10 November 1999. WADA has effectively assumed the IOC's role in the fight against doping in sports and lists its mission as "to promote and coordinate at the international level the fight against doping in sport in all its forms."⁴

The WADA Code is the cornerstone of this fight and, among other things, enumerates a definitive list of prohibited performance-enhancing substances⁵ and methods,⁶ the former of which includes anabolic steroids. The final version of the WADA Code was approved by numerous sports federations and governments⁷ at the World Conference on Doping in Sport in Copenhagen in 2003 and officially came into force in January 2004.⁸ The IOC subsequently amended the Charter to provide that inclusion in the Olympic Movement (which includes, inter alia, participation in Olympic Games by athletes and recognition of international sports federations by the IOC) is now contingent upon compliance with the WADA Code.⁹

A2. The US leagues

As part of its international fight against doping in sport, WADA has set its sights on the four North American major professional sports leagues (the National Football League (the "NFL"), the National Basketball Association (the "NBA"), the National Hockey League (the "NHL") and Major League Baseball ("MLB") (collectively the "US Leagues")) in an attempt to address the alleged use by athletes in those leagues of performance-enhancing drugs such as anabolic steroids. Although each league has its own policy with respect to the use of prohibited substances, in WADA's view none of these policies is stringent enough and all should be superseded by the WADA Code.

The US Leagues are generally viewed as being lax on drugs when compared with other sports such as athletics (referred to in North America as track and field). One of WADA's primary goals is the international harmonisation of banned substance lists, doping offences and consequent penalties across all sports in order to avoid double standards and divergent applications of doping

rules, which may otherwise benefit some athletes. For example, in August of 2003, UK sprinter Dwaine Chambers tested positive for the recently discovered "designer" steroid tetrahydrogestrinone or "THG" and was subsequently banned from competition for two years by the International Association of Athletics Federations (the "IAAF"). Shortly thereafter, he was given the opportunity to try out for various NFL scouts with a view to playing American football in the NFL¹⁰. Although it has been speculated that the NFL was simply trying to gain publicity in Europe by linking itself to a high profile athlete in his home market and that Chambers will never actually play in the NFL, there is currently nothing WADA, the IOC or the IAAF could do to prevent him from doing so. Under WADA's harmonisation objective, there would be mutual recognition of suspensions by all international federations and leagues and a ban by one such entity (in this case the IAAF) would effectively be a ban by all entities (in this case including the NFL) and Chambers would never be able to take advantage of such an opportunity.

This potential for disparity of sanctions applicable to athletes participating in the US Leagues and athletes participating in other sports was the subject of much debate during the extensive consultation and drafting process of the WADA Code. The International Cycling Union (the "UCI") in particular argued that it would be unfair for athletes in the latter category to lose their livelihood for two years for certain offences when athletes in the former category would not for the same offences. The UCI went on to state that the WADA Code should be applicable to athletes in the US Leagues in the same manner as it is to others so as to be "fundamentally in line with the principles of harmonisation and fairness that the Code seeks to promote."¹¹ As previously stated, the WADA Code does not currently apply to the US Leagues but it does specifically encourage "those professional leagues that are not currently under the jurisdiction of any government or International Federation" to accept the Code.¹²

One of the main obstacles faced by WADA is the fact that the US Leagues are private, self-funding¹³ bodies

that operate as independent businesses and they are not (with some exceptions as discussed in Part D3 below) subject to the jurisdiction of either the US federal government¹⁴ or the national or international federations that govern each of their respective sports. As such, they are under no obligation to conform to the doping policies of those federations or to even acknowledge the existence of WADA. WADA not only has no jurisdiction over them, but also has very little leverage with which to pressure them into adopting the WADA Code.¹⁵

B: An overview of anabolic steroids

B.1 What are anabolic steroids?

Anabolic Steroids are synthetic versions of the male hormone testosterone which artificially elevate naturally occurring levels of testosterone in the body and are known as ergogenic or performance-enhancing drugs.¹⁶ They can help an athlete quickly gain lean muscle mass, strength and endurance, especially if use is combined with a strength training program and proper nutrition. Steroids can also enhance recovery time between workouts by quickly replenishing the muscle tissue broken down during, for example, weight training, which allows the athlete to increase the intensity level and frequency of his or her training program.¹⁷ Such benefits often come at a price; the side effects of steroid use include an elevated risk of cancer, heart and liver damage, endocrine system problems, increased cholesterol levels, hypertension, strokes, shrinkage and dysfunction of genitalia, acne and aggressive behaviour (sometimes referred to as "roid rage").¹⁸ Although currently irrelevant for athletes in the US Leagues, side effects for women¹⁹ can include "masculinisation" such as development of body hair, breast reduction, deepened voice and reduction or cessation of menstruation. Use of anabolic steroids by adolescents is particularly dangerous as it can lead to stunted growth.

B.2. The legal status of anabolic steroids in North America

The use of anabolic steroids in both Canada²⁰ and the US²¹ is illegal pursuant to federal law unless obtained by

Should major league baseball adopt the WADA world anti-doping code to regulate the use of anabolic steroids?

prescription from a physician for a known medical condition. In the US, mere possession can result in a US\$1,000 fine or a maximum one-year in prison while possession for the purposes of trafficking, if a first felony drug offence, can result in a US\$250,000 fine and up to five years in prison (if a second felony drug offence, both penalties double). Many individual US states also have legislation in respect of anabolic steroids, although a review of same is beyond the scope of this paper. In Canada, there is no penalty for possession, however possession for the purposes of trafficking can result in a CAN\$2,000 fine or up to three years in prison.

Notwithstanding the aforementioned legal prohibitions and sanctions, anabolic steroids are easily obtainable by athletes competing in the US Leagues as they are available over the counter at pharmacies in Mexico and other Latin American countries, and increasingly, over the internet. Further, the US federal government has, to date, generally allowed the US Leagues to govern themselves and it therefore remains unlikely that an athlete competing in such leagues will be either charged or convicted under federal steroid legislation.

B3. The introduction of testing for anabolic steroids

Although most international sports federations had introduced drug testing of their athletes by the 1970s, particularly for the use of amphetamines,²² the use of anabolic steroids remained undetectable and was increasingly widespread. A reliable test was developed in 1974 and the IOC subsequently added anabolic steroids to its list of prohibited substances in 1976.²³

In 1988, Canadian sprinter Ben Johnson tested positive for the anabolic steroid Stanozolol at the Seoul Olympics and was stripped of the gold medal he had won in the 100 metres sprint. In 1990, the subsequently formed Dubin Inquiry²⁴ released its 638-page report which found, inter alia, that:

"... evidence shows that banned performance enhancing substances and in particular, anabolic steroids, are being used by athletes in almost every sport ..."²⁵

The NFL, the NBA and MLB have all subsequently implemented policies and testing programs, with varying degrees of severity, aimed at preventing the use of anabolic steroids by their athletes.²⁶

In the case of the NFL, the introduction of a testing program for anabolic steroids was actually initiated by the NFL Players' Union.²⁷ The NFL currently has the most stringent steroids policy of all the US Leagues. It has a zero tolerance approach and has included a steroid policy with mandatory testing provisions in its

Collective Bargaining Agreement with the NFL Players' Association²⁸ since 1993. Random²⁹ tests are conducted for both steroids and masking agents³⁰ on 6 players from each team every week from the beginning of the pre-season through the end of the post-season playoffs and periodically during the off-season. All players are tested at least once per year. There is also "reasonable cause" testing pursuant to which any player can be specifically targeted for testing in the event that (a) such player has previously tested positive for steroids (either while playing in or prior to entering the NFL); or (b) in the opinion of team physicians and the director of the steroid testing program, medical or behavioural evidence warrants such testing.³¹ A positive test results in a 4 game suspension for a first offence, a 6 game suspension for a second offence and a one-year suspension for a third offence, all without pay.³²

The NBA has included a steroid policy with mandatory testing provisions in its Collective Bargaining Agreement with the National Basketball Players' Association³³ since 1999. Random tests may be conducted on all players once during training camp and thereafter on first-year players up to three additional times during the season.³⁴ There is also a limited "reasonable cause" testing provision permitting the NBA to test a player where it has received information that leads it to believe such player has used, possessed or distributed steroids.³⁵ A positive test results in a five game suspension for a first offence, a ten game suspension for a second offence and a twenty-five game suspension for a third offence, all without pay.³⁶

In November 2003, MLB announced that it would be proceeding with a program of mandatory testing for the use by its athletes of anabolic steroids, which is further discussed and contrasted with the WADA Code in the following section.

C: Major League Baseball and anabolic steroids

C1. Why should Major League Baseball regulate anabolic steroid use?

There are three basic reasons why MLB, and any sport for that matter, should regulate the use of anabolic steroids. Firstly, regulation is required to protect the health of the players.³⁷ As noted above, the use of anabolic steroids can lead to long term, irreversible health problems, and in some cases can lead to premature death.³⁸ Further, without regulation, "clean" players will be pressured into risking their health in order to be able to compete on what they view as an uneven playing field.³⁹

Secondly, regulation is required to protect the integrity of the game. The use of any performance – enhancing

substance is cheating⁴⁰ and compromises not only the integrity of individual results, but also the long-term integrity of the sport and its legacy. MLB will want to avoid being in a position where its historical record book requires asterisks to denote clean records and those achieved by players using performance-enhancing drugs.⁴¹

Thirdly, regulation is required to protect the investment of the owners and the long-term economic viability of the game. Although use of steroids can increase muscle mass, such an increase can lead to an unsustainable strain on tendons and ligaments and can result in an increased propensity to injury. Between 1997 and 2001, injuries among MLB players increased by 130% and, as a result, owners paid approximately \$317 million in salary to players who were physically unable to play.⁴²

C2. Major League Baseball's anabolic steroid testing program

MLB is the league and the de facto governing body for professional baseball in North America and oversees 30 teams (or franchises) in 28 cities (26 in the United States and 2 in Canada⁴³). Each team operates as a separate business but MLB regulates team ownership, sets official rules and collects and distributes licensing fees from centralised merchandising activities. Although regional broadcasting rights are held by the individual teams, MLB licenses national broadcasting rights and distributes the revenues among the teams. MLB was formed when the formerly rival National League and American League joined together in 1903.

As with the other three US Leagues, the players in MLB are represented by a labour union, in this case the Major League Baseball Players Association (the "Players' Union"). Under US federal labour law,⁴⁴ MLB (which represents the teams or "employers") is obligated to negotiate or "collectively bargain" with the Players' Union in order to determine the terms and conditions that will govern the employment of the players (the "employees"). Such terms and conditions will include various issues which affect player rights, including drug testing, and must be agreed and codified in the Collective Bargaining Agreement between the parties (the "CBA"). MLB has historically taken the view that it cannot act unilaterally⁴⁵ and therefore cannot either impose drug testing or adopt the WADA Code⁴⁶ without the agreement of the players via the Players' Union.⁴⁷

In August of 2002, MLB and the Players' Union agreed the latest version of the CBA, which came into effect on 30 September 2002 and is effective through 19 December 2006. For the first time in the history of MLB, the CBA contained a mandatory anabolic steroid testing program (the "MLB Program"). Under Phase 1 (the Survey Phase), all players on each team's 40-man

roster were anonymously tested for certain anabolic steroids at some point during the 2003 season. An additional 240 players were randomly tested a second time. Once selected for testing, each player was subject to 2 tests, one initial test and a second follow up test conducted not less than five and not more than seven days following the initial test. In total, 1,438 tests were conducted on 1,198 players. More than 5% of the tests came back positive for anabolic steroid use which triggered a clause in the CBA providing that Phase 2 (the Penalty Phase) would become effective for the 2004 season. Under Phase 2, all players are subject to random testing during the season and subject to a range of penalties for testing positive. Further, the testing will continue until the total number of players testing positive for steroid use falls below 2.5% for two consecutive seasons.⁴⁸

C3. Comparison of the MLB program and the WADA code

In the fight against doping in sport, any testing for steroid use is better than no testing. However, when compared with the scope of the WADA Code, numerous shortcomings can be identified in the MLB Program. These shortcomings have undermined American public confidence in MLB's dedication to eliminating the use of anabolic steroids and have further motivated WADA to lobby MLB to adopt the WADA Code.

Firstly, the MLB Program is far less extensive than the WADA Code and only prohibits the use of 25 types of steroids (those which are covered by Schedule III of the Controlled Substances Act).⁴⁹

Secondly, unlike the WADA Code, the MLB Program does not prohibit the use of steroid precursors such as androstenedione, more commonly known as "andro."⁵⁰ A precursor is a substance from which another substance is formed. Although andro is not itself a steroid, it metabolises in the body as testosterone, which has the same effect as a steroid. St. Louis Cardinal's first baseman Mark McGwire admitted using andro in 1998, the year he hit 70 home runs to shatter Roger Maris' long standing single season record of 61 set in 1961. Under the WADA Code, not only would McGwire be unable to take andro, he would be tested for an additional 41 banned steroids⁵¹ (and numerous other prohibited substances).⁵²

Thirdly, the MLB Program does not contain a "catch-all" clause. In listing prohibited steroids, the WADA Code specifically proscribes the use of "other substances with similar chemical structure or similar pharmacological effect(s),"⁵³ thereby ensuring that athletes cannot exploit a loophole by using a product that is not yet identified as a prohibited substance but

Should major league baseball adopt the WADA world anti-doping code to regulate the use of anabolic steroids?

which provides the same physical advantages.⁵⁴

Fourthly, the MLB Program does not prohibit the use of masking agents such as diuretics, which can help an athlete disguise evidence of anabolic steroid use. Diuretics act on the kidney and cause the increased excretion of urine which eliminates excess body fluids. They are commonly used by athletes for quick, temporary weight loss but may also be used to “flush out” other substances or drugs from the body in an attempt to avoid detection of their use.⁵⁵ As set out above, all testing under the MLB Program is conducted as a two-step process and any initial positive test must be confirmed by a second follow up test which takes place five to seven days after the first test. This gives players a minimum five-day window during which they can freely ingest diuretics in order to flush any steroids out of their systems.⁵⁶ If the second test only shows the presence of the diuretic (ie. the masking agent), the player will be deemed to have tested negative and the initial positive test will be stricken from the record. Pursuant to the WADA Code, masking agents such as diuretics are prohibited substances.⁵⁷ The presence of a masking agent in an athlete’s urine is considered a doping offence and the athlete would be subject to the same sanctions as those applicable for a positive steroid test.⁵⁸

Fifthly, players are only subject to testing between spring training (commencing 3 March 2004) and the close of the regular season (ending 3 October 2004) and are not tested during either the post-season (the World Series finishes by late October) or the off-season. This gives players a minimum 5-month window during

which they can use steroids and bulk up with impunity. In fact, if a player tested negative in March, he would have a window of almost a year before potentially being subject to testing again. Under the WADA Code, athletes are subject to random, no advance notice, out-of-competition testing⁵⁹ and must make their whereabouts known at all times in the event they should be required for a test.⁶⁰

Finally, the penalties imposed on MLB players for positive steroid tests,⁶¹ as set out in the Table 1 above, are minimal and clearly out of line with those contemplated by the WADA Code:

A MLB player has to test positive five times before he might incur a one-year suspension. Further, given that the average salary of a MLB player exceeds US\$2.5 million per year,⁶² the proposed financial penalties are almost inconsequential and therefore unlikely to act as a deterrent. Under the WADA Code an athlete is subject to a two-year ban for a first positive test and a lifetime ban for a second.⁶³ In the view of much of the American public, it is therefore difficult to view the sanctions in the MLB Program as a serious attempt to rid the sport of steroid use. In the view of WADA President Richard Pound, none of the current policies and testing programs of the US Leagues has gone far enough, but he saves particular criticism for MLB.

Following a review of the MLB Program and its proposed sanctions, Mr. Pound responded:

“Baseball’s policy on steroids is a complete joke and an insult to the fight against performance-enhancing drugs.”⁶⁴

Table 1:

First Positive Test	Player receives counselling No suspension or fine No additional testing Results not disclosed to the public
Second Positive Test	Player is fined up to US\$10,000 or suspended for 15 days Results disclosed to the public
Third Positive Test	Player is fined up to US\$25,000 or suspended for 25 days Results disclosed to the public
Fourth Positive Test	Player is fined up to US\$50,000 or suspended for 50 days Results disclosed to the public
Fifth Positive Test	Player is fined up to US\$100,000 or suspended for 1 year

D: Related issues affecting the potential adoption of the WADA code by Major League Baseball

The following four related issues must be considered as they will affect the potential adoption of the WADA Code by MLB. The first three issues create additional difficulties for WADA but the fourth issue may ultimately create leverage in WADA’s favour.

D1. The players’ union and drug testing as a workplace issue

As previously noted, the MLB teams operate as independent, self-funding businesses. This commercial environment creates two factors, which together create further difficulty for WADA.

Firstly, the relationship between the players and their respective teams is viewed in MLB as that of an employee and employer and drug testing is therefore viewed as a workplace issue where the employees (ie. the athletes) have rights (including that of privacy) that are protected by federal employment and labour laws.⁶⁵

Secondly (and probably more importantly), the players are represented by the Players' Union. As noted at page 15 above, various issues, which affect player rights, including drug testing, are subject to mandatory collective bargaining between MLB and the Players' Union and must be agreed and codified in the CBA. The Players' Union has traditionally been opposed to any drug testing at all on the basis that it is an invasion of privacy and that random testing not only violates the players' civil rights but also violates the fundamental legal principle of "innocent until proven guilty." In 2002, Donald Fehr, the Executive Director of the Players' Union even suggested to the US Senate that the protections in the 4th Amendment to the US Constitution against unreasonable searches,⁶⁶ although not directly applicable to the private employment setting, should not be "put aside lightly" in the context of drug testing of MLB players.⁶⁷

In general, the attitude of MLB (and likely the other three US Leagues) towards the WADA Code can be epitomised by Marvin Miller, the former Executive Director of the Players' Union. In an interview conducted in June 2002 Mr. Miller was asked why the random drug testing system used by the IOC for the Olympics, where athletes are subject to testing where and when the IOC chooses, would not be good enough for baseball. He replied:

"I'm not familiar with all the details of the IOC's plan but if it works in fact the way you described it, I would have to say that it's an absolutely outrageous violation of a person's individual rights and should be absolutely unacceptable under any circumstances."⁶⁸

The Players' Union is one of the most powerful labour organisations in the US and appears to consider the WADA Code irrelevant when acting in its role as protector of the rights of MLB players and addressing the terms and conditions of what it views to be internal, domestic employment issues between the players and the league. This position, combined with the fact that MLB (as well as the other US Leagues) operates in a much more isolated geographic environment than that of other more international sports such as football (soccer), cricket or rugby has led to the view of MLB owners and players alike that drug testing is solely an internal, domestic issue and they have no obligation to conform to international standards. The recent implementation of mandatory drug testing under the latest CBA is a tacit admission by the Players' Union that the steroid issue needs to be addressed.⁶⁹ However, the primary role of the Players' Union is the domestic protection of player rights and, despite lobbying by WADA, it is unlikely that it will ever agree to full implementation of the WADA Code, under which its

members could potentially lose their jobs or be banned for life.⁷⁰

D2. Lack of real incentive – the entertainment factor

The term "entertainment sport" is sometimes used to refer to the fact that the public wants and expects to be entertained when they attend a sporting spectacle. WADA President Richard Pound has used the term to differentiate between the various approaches to drug testing in different sports:

"The problem is the difference between real sport and entertainment sport. In real sport they take cheating seriously, in entertainment sport they don't give a shit baseball is just ludicrous."⁷¹

At the extreme end of the scale of "entertainment sport" is World Wrestling Entertainment ("WWE") which, although based on a sport, is produced purely for entertainment and is essentially a scripted soap opera acted out in a boxing ring. MLB teams operate as independent businesses and depend on a continuous

MLB players are getting bigger and stronger and the most prevalent result is more hitting and more home runs. Whether or not this is attributable to anabolic steroid use, there is no doubt that the 1990s have seen one of the greatest hitting eras in baseball history

fan base for a significant amount of their revenue. As such, although they are a far cry from the WWE, their entertainment value can sometimes be said to be more important than their sporting value. MLB has a long season; each team plays 162 games per year, prior to commencement of the playoffs. MLB must ensure fans are entertained in order that they continue to purchase tickets to attend games, to purchase licensed merchandise and to watch television broadcasts of games, which increases ratings and correspondingly increases advertising revenue generated for the league.

In 1993, MLB set a record for average attendance at league games of 31,612.⁷² Shortly thereafter, the players went on strike over wage disputes resulting in a 7-1/2 month disruption and the cancellation of the World Series for the first time in 90 years. MLB has yet to again reach that 1993 level of attendance; average attendance in 2003 was 28,013.⁷³

Should major league baseball adopt the WADA world anti-doping code to regulate the use of anabolic steroids?

MLB players are getting bigger and stronger⁷⁴ and the most prevalent result is more hitting and more home runs; namely, more entertainment and therefore more fans attending games. Whether or not this is attributable to anabolic steroid use, there is no doubt that the 1990s have seen one of the greatest hitting eras in baseball history, which has increased interest in the game and brought back many of the fans lost during the above noted 1994 players strike. Roger Maris' single season home run record of 61 set in 1961 stood for 36 years but was broken 6 times between 1998 and 2001.⁷⁵ In 1998, Mark McGwire of the St. Louis Cardinals and Sammy Sosa of the Chicago Cubs conducted a season long battle to determine who would win the home run crown and whether one or both would break Maris' record.⁷⁶ Interestingly, neither team was a playoff contender but the battle generated such positive interest and publicity that fans flocked to the stadiums to see the teams play and hope to see baseball history being made.

The downside of this significant increase in entertainment value is that, if steroids are a factor, there is little incentive on the part of either the players, the Players' Union or MLB to crack down on their use. The owners obviously have a financial incentive to keep attracting fans to the stadiums and will be loathe to take any action which may reduce the number of home runs or negatively affect the hitters. The Players' Union wants to ensure salaries are kept at as high a level as possible and, to a large degree, salaries are driven by statistics such as home runs and batting percentage. Although the health and integrity factors discussed at pages 13-14 above should be and likely are considerations, they appear to be secondary to the preservation of the ongoing business of baseball.

D3. Lack of International Leverage

The International Baseball Federation (the "IBAF") is the international governing body for the sport of baseball and has adopted the WADA Code. USA Baseball, the US national governing body, is a member of the IBAF and has also adopted the WADA Code. However, USA Baseball only has jurisdiction over amateur baseball. As set out at page 7 above, MLB is a private, self-funding body operating as an independent business (a professional league) and does not participate in any events governed by either USA Baseball or the IBAF. MLB is therefore not subject to their jurisdiction and neither body has any leverage it can exercise in terms of forcing MLB to adopt the WADA Code.

The IBAF does, however, have jurisdiction over countries wishing to send baseball teams to the Olympic Games and, accordingly, participation of any

MLB player would be contingent on such player subjecting themselves to a drug testing regimen consistent with the requirements of the WADA Code and the Olympic Movement. Both the NBA and the NHL send their players to the Olympics and have negotiated appropriate testing programs with their respective international governing bodies, the International Basketball Federation and the International Ice Hockey Federation.⁷⁷ It may however be a moot point for baseball as MLB players do not generally participate in the Olympic Games⁷⁸ and, in any event, the status of baseball as an Olympic Sport is currently under review by the IOC.⁷⁹

The discrepancies between the MLB Program and the WADA Code were highlighted in a pre-Olympic training camp for the US Olympic Baseball team in October 2003⁸⁰ when 2 players, Derrick Turnbow, a Pitcher for the Anaheim Angels, and Termel Sledge, an outfielder for the Montreal Expos, each tested positive

The discrepancies between the MLB Program and the WADA Code were highlighted in a pre-Olympic training camp for the US Olympic Baseball team in October 2003 when two players tested positive for androstenedione.

for androstenedione (see page 17 and note 50 above). Although USA Baseball has banned both players from international competition for two years,⁸¹ they continue to play for their respective MLB teams.

Androstenedione is not banned by MLB⁸² and, even if it was, it is unclear whether MLB would recognise the IBAF suspension.

The situation was somewhat different and MLB was forced to make certain concessions in respect of the WADA Code when negotiations

were taking place between MLB, the Players' Union and the IBAF for a proposed Baseball World Cup to be organised by MLB in Spring 2005. Aldo Notari, the President of the IBAF, refused to sanction the competition unless Olympic drug testing guidelines were respected. In this particular case, MLB had no bargaining power as the IBAF's recognition by the IOC as baseball's international governing body is contingent upon the IBAF respecting the IOC's rules, including those on drug testing and the WADA Code.⁸³ On 27 April 2004, MLB announced that an agreement had been reached and that all athletes participating in the event would be subject to a drug testing protocol consistent with that of the WADA Code.⁸⁴ Members of other U.S. Olympic teams are

subject to testing as soon as they are named to the team. However MLB has said only that athletes would be tested "during the course of the World Cup." The extent of the testing to which MLB players will be subject therefore remains unclear but it is likely safe to assume that the Players' Union would never agree to the year round, out of competition, no notice testing envisioned by the WADA Code. Both the Players' Union and MLB may however be forced to agree further concessions in the event that the Baseball World Cup ever becomes a global event on the scale of the FIFA World Cup™.

D4. The Threat of US Government Intervention

As noted at page 9 above, the US Government has, to date, generally allowed the US Leagues to regulate themselves. However baseball is "America's Game" and "an institution inextricably interwoven into the fabric of our culture."⁸⁵ Public opinion therefore demands not only the protection of the integrity of the game by MLB (as discussed at page 13 above) but that the US federal government also keep a somewhat interested eye. The issue of steroid use in baseball has been previously raised by several governmental departments and was the subject of congressional hearings in 2002. The recent disclosure of the MLB Program and its relative leniency, however, has attracted the attention of US President George Bush, a former owner of MLB's Texas Rangers. In his State of the Union address given on 21 January 2004, Mr. Bush stated:

"The use of performance enhancing drugs like steroids in baseball, football and other sports is dangerous, and it sends the wrong message – that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now."⁸⁶

During a subsequent hearing conducted in March of 2004 by the US Senate Committee on Commerce, Science and Transportation, Senator John McCain, Committee Chairman, issued the following warning to Donald Fehr, the Executive Director of the Players' Union:

"Your failure to commit to addressing this issue straight on and immediately will motivate this committee to search for legislative remedies. The status quo is not acceptable. And we will have to act in some way unless the Players' Union acts in the affirmative and rapid fashion"⁸⁷

In April 2004, the US Senate passed a resolution introduced by Senator McCain, calling on MLB and its

players to take immediate action to adopt a drug testing policy that would effectively deter players from using anabolic steroids and other performance enhancing substances.⁸⁸ In his floor statement, Mr. McCain stated:

"This resolution would express the sense of the Senate that Major League Baseball's current drug testing policy stops short of what is necessary to protect the game, its players and the children and teenagers who emulate them."⁸⁹

Although the resolution is non-binding, it sends a strong message to MLB that the government is watching. WADA can only hope that the US government will back this initiative and introduce binding legislation,⁹⁰ with sanctions more in line with those in the WADA Code, in the event that MLB fails to act.⁹¹

E: Conclusion

MLB clearly needs to strengthen its steroid testing program if it wishes to send a message that it is serious about eliminating the use of anabolic steroids by its players. Adopting the WADA Code would be a step towards accomplishing that objective. However, given the independent, commercial nature of MLB and its teams, the strength of the Players' Union and the additional factors which have resulted in a lack of either domestic or international incentive, neither WADA nor the IBAF currently has sufficient leverage or influence which will enable it to successfully pressure MLB into adopting the WADA Code. A stricter testing regime more in line with that of the WADA Code will likely only be implemented by MLB if (a) baseball becomes a more international sport and MLB players become subject to the further jurisdiction of the IBAF; or (b) the US Government introduces binding legislation forcing it to do so.

Should major league baseball adopt the WADA world anti-doping code to regulate the use of anabolic steroids?

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- Clayton Act, 15 U.S.C. s. 15
- Constitution of the United States of America
- Controlled Substances Act, 21 U.S.C. s.801 et seq
- Labour Management Relations Act of 1947, 29 U.S.C. s. 185
- National Labour Relations Act of 1935, 29 U.S.C. s. 151
- Sherman Act, 15 U.S.C. s. 1-3

- Each signatory must individually accept the WADA Code and implement it by ensuring that its own rules and policies are in compliance with the mandatory provisions of the WADA Code. See further discussion regarding acceptance of the WADA Code by national governments at note 7.
- Figures are as at 12 October 2004. See "Code Acceptance" at www.wada-ama.org.
- Olympic Charter, Chapter 1 (The Olympic Movement and its Action), paragraph 2(8).
- As stated on page 2 of the WADA Strategic Plan 2004 – 2009.
- Classes of substances prohibited in-competition under the WADA Code include Stimulants, Narcotics, Cannabinoids, Anabolic Agents, Peptide Hormones, Beta-2 Agonists, Agents with Anti-Oestrogenic Activity, Masking Agents and Glucocorticosteroids. (See WADA 2004 Prohibited List, paragraphs S1 – S9).
- Classes of methods prohibited in-competition under the WADA Code include Enhancement of Oxygen Transfer (Blood Doping), Pharmacological, Chemical and Physical Manipulation and Gene Doping. (See WADA 2004 Prohibited List, paragraphs M1 – M3).
- Many national governments cannot currently sign the WADA Code as they cannot be bound by a document produced by a non-governmental organisation. They can however sign the non-binding Copenhagen Declaration, a political document by which they indicate their intention to formally recognise and implement the WADA Code. In order to provide a more enforceable mechanism by which governments can adopt and enforce the WADA Code, WADA is cooperating with UNESCO (the United Nations Educational Scientific and Cultural Organization) to produce an International Convention on Anti-Doping in sport (the "UNESCO Convention"). The UNESCO Convention will be a legally binding document and will, to some extent (see below), endorse the WADA Code. It is scheduled to be finalised and confirmed by member countries at the UNESCO general meeting to be held in September 2005. Thereafter, and prior to the commencement of the 2006 Winter Olympics in Turin, Italy, governments will be required to incorporate the UNESCO Convention into their domestic law or be subject to sanctions imposed by the IOC which may include a prohibition on either hosting (or bidding to host) Olympic Games or on sending athletes to Olympic Games. This prohibition will also likely extend to participation in any international competitions (such as world championships) as host countries or their respective international federations who have adopted the WADA Code will only permit the participation of others who have also adopted the WADA Code. The UNESCO Convention is currently in draft form and not yet available to the public. Therefore the extent to which the entire WADA Code will be endorsed, the extent to which governments will be permitted to "opt out" of specific provisions of the WADA Code and the resulting effect, if any, on the US Leagues all remain unclear.
- See note 1.
- See Charter, Chapter 3: The International Federations, Rule 29 (Recognition of the International Federations); Chapter 5: The Olympic Games, Rule 45 (Eligibility Code), Rule 48 (World Anti-Doping Code and Medical Commission), Rule 49 (Entries) and Rule 52 (Sports Programmes, Admission of Sports, Disciplines and Events).
- Various track and field athletes have made the crossover into the NFL. In 1982, the San Francisco Forty-Niners signed Renaldo Nehemiah, a champion high hurdler and the first man to break the 13-second barrier, to a pro football contract. He played for 3 years and won a Super Bowl with the team in 1984.
- "The UCI's Perspective on the World Anti-Doping Code" published February 2003 by the International Cycling Union, at page 3.
- See WADA Code, Article 23 (Acceptance, Compliance and Modification), Section 23.1.2 and comment.
- The US Leagues receive no public funds. Sports organisations that receive public funding can be pressured into adopting the WADA Code by the funding body (usually the national government) making such adoption a condition of their funding.
- Except of course in relation to the general law of the land.

- In contrast, US athletes who compete in track and field are subject to the jurisdiction (and therefore the doping policies) of both national (USA Track & Field ("USATF")) and international (IAAF) governing bodies, both of which have adopted the WADA Code. Athletes must be in compliance with the WADA Code if they wish to compete in national championships (governed by the USATF) or international competitions (governed by the IAAF). There is no such restriction on athletes who wish to compete in the US Leagues. See also discussion of athletes in US Leagues participating in Olympic Games at page 26.
- Health Canada, "Straight Facts about Drugs and Drug Abuse" published in 2000 by the Minister of Public Works and Government Services, at pages 15 and 44.
- "Current Concepts in Anabolic-Androgenic Steroids", Nick A. Evans M.D., *American Journal of Sports Medicine*, Volume 32, No. 2, March 2004 at page 534.
- Ibid* note 16.
- To date, only 2 women have participated in any of the US Leagues: Manon Rheame, a goaltender for the Canadian National Women's Ice Hockey Team, who played an exhibition game for the Tampa Bay Lightning on 23 September 1992 and Ann Meyers who was given a tryout with the Indiana Pacers basketball team in 1979.
- Controlled Drugs and Substances Act, S.C. 1996, c.19.
- Anabolic Steroids Control Act of 1990, Public Law 101-647, Sec. 1902, 104 Stat. 4851 (1990) amending 21 U.S.C. s. 812(c)(1981) to include anabolic steroids. See also discussion of the Anabolic Steroid Control Act of 2004 at note 50.
- The greater urgency of testing for amphetamines was likely influenced by the untimely deaths of Danish cyclist Knud Enemark Jensen (in 1960) and British cyclist Tommy Simpson (in 1967), both of whom were alleged amphetamine abusers.
- See "A Brief History of Anti-Doping" at www.wada-ama.org.
- The Commission of Inquiry Into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance, chaired by Justice Charles Dubin, was formed in Canada in the aftermath of the Ben Johnson scandal.
- At page 517.
- The NHL is the only US League that does not have a mandatory drug testing policy and does not conduct tests on its players for the use of steroids. Players who are already in the league's substance-abuse aftercare program may be tested, but the program is primarily aimed at abuse of substances which create dependency issues such as alcohol, amphetamines and recreational drugs such as marijuana and cocaine.
- This proactive desire to deal with the steroids issue may have been accelerated by the death of Lyle Alzado, a high profile all-star defensive end who died in May 1992 at the age of 43 from a rare form of brain cancer. Although no conclusive link was ever determined, many physicians believed that abuse of steroids contributed to his premature death. Alzado himself believed that there was a link between his admitted steroid abuse and his subsequent development of terminal cancer, as he acknowledged in an interview with Maria Shriver for "DateLine NBC" in 1991.
- See page 15 for a discussion of players' unions and collective bargaining agreements under US federal labour law.
- Players to be tested are randomly selected by computer on a blind basis.
- See NFL Steroid Policy, Appendix A – List of Prohibited Substances.
- Ibid.*, Paragraphs 3 (Testing for Prohibited Substances) and 11 (Reasonable Cause Testing).
- Ibid.*, Paragraph 6 (Suspension and Related Discipline). As the NFL regular season is only 16 games, a first offence will result in the offender being suspended (and losing his paycheck) for 1/4 of the entire season. Contrast this with the penalties for a first offence in the NBA (suspension of 5 out of 82 games (6% of the season) – see page 12) and a first offence in MLB (no suspension out of 162 games – see page 20).
- Ibid* note 28.
- See NBA CBA, Article XXXIII Anti-Drug Program, Sections 6 (Testing of First-Year Players) and 7 (Testing of Veteran Players).
- Ibid.*, Section 5 (Reasonable Cause Testing or Hearing).
- Ibid.*, Section 10 (Use or Possession of Steroids).
- This view is not without its detractors. An alternate view is that this is a paternalistic approach and that protection of the health of an athlete is a matter for the individual athlete and not for his or her respective sporting authority. See Adam Lewis and Jonathan Taylor "Sport: Law and Practice", Chapter E4 "The Regulation of Drug Use in Sport" at paragraph E4.12.
- On 10 October 2004, the opening night of the MLB American League playoffs, Ken Caminiti, the 1996 National League MVP and an admitted steroid user, died from a heart attack at the age of 41. The effect of his steroid use on his health or its contribution to his premature death remains unclear, however, damage to the heart is a known potential side effect of steroid use (see page 8).
- See note 70.
- In an alternative view, former IOC President (and current Honorary President for Life) Juan Antonio Samaranch has suggested, "substances that do not damage a sportsman's health should not be banned." See Daily Telegraph 26 July 1998.
- The current single season home run record holder is Barry Bonds of the San Francisco Giants who hit 73 in 2001. Although Bonds himself has always denied using anabolic steroids, in February of 2004, following an investigation of the Bay Area Laboratory Co-operative ("BALCO"), both Greg Anderson (Bonds' personal trainer) and Victor Conte (the founder of BALCO who provided Bonds with supplements and received his endorsement) were indicted for illegally distributing anabolic steroids. BALCO first came to the attention of investigators as being the supplier of the "designer" steroid tetrahydrogestrinone (or "THG") noted at page 6 above.
- "Caminiti Comes Clean," *Sports Illustrated* 28 May 2002.
- As at the end of the 2004 season, there will be only 1 team in Canada, the Toronto Blue Jays, as the Montreal Expos are relocating to Washington D.C. for the 2005 season.
- National Labour Relations Act, 29 U.S.C., Chapter 7, Subchapter II.
- It is questionable whether or not this view is legally correct. Under US federal labour law, certain residual rights are preserved for management, outside the CBA, under what is known as the "management rights clause." Pursuant to this clause, management is entitled to promulgate rules and regulations for the operation of its business on issues that are not covered by the relevant CBA. Until 2002 there was no drug testing policy in the CBA so it could be argued that MLB would have been entitled, prior to 2002, to invoke the management rights clause to unilaterally impose such a policy. It could be further argued that, although the CBA now covers in-competition drug testing, MLB could invoke the same clause to unilaterally impose more stringent out-of-competition testing (which is not currently covered by the CBA). However, it is beyond the scope of this paper to pursue the intricacies of US federal labour law and the writer will therefore leave further debate on this issue to those who know far more about labour law than she does.
- The MLB Constitution contains what is known as the "best interests of baseball" clause, pursuant to which the League Commissioner has limited powers to supersede the CBA and take unilateral action. [See Major League Constitution, Article II, sections 3 – 6, (originally adopted as the Major League Agreement, 12 January 1921)]. The current Commissioner, Allan H. "Bud" Selig, has

- intimated that he may invoke this clause in order to implement a more stringent drug testing program. However, he previously agreed with the Players' Union never to do so on issues affecting player rights [See undated letter from Bud Selig, MLB Commissioner, to Donald Fehr, Executive Director, Players' Union, Attachment 2 to the CBA]. It also remains questionable whether any such unilateral action by Mr. Selig could withstand a challenge by the Players' Union under US federal labour law.
- 47 MLB can however act unilaterally with respect to its Minor League or "farm" system and has imposed mandatory, no-notice drug testing on players in such leagues since 2001. Players are subject to unannounced testing up to four times per year, including during the off season and are tested for various prohibited substances including anabolic steroids and the weight loss drug Ephedra, use of which contributed to the death of Baltimore Orioles pitcher Steve Bechler at the age of 23 on 17 February 2003. Players are also subject to testing for masking agents and steroid precursors – see further discussion at pages 17-19.
- 48 Paragraph 3(A) of Major League Baseball's Joint Drug Prevention and Treatment Program – Attachment 18 to the CBA.
- 49 21 U.S.C. s.801 et seq.
- 50 Until recently, androstenedione was not a prohibited substance under US federal law and was freely available over the counter in health food and other stores. Both MLB and the Players' Union have frequently relied on this fact to justify why andro has not been banned by MLB. When testifying before the US Senate in 2002 (see note 67), Donald Fehr, Executive Director of the Players' Union even challenged federal legislators to revisit the issue of whether andro and similar products with steroidal properties should be covered by Schedule III of the Controlled Substances Act (see note 49). The legislators appear to have taken up the challenge as on 11 October 2004 the US Congress enacted the "Anabolic Steroid Control Act of 2004" which, inter alia, amends the definition of "anabolic steroids" in the Controlled Substances Act to include tetrahydrogestrinone (otherwise known as "THG" – see page 6) and "any drug or hormonal substance chemically and pharmacologically related to testosterone." The result of this legislation will be that all steroid precursors such as andro will be regulated in the same manner as anabolic steroids (i.e. possession and use would be illegal without a doctors prescription – see Section B2) and will be banned by MLB. At the time of writing, the legislation was expected to be imminently signed into law by President George W. Bush.
- 51 WADA 2004 Prohibited List, paragraph S4.
- 52 In 1999, McGwire publicly gave up taking andro, stating that he didn't want kids taking it just because he did.
- 53 Ibid, Note 51.
- 54 See Johann Muehlegg v. International Olympic Committee CAS/2002/A/374 (24 January 2003).
- 55 Canadian Centre for Ethics in Sport – Banned Classes of Substances (at www.cces.ca).
- 56 A popular diuretic is Probenecid, which is used to treat gout but can also help to flush out steroids.
- 57 WADA 2004 Prohibited List, paragraph S8.
- 58 In February 2003, Australian cricketer Shane Warne was suspended for 12 months by the Australian Cricket Board after testing positive for two banned diuretics, amiloride and hydrochlorothiazide (see WADA 2004 Prohibited List, paragraph S8), which he claimed he was taking to help him lose weight.
- 59 See WADA Code, Article 5 (Testing).
- 60 In September 2003, Rio Ferdinand, a defender for Manchester United and the England National Football Team, left the Manchester United training ground without complying with a request by UK Sport doping officials for a urine sample. He claimed he forgot and was later photographed shopping in Manchester. He was subsequently determined to have "failed to attend a routine drugs test" and suspended by the England Football Association for 8 months.
- 61 Paragraph 9(B) of Major League Baseball's Joint Drug Prevention and Treatment Program – Attachment 18 to the CBA.
- 62 Associated Press, Study of 2003 Baseball Salaries as cited in "Money Matters," 3 April 2003 at sportsillustrated.cnn.com.
- 63 See WADA Code, Article 10 (Sanctions on Individuals).
- 64 Associated Press, "Anti-Doping Head: Baseball Drug Penalties a Joke and Insult" at www.CBSsportsline.com, 14 November 2003.
- 65 Including the National Labour Relations Act of 1935 and the Labour Management Relations Act of 1947, 29 U.S.C. s. 185.
- 66 Amendment IV to the US Constitution as codified in the Bill of Rights, ratified 15 December 1791.
- 67 12 June 2002, Statement of Donald Fehr, Executive Director, Major League Baseball Players Association, before the United States Senate, Committee on Commerce, Science and Transportation, Subcommittee on Consumer Affairs, Foreign Commerce and Tourism.
- 68 As interviewed by Allen Barra for Salon magazine on 20 June 2002, posted on www.salon.com/news/sports/col/barra/2002/06/20/miller/print.html.
- 69 The imposition of mandatory testing in the Minor Leagues (see note 47) is arguably a tacit admission by the owners of the same point.
- 70 The Players' Union is however coming under increased pressure from "clean" players who resent the potential advantages gained by steroid users and therefore support a more stringent testing program. Among those speaking out is Reggie Jackson, a member of the baseball Hall of Fame and one of the game's all time greatest hitters. See Associated Press, "Slugger Doesn't Believe Today's Athletes" 17 March 2004 at www.espn.com.
- 71 Reuters, "WADA mulls urging IOC to make U.S. a Sports Outcast" at www.ABS-CBNNews.com, 21 November 2003.
- 72 Associated Press, "Attendance Soars in Major League Baseball" 13 April 2004.
- 73 Ibid.
- 74 The average weight of players participating in MLB's annual all-star game was 199 lbs in 1991 and had increased to 211 lbs by 2001 ("Caminiti Comes Clean," Sports Illustrated, 28 May 2002).
- 75 Historical Statistics at www.mlb.com, Home Run Records, Single Season – 2001 (73 – Barry Bonds, San Francisco Giants; 71 – Sammy Sosa, Chicago Cubs); 1999 (65 – Mark McGwire, St. Louis Cardinals; 63 – Sammy Sosa); 1998 (70 – Mark McGwire; 66 – Sammy Sosa).
- 76 Both did break the record but McGwire was the eventual winner, hitting 70 to Sosa's 66.
- 77 Similarly, the NFL will be subject to the jurisdiction of the International Federation of American Football in the unlikely event that American Football ever becomes an Olympic sport, and such federation is recognised as the international governing body by the IOC.
- 78 Primarily because the owners do not wish to shut down their playing season for a minimum of 2 weeks.
- 79 The Olympic Programme Commission presented a full review of the sports programme at the 114th general session of the IOC held in Mexico City in November 2002 and recommended the future exclusion of baseball, softball and modern pentathlon. It was resolved to postpone a decision on the recommended exclusions of these sports until after the 2004 Summer Olympic Games in Athens.
- 80 The US team consisted mostly of minor league players and subsequently failed to qualify for the Athens 2004 Olympic Games.
- 81 The suspensions were announced by Press Release of the United States Anti Doping Agency on 13 January 2004 in respect of Sledge and on 5 January 2004 in respect of Turnbow.
- 82 See discussion on androstenedione and the Anabolic Steroid Control Act of 2004 at note 50.
- 83 Similarly, a World Cup of Ice Hockey, organised by the NHL, in cooperation with the NHL Players Association, took place in September 2004 in Canada, the U.S. and Europe. The International Ice Hockey Federation sanctioned the event because all parties agreed to implement a drug-testing regime consistent with the provisions of the WADA Code.
- 84 Major League Baseball Press Release 27 April 2004.
- 85 8 April 2004, Floor Statement in the U.S. Senate by Senator John McCain, Chairman of the US Senate Committee on Commerce, Science and Transportation.
- 86 Associated Press, "Bush Makes Anti-Drug Plea" at www.cbc.ca, 22 January 2004.
- 87 See Barry M. Bloom, "Selig, Fehr testify before Senate" at www.mlb.com, 10 March 2004.
- 88 The importance of baseball in the U.S. can be inferred from that fact that no Senate resolutions were introduced in respect of the drug testing policies of any of the other 3 US Leagues.
- 89 Ibid, note 85.
- 90 The US government has already indicated an initial willingness to act – see discussion of the Anabolic Steroid Control Act of 2004 at note 50.
- 91 WADA will also likely support the argument made by some that the continuation of MLB's exemption from anti-trust laws (granted pursuant to a 1922 decision of the US Supreme Court [Federal Baseball Club of Baltimore Inc. v. National League of Professional Baseball Clubs et al, 259 U.S. 200, 42.Ct. 465 (1922)]) should be contingent on MLB adopting a stronger anti-drug policy.

Football disciplinary codes – The triumph of expediency over justice

By Mel Goldberg and Simon Pentol

Let there be no doubt – when it comes to *on-field disciplinary issues*, the football world is no place for the ECHR, let alone the common law. The Disciplinary Codes presently in force for international and domestic matches have been drafted in such a way to limit the scope for both effective challenge by a Player of an on-field violation and his avenue of appeal, to such an extent that his rights have been all but abolished.

1. FIFA-LAW (applicable to matches played both for club & country in the international arena)

The highly publicised case concerning the ultimately unsuccessful attempt by Robbie Savage (for whom we are both instructed) to overturn a dubious red-card when playing for Wales in a World Cup Qualifier vs N.Ireland, highlights how FIFA-law has been drafted in such a way to render challenge of such a decision nigh impossible, with the result that the player concerned will automatically miss the biggest game of his career in the subsequent match vs England.

FIFA Disciplinary Process

The judicial bodies of FIFA are the Disciplinary Committee (the DC) and the Appeal Committee (the AC).

FIFA law is enshrined effectively within its Disciplinary Code of May 2002 (the FDC), its Statutes of 2002 and its Regulations for the 2006 World Cup.

Direct Expulsion

A “straight red card” (direct expulsion) is issued for *serious unsporting behaviour* per law 12 of the Laws of the Game and defined in Art.52 FDC to include *brute force & violent or aggressive conduct*. It automatically incurs suspension from the subsequent international match, although the DC may extend the duration of the suspension.

Challenge to Direct Expulsion

The FDC provides no right of appeal in cases of direct expulsion nor the corresponding automatic suspension

from the subsequent match. FIFA prefers instead to give statutory preference to the principle that “the referee is always right” (Art.78FDC).

Sanctity is to be found superficially within the ambit of powers bestowed upon the DC to include that of rectifying obvious errors in the referee’s disciplinary decisions (Art.83(b)FDC)

Procedural requirements of challenge in World Cup matches

We say “superficial” sanctity because in World Cup matches there lies a two-fold procedural hurdle that must firstly be overcome –

1. The team captain must make protest to the referee immediately after the disputed incident has taken place; and
2. The protest must be confirmed in writing to FIFA by the head of the team delegation no later than 2 hours after the match and in cases during the preliminary competition (ie World Cup qualifiers, such as the Robbie Savage game), followed up by letter to the FIFA general secretariat within 2 days.

Failure to so comply will render invalid any subsequent attempt to invoke the DC’s power of rectification.

Does the onus to ensure compliance therefore rest with the player concerned? What recourse does the player have if (in the heat of the moment) others fail him by their omission? These important questions remain unanswered.

Does the player have recourse to CAS in the event of procedural non-compliance? We shall deal with this, below.

The substantive challenge

Assuming no procedural bar exists and the player has a justifiable grievance, then what?

FIFA Circular no. 866 of 24 September 2003, defines an *obvious error* per Art.83FDC as *principally an error of identity* and stipulates that if any doubts remain, (whatever the ground for complaint) then the referee

has clearly not made an *obvious error*.

The onus is therefore on the Player to prove beyond reasonable doubt that not only had the referee made an error, but that it was an obvious one.

In which other disciplinary procedure we venture to suggest, would it be insufficient for a claimant to prove an official had merely made an error as opposed to an obvious one, in order to escape the sanction imposed?

If the burden of proof were not high enough, access to a lawyer and the calling of "live" or expert evidence to present his case rests solely within the discretion of the DC.

This request as we can attest is unlikely to be granted. FIFA's rationale runs, if the error is *obvious*, there is no need for lawyers nor the calling of evidence to prove it – it will be clear on the face of the file and (any) video. Oh if only life were as simple as that!

Appeal from the DC to the AC

An appeal to the AC lies only in cases where the sanction imposed by the DC is greater than a three match ban (Art.123FDC) – which is not much use to Robbie Savage nor anyone whose sanction is less than a four match ban.

Appeal to the Football Chamber of the Court of Arbitration for Sport (CAS)

FIFA provides recourse to CAS as the "court of last resort" after all previous stages of appeal have been exhausted. It does so, as a quid pro quo to prohibiting recourse to ordinary courts of law (Art.61(2) FIFA Statutes & Art.15(1) World Cup 2006 Regs.)

Significantly however, Art.60(2) FIFA Statutes specifically provides that CAS shall not hear appeals on either:

1. Violations of the Laws of the Game; or,
2. Suspensions of up to 4 matches.

Given that by its nature, an appeal of a referee's decision to expel a Player for putative violent conduct must necessarily involve a review of a violation of the Laws of the Game, recourse to CAS has been drafted

so narrowly by FIFA to deliberately prohibit any appeal of the DC to uphold the original decision of the referee in any case, let alone in one where the sanction is less than a suspension of up to 4 matches.

In an arguable case therefore (such as Robbie Savage's) FIFA denies recourse to CAS with the result that the Player who falls victim to a questionable decision of the referee, is powerless to challenge that decision both within the framework of domestic law and FIFA law. The Player is denied the opportunity to challenge his automatic suspension from the subsequent match and in the case of Mr. Savage, will miss the "biggest game of his life".

What option remains for the Player?

Given that CAS does not exist to operate outside the enabling provisions set by the given sporting institution to afford recourse to it, an application for a preliminary determination seeking a declaration that FIFA's criteria are unfair, will doubtless fail.

The only option for legal challenge is to the European Court. With less than 4 weeks between the game in which Robbie Savage was sent-off and the game from which he is suspended, it is not a viable option, however meritorious the case.

All that remains is to highlight the iniquities in FIFA's procedures and trust that the footballing bodies will bring enough pressure to bear upon FIFA to change its unfair laws.

2. F.A-LAW(applicable to matches played in the Premiership, Football League & Football Conference)

Pilot Scheme for 2004-5 Season

A new disciplinary fast-track scheme governing on-field, player related cases has been implemented by the F.A. this season.

It follows the FIFA model and has been introduced to expedite the disciplinary process & prevent certain Clubs from employing delaying tactics.

Its greatest impact concerns *automatic suspensions*

Football disciplinary codes – The triumph of expediency over justice

for incidents seen & dealt with by the referee and on-field incidents not seen by match officials but caught on video.

F.A. Disciplinary Process

All matters are now referred to the Disciplinary Commissions (DC) that replace the Video Advisory Panel. Appeals are heard by Appeal Boards.

Automatic Suspensions for Incidents seen and dealt with by the Referee

Suspensions will come into force immediately *unless* a claim for wrongful dismissal or mistaken identity is lodged by the Club (of the player concerned) with the FA by 12pm the following day.

The onus falls on the club as opposed to the player – what recourse therefore will the Player have for any failure or dilatory response made by his Club, which deprives him of his opportunity to challenge the referee's decision?

The new Code speaks about submitting relevant documentation & video(s) etc in support of the player's claim but is silent on the rights of representation and calling of live or expert evidence.

That silence can be assumed to offer no such rights at a challenge at "first instance", given all claims are to be dealt with, within 4 to 5 days of a fixture.

On-field Incidents not seen by match officials but caught on video

This applies to serious incidents which would otherwise warrant a *straight red-card* and the sanction will take the form of match bans, not fines.

Where a charge is brought, an offer of sanction ie length of ban will be made to the Player. If he denies the charge or refuses to accept the sanction, the case will be heard by the DC on the basis of documentation & video evidence *only* – there is *no personal representation nor live evidence*.

Given the blanket video coverage of fixtures and the serious nature of the incidents to be dealt with, the denial of both representation and the calling of live evidence in cases which will likely turn upon issues of credibility & video-enhancement, amounts to a denial of the basic rights to a fair trial.

Appeals

For offences not seen by the match officials, appeals will be permitted only if the *ban exceeds three matches* and then, only to that part of the ban which exceeds three matches. A player therefore who is banned for up to three matches in these circumstances, is denied a *right of appeal*.

Paradoxically, for offences not seen by the match

officials – representation is allowed at an appeal, but given no appeal is permitted in cases where the ban is less than 4 matches, it is a right that exists in only a small number of cases.

Legal challenge to the new procedures

Judicial Review of FA Procedures is not an option, however contemptible they seem to be. The FA is not susceptible to JR as its functions are deemed insufficiently governmental in character and per Rose J. in *R-v-Football Assoc'n Ltd exp Football League Ltd* (Times 22-08-91) *the FA is a domestic body whose powers arose from and exist only, in private law*.

A challenge to the High Court under the auspices of Art. 6(1) ECHR will be equally difficult to sustain since the minimum requirement is a *fair & public hearing by an independent & impartial tribunal*, following by application, the ruling in *Phyllis Colgan -v- The Kennel Club* (QBD 26-10-01).

What option remains for the Player?

As with the FIFA Rules, the time has come for players to actively seek changes in FA Law by bringing public pressure to bear upon the FA through the media & the PFA by complaining about the anomalies we have identified.

The Reality

As unpalatable as it is, there is only so much that we as lawyers operating in the football arena, can do to redress the unfairness that exists in the disciplinary process adopted by the respective bodies against the interests of our clients.

We can identify the issues and advise accordingly.

The impetus for change has to come from the Players and the clubs / international teams who suffer.

Politics in football often dictates whether the challenge will be taken.

We strongly encourage that it is.

**Mel Goldberg, Solicitor – partner Max Bitel Greene
Simon Pentol, Barrister – 25 Bedford Row
2nd October 2004**

Community Amateur Sports Clubs – Important Tax Incentives!

The promotion of 'healthy living' is high on Government's agenda. 'Game Plan' (December 2002) recommended ambitious targets for increasing mass participation in physical activity, but at the time, the tax system did nothing to facilitate the achievement of these targets. The ability to register as a Community Amateur Sports Club ("CASC") has changed the outlook for the better. Here Richard Baldwin of Deloitte – one of the main authors of the legislation – gives his views.

Introduction

Government has now acknowledged the vital role that local sports clubs play in our society in promoting social and community inclusiveness and, more particularly, health through regular exercise. Historically, this significant contribution has not been recognised through the tax system which, if anything, has hindered the development of sports clubs. Young people are increasingly losing interest in sport after they leave the education system. Local sports clubs, established on a sound financial basis, can help reverse this decline in participation.

The voluntary sports club sector suffers from a lack of both cash and adequate facilities despite the valuable efforts of many thousands of volunteers. In the past two years, and following Government and Charity Commission consultation, we have now entered a new era for the amateur sports club, which can now take advantage of valuable new tax reliefs by registering either:

- as a charity with the Charity Commission; or
- as a CASC with the Inland Revenue.

As anticipated at the time, registration as a CASC has proved to be more popular principally because of the ease with which the clubs can follow this alternative. However, the Charities Bill currently going through Parliament, which makes the advancement of amateur sport a charitable objective, may encourage more to register as charities.

In the past, sports clubs, whether incorporated or not, have generally enjoyed no special exemptions from tax; neither has a complex tax system encouraged giving to clubs. Registration under either of the two new routes changes all of this. In view of the popularity of the CASC route, this article concentrates on the benefits and qualification rules for CASCs. However, the Charity Commission website, www.charity-commission.gov.uk provides details of the charity alternative.

Progress to date

CASC registrations were slow to take off; Finance Act 2002 introduced reliefs confined to exemption from corporation tax (now extended this year) and gift-aid relief for individuals. It was not until September 2003 that the Local Government Act introduced mandatory rate relief, accelerating registrations, particularly for those clubs that owned or occupied their own facilities.

As at 30 September 2004, 1,875 clubs had registered as CASCs, and Table 1 contains a league table of the top ten sports. Cricket is leading the way, and congratulations to that sport, reflecting a significant effort made by it to promote the CASC initiative.

Table 1: Top 10 Registrations – 30 September 2004

	Registered CASCs
1. Cricket	402
2. Bowling	285
3. Tennis	166
4. Rugby Union	148
5. Golf	129
6. Football	126
7. Sailing, Yachting & Cruising	117
8. Mixed Sports	111
9. Gaelic football & Hurling	56
10. Shooting	55
Total	1,595

Note: Registered CASCs serving the top ten sports include 1,595 (or 85%) out of the 1,875 registered clubs.

Source: Deloitte analysis of Inland Revenue list.

Registration by these clubs has already generated a total cash benefit for them, estimated by Deloitte at £4.7m as per Table 2. This effectively represents one year's cash benefit from the scheme, and it is estimated that the

Table 2: Total Cash Benefit to Clubs – estimated 30 September 2004

	£m
Rate relief	2.6
Corporation tax savings	1.5
Gift Aid repayments	0.6
Estimated Total Cash Benefit	4.7

Source: Deloitte analysis.

future annual benefit will be at least £5m, a substantial sum when one considers how difficult it is to obtain Government funding for sport. Indeed, there is more to go for, since DCMS estimated in June 2004 that around 40,000 amateur sports clubs across the UK might benefit from CASC status, generating an estimated annual saving of £75m. These would not only be clubs with facilities, but also clubs that have the ability to raise funds from individuals under gift aid. Scope for tax effective fund-raising even by the smaller clubs may give rise to gift aid tax repayments, which may make registration worthwhile.

What are the benefits?

CASCs enjoy the following tax reliefs:

- exemption from corporation tax, subject to certain limits;
- individuals can make gifts to CASCs, using gift aid;
- mandatory rate relief of 80%;

Table 3: Case study – Woodford Rugby Football Club

- Club membership is over 500.
- A new clubhouse was built in the mid-1990s, partly funded by loans.
- CASC registration is a major opportunity for using gift aid, which has enabled the club to raise donations and repay its loans.
- Tax repayments will add a one-off £45,000 to the funds raised.
- Gift aid has transformed the way the club approaches fund-raising.

Source: CCPR.

Tables 3 and 4 contain illustrative case studies of the benefits that Woodford Rugby Football Club and

Table 4: Case study – Wembley Cricket Club

- The club decided to register as a CASC, finding the registration process relatively straightforward.
- Only minor amendments to its Constitution were needed, registration taking only a couple of weeks.
- Tax repayments of £836 have already been received on individual donations.
- The club's rates bill was over £5,000 pa with only 25% discretionary relief from the Council.
- 80% mandatory relief is worth nearly £3,000 pa, plus the certainty that the Council will not withdraw it.
- CASC registration has already generated nearly £4,000 for the club with the potential for an annual cash benefit at that level.

Source: "Scorecard" Middlesex Cricket Board's Newsletter.

Wembley Cricket Club have obtained from registering as CASCs.

Corporation Tax

CASCs enjoy complete exemption from corporate tax on interest, gift aid income and capital gains provided these are applied for qualifying purposes. However, exemption from corporation tax is only available on:

- profits from trading and fund-raising where gross income is less than £30,000 per annum;
 - income from property where the gross income is less than £20,000 per annum
- provided, again, that the income is applied for qualifying purposes.

If the above limits are exceeded then:

- 100% of the income is taxable without any marginal relief;
- it is possible to deduct notional costs in arriving at taxable income;
- the exemptions for non-commercial and mutual income apply, and the nil rate band of £10,000 is still available.

For most sports clubs the corporation tax position is not a practical problem, since they are too small. Others that go through the calculations may find that they do not significantly benefit from corporation tax exemptions, since little tax is currently payable. Major benefits of CASC registration are, for most sports clubs, the new tax effective giving regime and business rate relief.

Community Amateur Sports Clubs – Important Tax Incentives!

Gift Aid

Individuals can make gifts to CASCs using gift aid. This results in benefits for both sides, a ‘win-win’ situation:

- income tax relief is available for their gift, resulting in a tax repayment for a higher rate taxpayer; and
- a tax refund for the club itself.

Table 5 shows the benefits to the club and the individual, and Table 6 shows the tax subsidy provided by Government. Clubs that can raise regular or one-off donations should seriously consider registration.

Table 5: Gift aid relief – illustrative net cost to individual donor

	£
‘Gross’ equivalent	128
Income tax at 22%	Recoverable by club (28)
Paid by donor	100
Higher rate relief	Recoverable by higher-rate taxpayer (23)
Net cost to donor	77

Table 6: Gift aid relief – tax subsidy

	Higher Rate Taxpayer		Basic Rate Taxpayer	
Net costs to individual	77		100	
Tax subsidy (percentage of net cost)	51	67%	28	28%
Received by club	128		128	

The timing of the payment is also, now, less of an issue. Historically, in order to qualify for gift aid relief in an income tax year, the gift must have been paid within that year. However, as from 6 April 2003, a taxpayer can make a payment after the tax year has ended and before 31 January following the end of the year, and carry it back to the previous income tax year.

There are other direct tax reliefs for CASCs, the major one being that individuals can also benefit from relief from inheritance tax on gifts to a registered CASC. This currently bites on estates valued at more than £263,000 at a rate of 40%. This means that a bequest of £100, will now cost £40 less than previously (being the IHT saving).

Unfortunately, subscriptions are not eligible for gift aid, although they may be set at a level that enables the

club to do no more than break even with a request for a voluntary donation on top, which will attract gift-aid relief. The voluntary donation principle can be used to secure more funds for the club and tax relief for the donor in other situations besides subscriptions:

- “sponsorship” of individuals raising funds for the club, eg running in Marathons;
- fundraising events, where the ticket price is set at a level to pay for the direct cost of the event, with a donation suggested on top; and
- auctions, where the Inland Revenue will accept that, if a price bid for an item that has a readily ascertainable value, is in excess of that value, the excess can be treated as a donation. This donation will qualify for gift-aid relief (see booklet CWL4, published jointly by the Inland Revenue and HM Customs & Excise – *Fundraising Events: exemptions for charities and other qualifying bodies*).

The use of a voluntary donation does, of course, have commercial risks to the club, eg that person may not actually make it. If it is truly voluntary and there is no legal obligation to pay the donation, this should also not count as taxable fund-raising income for the purpose of considering the limited corporation tax exemption above.

Business Rates

The Local Government Act, which became law in September 2003, provides mandatory rate relief of 80% for CASCs that are registered with the Inland Revenue. This came into effect on 1 April 2004. Some clubs already benefit from discretionary relief up to 100% awarded on a case-by-case basis by the Local Authority.

Mandatory relief brings CASCs in line with their counterparts in the charity sector who have enjoyed this treatment for some time. Clubs that remain unregistered will have to negotiate discretionary relief or suffer normal business rates as before.

How do clubs qualify as a CASC?

There are a number of conditions that have to be satisfied for a club to qualify as a CASC. Broadly these are:

- The club must have as its main purpose the provision of facilities for and promotion of participation in one or more eligible sports.
- In terms of the activities that qualify, there are over 100 eligible sports listed by the Inland Revenue and generally follow the sports recognised by the Sports Councils.
- Membership of the club must be open to the whole

community without discrimination and with affordable membership fees. The facilities should be available to all giving broadly the same treatment to less skilful and less competitive players.

- Clubs must be amateur, which means that players cannot be paid, but expenses can be reimbursed. A player/coach can be paid.
- Distributions to members are not allowed; surpluses must be reinvested in the club. Any net assets on dissolution must be applied for approved community sporting or charitable purposes.
- CASCs can have social members provided broadly they are in a minority, and can also run bars as a social adjunct to the provision of their sporting activities.

CASCs must register with the Inland Revenue Sports Clubs Unit in Bootle (previously in Edinburgh), see below as to how to do this, which administers and monitors the new system.

Some practical aspects

The legislation has been in place for two years now. Experience of dealing with both clubs and the Inland Revenue is building. In practical terms, clubs are run predominantly on a voluntary basis, and the registration process is designed to be simple and accommodating for voluntary officials. Application is made for CASC status to the Inland Revenue Sports Clubs Unit enclosing:

- a registration form with seven simple questions on it;
- a copy of the club's governing document – this might be a Constitution, Rules or Memorandum of Association;
- a copy of the club's latest accounts;
- a copy of any prospectus, member's handbook, rule book, etc.

Applicant clubs will be informed when they have become registered as a CASC and told the date from which they are registered. Often the clubs' existing governing documents do not comply with the scheme. Some clubs may initially be refused registration until they change aspects of their rules or Constitution (specific feedback will be given). Other clubs may be refused registration on the basis of more fundamental issues and asked not to reapply. There is an appeals process against decisions.

The Inland Revenue website, www.inlandrevenue.gov.uk contains details of how to register and also some guidance notes. The application form itself contains some useful hints for the completion of the questions and the reasoning behind them.

To date, the main reasons that clubs are not qualifying for CASC status are because

- they have old or outdated governing documents that:

- contain no dissolution clause or an invalid clause;
- do not make it clear that the club is open to the whole community without discrimination; or
- do not state participation in sport as an objective; or
- the club does not participate in an eligible sport; or
- players are paid; or
- the organisation does no more than provide facilities for other clubs.

The Central Council of Physical Recreation ("CCPR") website (www.ccpr.org.uk) contains a useful proforma Constitution for a club that wishes to qualify as a CASC. CCPR are also taking up the issue of multi-sports clubs, some of which may presently find difficulty in registering.

The way forward

Registration as a CASC represents a significant opportunity for local amateur sports clubs to generate more funds for use in their communities. Whilst the take-up was at first slow, the pace is now quickening. The available tax reliefs can only be accessed after registration. This is simple to put into effect and, generally, will not have any significant disadvantages unless at some stage members want to share in the surpluses of the club.

It may be that the CASC 'brand' will be used by Government to further encourage local sport. Other incentives may be provided in the future. It certainly is the case that, if sport does not take advantage of this hard-won initiative, it will find it more difficult to get direct funding from Government.

Richard Baldwin

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Sports Business Group at Deloitte

This article has been written in general terms and is intended as a guide only. Its application to specific situations will depend upon the particular circumstances involved. Whilst all reasonable care has been taken in the preparation of the article, no responsibility is accepted by the authors for any errors it may contain, whether caused by negligence or otherwise or for any loss however caused occasioned to any person by reliance on it.

Richard Baldwin is a member of the working party convened by the Department for Culture, Media and Sport in 1999 to press for tax changes to encourage community sport. He continues that involvement now that the legislation has been enacted in terms of resolving particular issues arising from the implementation of the legislation and promoting the scheme.

For more details about the Sports Business Group at Deloitte and to download your free copy of our brief guide to CASCs – Community Amateur Sports Clubs – The Tax Options – please visit our website at www.sportsconsulting.co.uk.

Football's finances – never far from the headlines

The Sports Business Group at Deloitte has been producing its annual analysis of football's finances since 1991. August 2004 witnessed the issue of the thirteenth edition of the Deloitte Annual Review of Football Finance. Here we reproduce some thoughts from Dan Jones and Gerry Boon, partners in the Sports Business Group, about some of the current trends and, also, the financial overview given by their Highlights summary.

In the time since Deloitte first produced its Annual Review of Football Finance, we have celebrated the continued spectacular growth in football's popularity (attendances really started to pick up from the mid-1980s), and the fact that the sport in England has comprehensively improved its image after the problems of the 1970s and 1980s. The tide of money flowing into football has facilitated a transformation of English stadia, and of the global appeal of the English game, that was unimaginable fifteen years ago.

England has been in the vanguard of the advance for the concept of 'the football business' and its finances, but much of what has occurred in England has been replicated in Europe's other big football leagues. The question being asked now across Europe is whether the wave that football has been riding is breaking, and might clubs hit the rocks? At the very least there are some choppy waters to navigate. Our Annual Review again charts the latest stage in football's business voyage in some detail. Before we get into the numbers, though, we consider some themes of current interest to the football business.

After the watershed

The football finance season covered by our review – 2002/03 – was without doubt a difficult one. This, and 2003/04, were years of painful adjustment. For almost all Football League1 clubs, the collapse of ITV Digital was a turning point, not just due to the direct impact on club revenues but also the sea change in sentiment it brought with it. It suddenly became apparent that the flood of money had ceased, and all clubs could not stay afloat and resulted in a number of clubs sinking into Administration. Even those which stayed afloat only did so by battening down the financial hatches. We have commented before on the resilience of football clubs and the loyalty of their paying customers; this has in

many cases been severely tested over the past three years. Yet, as we write, none of the top 92 English clubs has been permanently lost to insolvency.

How has this been achieved?
And what does it mean for the market going forward?

In some cases the remedy has been radical, fundamental restructuring of the balance sheet in Administration. We have seen debt investors take a lot of pain to secure any kind of return. As a consequence, institutional debt providers have joined most equity investors on the sidelines of football club finances. Any future securitisations or major debt raising will – and should – be subject to much more rigorous due diligence than was the case three or four years ago. This mirrors the tightening of the equity markets – as football clubs' financial performance disappointed after the mid-1990s glut of flotations. In equity terms, we expect a continued flow of clubs delisting from the public markets, and increasingly robust pre-acquisition due diligence by any private buyers of clubs.

An emotional purchase it may be, but buying a club without the business discipline of proper due diligence is foolhardy.

Aside from balance sheet reconstruction, clubs have also had to tackle their ongoing finances. If long term capital is less accessible then the books must balance day to day. The most immediate sign of stronger financial management is the downturn in the player transfer market. This discretionary spending by clubs has largely halted – with the notable exception of those with very different financial circumstances, such as Chelsea, or the rare 'star player' transactions such as Wayne Rooney's move to Manchester United. Clubs, particularly in the Football League, had little choice but to drastically reduce costs, in the process reducing

squad sizes and retaining whatever player transfer receipts they could generate. Another influential change in the player market has been the relaxation of rules governing loan transfers. These give players the chance to shine elsewhere if they are surplus to requirements at their current club – and give cash strapped clubs an opportunity to improve their squads at reduced cost.

The data is not yet available to analyse definitively the impact on club wages, but all the anecdotal evidence points to a downturn, or at least a freeze, for most clubs, especially those outside the Premiership. The picture in Europe is even clearer than in England – almost all continental clubs have, out of necessity, locked down their spending.

Nonetheless, high pay for the best players will continue. Football is an industry where a small number of individuals are the key content (and therefore value) creators. These key players have a high market value. In other ‘people’ industries, such as some City occupations, similar salaries and a ‘star’ culture are the norm. We are seeing a continuing widening gap in contract terms between star players (who are likely to command high value, long term contracts), and other squad members (who are much more likely to receive shorter term, less lucrative deals).

What we would like to see – as progress has been generally slow in this area – is a far greater performance related element introduced into all contracts (as is the case in the other industries mentioned earlier). This is fundamental to the financial stability of the clubs – and may also have motivational benefits to drive on-pitch performance. We accept though that ‘game theory’ is at work here. Collectively, the clubs have an interest in keeping basic wages low and increasing the importance of performance related elements. But, individually, it appears that clubs still try to seek an edge, and pay a little more. It only needs a few clubs to raise the stakes for the majority to follow to try and keep up. The market for playing talent is fiercely competitive and historically that has driven out all the profits. Football still needs to show – as other industries reliant on talent recruitment and rotation have – that it can generate a return for capital as well as labour.

Overall, we see the changes in the accessibility of the capital markets as permanent for most clubs, and very long term for the remainder. Economic, rather than emotional, investor interest in the sector will take time to recover and will only follow strong evidence of cost

control and profitability in the football industry. Clubs need to continue to convince the market that they can do this. The opportunity is there now to change the game in the player market as that market has tilted back, probably irreversibly, towards the clubs and away from most players and their agents.

Prime time – live and exclusive

Over successive editions of the *Deloitte Annual Review of Football Finance* we have commented on the impact that broadcasting has had on the football industry’s development. Broadcasting income has been the main driver of revenue growth over the past decade. Indeed broadcasting’s influence goes deeper still beyond rights fees as the exposure and glamour draws in new fans and attracts sponsors. Some fret over football’s reliance on TV money and foresee a collapse in incomes. We

The bigger risk to football’s finances is from ill-judged interference in the broadcast market for football from regulators. It would be wrong to try and use football as the tool to shape the European broadcast market.”

are more sanguine, but not complacent. Broadcasters and football enjoy a symbiotic relationship.

As much as football relies on Pay-TV’s cash investment into the sport, Pay-TV uses football to drive up and sustain subscriber numbers. The fact that more mature Pay-TV broadcasters are focussed on increasing average revenue per subscriber to achieve profit growth does not alter that; their challenge would be even harder if

they lost subscribers. While we have seen a correction in rights values, particularly for ‘second tier’ rights, after the speculative phase of three or four years ago, premium rights have held their value. The overall value generated from the recently concluded sales of FA Premier League broadcast rights, for example, remains broadly similar to that generated in 2000, with the slight reductions in domestic rights being partially offset by an increase in revenue from overseas rights. The market for top football content remains strong.

The bigger risk to football’s finances is from ill-judged

Football's finances – never far from the headlines

interference in the broadcast market for football from regulators. Regulators will obviously watch with interest as one leading Pay-TV broadcaster emerges in many European broadcast markets. The regulators are naturally concerned about the possible impact of this on the marketplace and, in particular, consumers. Nonetheless it would be wrong to try and use football as the tool to shape the European broadcast market. Football is making great efforts in disaggregating its rights portfolio into smaller packages and different windows (including carving out packages for emerging technologies) to promote competition and innovation. For example, Video-on-Demand, Broadband and mobile telephony rights all have medium to long term potential to challenge the importance of live TV rights as a delivery platform. A particular area of concern to football is any further regulatory attempt to artificially prevent exclusivity by, for example, forcing individual selling by clubs. This is a recipe for disaster – not just for broadcasters and football clubs but also for fans and consumers. Fortunately in the recent cases involving UEFA's Champions League rights, the FA Premier League and, most recently, the Bundesliga, we have seen strong signs that sense will prevail. We are pleased regulators now apparently recognise collective selling as the glue that holds football together.

Tales of the unexpected

Consider the key points noted above: wary capital markets, no new funds at most clubs to spend on players, and a levelling off of the broadcast market. All these pressures are being felt most by those clubs outside the elite. So, what is the impact, where it matters, on the pitch?

Over the last couple of years we have heard an increasing body of opinion that football is getting 'stale'. This perception is one of increasing certainty of outcome in football, with teams likely to finish in more predictable positions and the development of a series of mini-leagues within leagues. The hypothesis is that – as the business side of football becomes increasingly paramount, it seems perhaps inevitable that those with deepest pockets will succeed. There is, of course, some strength to that case. However, in Serie A the 'flying donkeys' of Chievo Verona, in 2003/04, finished in the top ten for the third successive season, ahead of some of their more illustrious (and wealthy) neighbours. Closer to home, 2003/04 saw Charlton finish in 7th place in the Premiership, while Millwall reached the FA Cup Final. Still more impressive – and unpredictable – was Porto's Champions League victory in a final with Monaco, which was not foreseen at this time last year. To cap this off Euro 2004 delivered Greece, who had

previously never won a game in a major finals, as European champions.

That is the beauty of the game – football remains a game of eleven versus eleven and nothing is certain. This makes it a tough business to manage – plans will go awry – but it is the same magic that draws in the fans and generates the value. That the past few months have shown football still has that magic is of great benefit to the sport in business terms.

Dan Jones & Gerry Boon
Partners – Sports Business Group at Deloitte

For more details about the Sports Business Group at Deloitte – please visit our website at www.sportsconsulting.co.uk.

Note: The topics included in 2004's Deloitte Annual Review of Football Finance cover all the key areas to gain an overview of football's finances. Europe's premier leagues documents England's leading position in European football (in off-the-pitch terms) and provides a detailed review of key developments overseas. The Profitability of English clubs and Player costs – wages and transfers sections again form the backbone of Deloitte's review of the English situation. They aim to provide not only a track record up to the end of the 2002/03 season, but also include some pointers on industry developments in 2003/04 and beyond. Stadium development discusses an area of English clubs' key competitive advantage and continuing developments therein. In Financing the clubs, Deloitte look at the balance sheet of Premiership clubs and the aftermath of a spate of insolvencies amongst Football League clubs. Deloitte's new addition this year is a review of 'Football and tax'. Finally, the Appendices again provide the most comprehensive collection of financial, statistical and reference data on the football business.

The basis of preparation for Deloitte's review, guidelines for interpreting the information provided and some notes on the limitations of published financial information, are set out in the document itself. A review of this nature cannot provide detailed answers to your football business issues – if a business, commercial, financial, tax or accounting issue arises, we suggest you consult your professional advisers.

Highlights of the Deloitte Annual Review of Football Finance
Follow on the opposite page.

Highlights

Europe's premier leagues

- Total income generated by the top divisions of the 'Big Five' leagues was €5.6 billion in 2002/03. This was a 7% increase on the previous season and a near tripling of income since 1995/96.
- Each of the 'Big Five' top divisions experienced revenue growth in 2002/03, with the English Premiership enjoying the largest growth, therefore widening the gap between it, the highest revenue generator at €1.8 billion, and the Italian Serie A, the second highest earner at €1.2 billion. France's Ligue 1 generated the lowest revenue of the five top divisions with €689m.
- Broadcast income remained the most important revenue source for all 'Big Five' leagues in 2002/03 with Serie A the most reliant, where the revenue stream contributed 55% of total income. The German Bundesliga was the least reliant on broadcast income at 33%, having dropped from 40% in 2001/02 due to the collapse of the league's broadcasting deal.
- Total wages and salary costs for the 'Big Five' top divisions stabilised at €3.6 billion in 2002/03, approximately equal to the previous year's total.
- Two leagues, Serie A and the Bundesliga, achieved a decrease in wages and salary costs compared to the previous year, the first time during the period analysed that any league has exhibited a year on year decrease. As a consequence Italy's wages to turnover ratio has dropped from 90% to 76%, whilst Germany had the lowest ratio at 45%
- The variation in operating profit performance between the four leagues analysed is vast. The English Premier League has recorded cumulative operating profits of €930m since 1995/96 – the most of any league; Serie A has recorded combined losses of €1.2 billion over the same period. Encouragingly, whilst England and Germany showed increased profits in 2002/03, Serie A and the French Ligue 1 also halted a worrying increase in the scale of losses over the previous two years.
- The estimated broadcast income from 'Big Five' league domestic live and highlights deals in 2002/03 was €1.8 billion although the changing broadcast landscape in several countries has affected rights values. There is a disparity in the capacity to earn broadcast income between clubs within the same league, which is exacerbated in those leagues where clubs sell rights individually.

- Each of the 'Big Five' leagues has experienced the regulator's influence on their media rights selling strategies in recent seasons. The industry should be wary of assuming any particular judgement or ruling from another league or 'market' will apply universally as each situation is unique. Whilst recognising the regulator's well meaning intentions, football must continue to 'sell its case' regarding the specific benefits its arrangements bring – in solidarity between clubs and a coherent product for fans, to name but two.
- The Bundesliga's average attendance was 35,048 in 2003/04, the highest amongst the 'Big Five' leagues, and the first time since 1998/99 that the English Premiership hasn't been the highest. Despite this, the Premiership's average stadium utilisation was 95% compared to the Bundesliga's 78%.

Profitability of English clubs

- In 2002/03 the 92 top professional clubs generated total revenue of £1,658m – up 4% from 2001/02.
- The total revenue of Premiership clubs was £1,246m, up 10% on 2001/02 (£1,132m) maintaining the League's position as the 'European and world champions' in terms of revenue generation.
- The loss of ITV Digital monies resulted in total Football League clubs' revenue falling by 12% to £412m – the majority of the drop occurring in Division One (down 14% to £255m).
- Manchester United headed the Premiership 'revenue league table' at £175m, followed by Liverpool and Arsenal (both at £104m). At the other end of the table was West Bromwich Albion (£28m). In 2002/03, the average Premiership club generated revenue of £62.3m.
- Premiership clubs' matchday income increased to £363m – driven by a 3% increase in Premiership attendances, more European matches and increased ticket yield.
- Commercial revenue was almost unchanged, at £340m in total, in part reflecting the tough market for sponsorship and advertising.

Highlights

- The Premiership clubs' largest source of revenue came from broadcasting – 44% of the total at £543m. Looking back a few years, broadcasting was the smallest revenue source. In 1996/97, broadcasting monies were less than £100m, representing just 21% of Premiership clubs' total revenue and, in 1991/92, were less than 10% of revenues at a mere £15m.
- In the 2003/04 season just ended Premiership clubs are estimated to have generated turnover of £1.33 billion, which we forecast will increase further to £1.36 billion by 2004/05.
- Premiership clubs reported overall operating profits of £124m – a record high since the formation of the Premier League and a healthy 10% margin – with 16 of the clubs making operating profits. By contrast, pre-tax losses rose to £153m and only five of the clubs made a pre-tax profit.
- The apparent paradox – of a record level of Premiership clubs' operating profits and pre-tax losses in the same year – is largely the product of high player amortisation costs (a legacy of high transfer spending in the past) and much reduced profits on player disposals (as transfer spending was much reduced in 2002/03).
- Contrary to the speculation from some commentators that media values might collapse, the deals announced so far by the Premier League, and press comment about other deals yet to be announced, indicate that monies to Premiership clubs for the next period should be in line with the previous broadcast deals.
- The four English clubs competing in the Champions' League in 2002/03 – Manchester United (to Quarter Final), Arsenal (2nd round group stage), Newcastle United (2nd round group stage) and Liverpool (1st round group stage) – received approximately £49m from UEFA between them.
- The gap between the Premiership and Division One grew again in 2002/03, with the average Premiership club having revenue almost six times greater than its Division One counterpart.
- The 2004 prize for Crystal Palace winning promotion to the Premiership (even if the club 'yo-yo's' straight back down) was around £35m – making the Division One Play-Off Final the 'richest game on earth'.
- Manchester United were again top in terms of operating profit. Their profit of £47.8m increased their Premiership record (previously £34.5m in 2001/02). Furthermore, their cumulative 5 year operating profits of £174m were well over three times those of their nearest rival – Newcastle United at £52m.

Player costs – wages and transfers

- In the 2002/03 season, Premiership clubs' total wages and salaries (i.e. not just players' wages) grew by 8% to £761m, the lowest rate of increase since the formation of the Premier League, and well below the average annual increase of c.25% over the previous ten years.
- The 15 clubs for whom we have accounts and who were in Division One in both 2002/03 and in 2001/02 saw total wages and salaries drop by 2%. For the division as a whole however, the wage bill grew slightly to £228m (a 6% increase). Lower down the pyramid, total wages and salaries amongst clubs in Divisions Two and Three declined in absolute terms.
- With some notable exceptions, it appears that clubs have also been relatively restrained, in terms of wage increases, in the 2003/04 season.
- The ratio of total wages to turnover – a key financial performance indicator in football – for the average Premiership club fell to 61% in 2002/03 (2001/02: 62%). West Bromwich Albion, Manchester United and Newcastle United all had ratios below 50%. The equivalent ratio for Sunderland, Fulham and Leeds United was over 80% in each case.
- The surplus of Premiership clubs' turnover over total wages was at a record high of £485m (2001/02: £426m).
- The average total wages and salaries cost for a Premiership club in 2002/03 was £38m (2001/02: £35m). Manchester United had the highest total wages costs (as was the case in 2001/02) of £79.5m and the lowest was West Bromwich Albion (£11.5m).
- As in the previous season, in 2002/03 there were five Premiership clubs with a total wages cost (not just players) over £50m – Manchester United (£79.5m), Arsenal (£60.6m), Leeds United (£56.6m), Chelsea (£54.4m) and Liverpool (£54.4m).

- Unfortunately, the reduction in turnover – which was somewhat outside their control – for clubs in Divisions One and Two was greater than the amount by which clubs managed to reduce their wages and salaries costs. Hence, the overall wages to turnover ratio in each of those divisions increased in 2002/03 to 89% and 85% respectively.
- The average wages to turnover ratio for clubs in Division Three – the least affected by ITV Digital's demise – reduced to a more sustainable level of 68%. This improvement appears to have been further reinforced in 2003/04, the first season of implementation of the 'salary cost management protocol', that is to be extended to Division Two clubs from 2004/05.
- Total payments in respect of players (wages plus transfers) have fallen by 5% to £852m. This is a monumental change – the first recorded year on year decrease in player spending since we started producing the Annual Review 12 years ago.
- The total of transfer fees committed by English clubs in 2002/03 (of £203m) was down 50% on the total in the previous season (2001/02: £407m).
- The total of transfer fees committed by Premiership clubs in 2002/03 (of £187m) was down 42% on the total in the previous season (2001/02: £323m) and transfer spending by Football League clubs fell dramatically from £84m in 2001/02 to only £16m in 2002/03, a decrease of 81%.
- The most significant change in 2002/03 was the reduction in the amount of money spent by Premiership clubs on buying players from non-English clubs. In 2001/02 transfer spending by Premiership clubs with non-English clubs was down 48% to £101m (2001/02: £195m), thereby keeping more money within the English game.
- Of the £187m committed by Premiership clubs, a net £32m was re-distributed to Football League clubs – this is almost double the £18m re-distributed in 2001/02.
- Significant transfer spending by Chelsea over the past year – reportedly over £120m (aggregate of summer 2003 and January 2004 windows) – means we expect that total transfer spending by Premiership clubs in 2003/04 will have risen again, to around £260m. However, this is still well below the peak of £364m in 2000/01, which is unlikely to be exceeded again.
- Over the 12 year life of the Premier League, Premiership clubs have provided a total of around £600m in transfer fees to Football League clubs.
- Since the end of the 2002/03 season, transfer spending by Football League clubs has continued to be minimal. Clubs are no longer prepared to, nor need they, spend significant sums on acquiring player registrations. As we predicted, the 2001/02 season was a watershed and the subsequent financial results demonstrate that the market has changed.
- The January 2004 transfer window spending by Premiership clubs was estimated by Deloitte at under £50m, and non-English clubs barely spent at all (less than £10m across Italy, Spain, Germany and France).
- The summer 2004 transfer market has continued the trend from the January 2004 transfer window, with transfer activity remaining relatively muted even after Euro 2004.

Stadium development

- Total spending by English clubs on stadia and facilities in 2002/03 was £176m, taking the total investment in the post-Taylor era to over £1.6 billion.
- Spending by Premiership clubs on stadia and facilities was £133m in 2002/03. This was the sixth successive year when facilities investment by Premiership clubs exceeded £100m and brings spending, since 'Taylor', to almost £1.2 billion.
- Arsenal was, by far, the club who invested most in facilities in 2002/03, comprising £80m of the £176m total. Arsenal is expected to stay at the head of the investment list until completion of Ashburton Grove – which is planned in time for the 2006/07 season.
- In 2002/03, average attendances at Premiership matches topped the 35,000 mark – the largest top division average since the 1950/51 season, and a 3% increase on the previous season. Overall capacity utilisation rose to 93.8%.
- Largely due to a change in the 'mix' of clubs, the average Premiership attendance in the 2003/04 season just ended fell back a shade to 35,008, although capacity utilisation improved further to 94.7%.

Highlights

- The total capacity of Premiership stadia in 2003/04 (of 739,000) is 89,000 (14%) greater than six years ago (1997/98: 650,000).
- Whilst capacity utilisation now stands at 94%+, Deloitte estimate that there was still around £19m worth of empty seats at Premiership matches in 2002/03 and around £16m in 2003/04 – a further opportunity – along with more sophisticated pricing of existing sales – for the application of yield management techniques to maximise revenues.
- Football League attendances totalled 15.9m in 2003-04, a 7% increase on the previous season. Aggregate attendances for the three divisions below the top flight are now at their highest level since 1963/64 and more than double the aggregate crowds for these games in the mid 1980s. The average Division One attendance in 2003/04 was 15,890, a healthy 45% of the size of the average attendance at a Premiership game.

Financing the clubs

- There was £1.05 billion of total 'Capital Employed' amongst Premiership clubs in summer 2003. Only 18% was from bank borrowings – bank loans and overdrafts, net of cash at bank, was £187m. Total borrowings were £704m, such that the overall gearing ratio (of debt to shareholders' funds) was 204% (2002: 137%).
- Over recent years, several Premiership clubs have used alternative financing mechanisms – in particular, securitisation of ticket receipts and specialised player financing methods – to supplement traditional finance sources. Generally, these monies are included in other loans, which stood at £505m for Premiership clubs at summer 2003. The flow of such deals appears to have 'dried up' in 2003.
- Net Interest charges from finance providers increased to £44m (2001/02: £30m), but interest cover remained in excess of 2 1/2 times.
- Dividend payments to shareholders were a modest £14m (2001/02: £11m).
- At summer 2003, Fulham (£133m) topped the table for net debt, albeit £91m of the balance was 'soft' loans. The next two clubs in the table of net debt were Leeds United (£78m) and Chelsea (£75m). In both cases, albeit in rather different circumstances, there has been a restructuring of each club's finances since their last annual financial statements.
- At summer 2003, Manchester United (£157m) topped the table for net assets, more than double their nearest rival (Arsenal – £76m). Overall net assets for Premiership clubs were £345m.
- Amongst Division One clubs, bank borrowings (£115m; 57% of capital employed) are a relatively more important source of financing than for Premiership clubs (£186m; 18% of capital employed).
- A record number of clubs entered insolvency proceedings during 2002 and 2003 (seventeen Football League clubs in total). As we predicted, the Football League has come through a particularly challenging couple of years with a full complement of clubs intact (just!).
- Division One clubs had a deficit in shareholders' funds of £78m at summer 2003, compared to a surplus of £37m the previous year – a 'swing' of £115m. This is largely due to the change in mix of clubs between seasons and losses in the 2002/03 season.
- There is an increased air of financial realism at Football League clubs. Better financial management is being further encouraged and supported by structural changes such as sporting sanctions for insolvency, limits on wage spending, parachute payments between the divisions of the Football League and division dependent pay levels for players.
- There is an increasing amount of supporter involvement in the ownership and operation of clubs, particularly below the Premiership. Primarily this has been driven by the supporters' trust movement, that has contributed over £2m of fundraising to clubs in 2002/03. While this amount itself is relatively small, in the overall context; the principle, and achievements, of supporters trust involvement has had a big impact. A strong relationship between club and community is also good for business.

Football and tax

- The football industry continues to generate substantial tax receipts for Government. Clubs in the top four divisions of English football paid around £550m of tax to Government in 2002/03.
- The estimated annual tax take of around £550m is almost four times greater than in 1995/96 (£149m). And, the tax burden is increasing – the rate of compound annual growth in the tax take (21%) exceeds the rate of growth in football's income (18%) over that period.
- The Premiership clubs are estimated to have paid around £394m in tax (PAYE/income tax; National Insurance; VAT and corporation tax) in 2002/03.
- During the 12 year life of the Premier League, Premiership clubs have provided a total of around £2.5 billion of tax receipts for Government. The total contribution by clubs in the top four divisions, over that same period, is over £3 billion.
- The substantial tax contribution, together with the investments by clubs into grassroots and social initiatives, mean that the clubs are a significant contributor of funds for the wider public benefit, estimated to be over £600m for 2002/03.

Basis of annual review & interpretation of appendices

Basis of preparation

Our review of the financial results and financial position of English football clubs, and comparisons between them, has been based on figures extracted from the latest available company or group statutory financial statements – which were either sent to us by the clubs or obtained from Companies House.

Our review of the financial results and financial position of various European Leagues, and comparisons between them, has been based on figures extracted from the company or group financial statements, information contained in publications by other country practices of Deloitte Touche Tohmatsu or from information provided to us by national associations/leagues.

In relation to estimates and projections, actual results are likely to be different from those projected because events and circumstances frequently do not occur as expected, and those differences may be material. Deloitte can give no assurance as to whether or how closely the actual results ultimately achieved will correspond to those projected and no reliance should be placed on such projections.

Availability of financial information regarding football clubs

For the 2002/03 season there were twenty three clubs, in the 'top four divisions' of English football, for whom financial statements were not available to us at June 2004.

Any clubs for which 2002/03 accounts are not available to us have been omitted from the analysis. Divisional totals have been 'grossed up' – in general by using the relevant averages for the division – to represent the full divisional total for comparison purposes (from year to year or between divisions). Where necessary, the aggregate divisional totals for European Leagues have been 'grossed up' in a similar manner.

Limitations of published information

As noted above, our review has been based on figures extracted from company or group financial statements. This results in occasional difficulties in directly comparing clubs due to:

- *The different levels of disclosure, due to the inherent limitations of relying on published accounts – some of which for smaller clubs are in the form of abbreviated accounts – and information provided by clubs, particularly on the split of turnover and their commercial activities;*
- *The increasing diversity of activities carried out within some companies/groups, many of which are, but some of which are not by virtue of size/nature of activity, incidental/ peripheral to the core football business; and*
- *The accounting policies adopted by clubs and how such accounting policies are applied in practice, which can vary significantly. For example, differences in stadium depreciation policies can have an impact on reported profitability.*

In a few cases we have made reclassification adjustments to the disclosed figures to enable, in our view, a more meaningful comparison of the financial results of the football business on a club by club basis. We have not performed any verification work or audited any of the information contained in the statutory financial statements for the purpose of this report.

The aggregated results shown in the report for the clubs in the top four divisions of English football are not a true consolidation exercise because transactions between clubs, such as the transfer of player registrations, are not eliminated.

Figures for 2001/02 have been restated, from those disclosed in last year's Annual Review of Football Finance, for those clubs who have restated the comparatives in their later sets of accounts.

Divisional totals

The totals, for both years, for each division in Appendices 1-4 are for the clubs which comprised that division in the 2002/03 season. Where comparisons have been made, in the review itself, of League or Divisional totals, we have used – for 2001/02 and earlier seasons – the relevant totals for the divisional composition in that season.

Wages and salaries

The published financial statements of clubs rarely split wages and salaries costs between playing staff and other staff. Therefore, the great majority of references in this review to wages and salaries relates to the total wages and salaries for a club/division, including playing and non-playing staff.

Exchange rates

For the purpose of our international analysis and comparisons we have converted all figures into Euros using the exchange rate at 30 June 2003 (£1=@1.437).

Sports Law Foreign Update

Compiled by Walter Cairns

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The Current Survey of the Sport and the Law Journal has hitherto provided an update on general developments in the field of sports law, both at home and abroad.

However, this is a task which has fallen exclusively on one pair of shoulders, and has become increasingly difficult to complete without endangering the author's health and sanity.

This is why it has been decided that this column will henceforth concentrate on developments abroad. The term "abroad" is understood to have the broadest possible meaning, in the sense that it will not exclude home developments where international events have an impact in this country. The structure will remain virtually unchanged from the formula hitherto adopted, namely:

1. General		
Conferences, meetings, lectures, courses, etc.	45	
Obituaries	45	
Lawyers in sport	45	
Digest of other sports law journals	45	
Sport and international relations	46	
Other issues	52	
2. Criminal law		
Corruption in sport	53	
Hooliganism and related issues	55	
"On-field" crime	58	
"Off-field" crime	61	
Other issues	64	
3. Contracts (including employment law)		
Media rights agreements	65	
Legal issues arising from transfer deals	65	
Employment law	65	
Sporting agencies	66	
Sponsorship agreements	66	
Other issues	66	
4. Torts and insurance		
Sporting injuries	67	
Libel and defamation issues	68	
Insurance	68	
Other issues	69	
5. Public law		
Sports policy, legislation and organisation	70	
Public health and safety issues	72	
Nationality, visas, immigration and related issues	72	
Other issues	72	
6. Administrative law		
Planning law		73
Judicial review (other than planning decisions)		73
Other issues		73
7. Property law (including intellectual property law)		
Land law		74
Intellectual property law		74
Other issues		76
8. Competition law		
National competition law		77
EU competition law		77
9. EU law (excluding competition law)		78
10. Company law (including sports associations)		
Bankruptcy (actual or threatened) of sporting clubs & bodies		84
Other issues		84
11. Procedural law and Evidence		85
12. International private law		85
13. Fiscal law		85
14. Human rights/Civil liberties (including race and gender issues)		
Racism in sport		86
Human rights issues		86
Gender issues		86
Other issues		87
15. Drugs legislation and relates issues		
General, scientific and technological developments		88
Doping issues and measures – international bodies		89
Doping issues and measures – individual countries		89
Doping issues – individual sports		90
16. Family Law		94
17. Issues specific to individual sports (including disciplinary proceedings)		
Football		95
Cricket		95

1. General

Conferences, Meeting, Lectures, Courses, etc.

Belgian debating forum on the Voetbalwet (Law on Football)

As has been the case in most countries where football attracts a considerable following, Belgium has in recent years been compelled to issue legislation aimed at securing the safety of all those involved in the game. On 11/5/2004, the Fortis Bank Antwerp organised a debating forum on this subject, in co-operation with the University of Antwerp. The occasion was the fifth anniversary of the entry into effect of this legislation. (Also on the subject of the Voetbalwet, see below, p.57 under the heading "Hooliganism and related issues").

Obituaries

Jesus Gil¹

Spanish football has always been surrounded by an array of colourful characters. Prominent amongst these as been Jesus Gil, property tycoon and populist Mayor of the seaside resort of Marbella who was also the flamboyant president of the top Spanish side Atletico Madrid.

Although extremely popular with the club's supporters, the publicity which he attracted was not always of the most fortunate type. Many top managers joined and left Atletico in rapid succession, and Mr. Gil was frequently the subject-matter of disciplinary measures taken by the Spanish football authorities for his overt reactions to some refereeing decisions.

Mr. Gil embarked on his business career by trading in vehicles. His political career went hand-in-hand with his progress as a businessman, in that the former began as a means of facilitating the latter, more particularly his various property deals. When he experienced the Socialist council in Marbella as an obstructive force, he established a new political party, called the Grupo Independiente Liberal (GIL) and sought election as Mayor in 1991. He won a famous victory on the strength of his pledge to reduce crime rates and build cheap housing, and served for over a decade.

Once elected, the name of the resort over which he presided started to be featured on the shirts of Atletico's players. This connection was one of many controversies which later would return to haunt him. In 1998, an inquiry was launched into his business affairs, and the following year he was detained by the authorities following accusations of diverting the club's finances into Marbella's coffers. He was, however, released on bail within a week. The actual trial occurred in 2000, and was based on charges which included

defrauding his club of over £40 million. As a result, he was banned from mayoral office for 28 years, and was also found guilty of using Atletico in order to further his political interests. In a later case, he was jailed for a term of three years.

Ratu Sir Kamisese Mara

The colourful Prime Minister and President of Fiji, who died in April 2004, had a notable sporting achievement to his credit in 1956 when he led the Fijian cricket team to victory over Denis Atkinson's West Indians in a one-day fixture in Suva².

Lawyers in sport

[None]

Digest of other sports law journals

Recent issues of *Zeitschrift für Sport und Recht*

In the second issue for this year³, this German sister journal features in the first instance an article examining the legal relations between the sporting performer and his manager. The authors, Ilkin Karakaya and Bernhard Kretschmer, seek to establish whether in fact this relationship does not constitute an arrangement which infringes public morality. It is from this angle that they analyse the various legal issues arising from the contracts which underlie this relationship, such as exclusive dealing agreements, as well as the general rights relating to the performer's personality and his/her marketing potential. It is particularly in relation to the duration of the contract and the transfer of players that, in the authors view, principles of public morality are being infringed in individual cases.

In "The initial imposition of a sporting federation penalty by arbitration courts acting as organs of the federation" Bernhard Reichert examines the underlying problem in the light of recent decisions on the subject, more particularly a ruling recently issued by the Sports Arbitration Court of Frankfurt. The author asserts that, according to the existing case law and the opinion of leading writers, the constitution of a sporting federation may only confer on an arbitration court the power to review such penalties as have already been imposed by the federation, and that the same applies to other legal disputes arising from the federation's activity. The court decisions on this issue indicate clearly that an arbitration court may not exercise the federation's disciplinary powers acting as an organ of the federation.

The author Harald Schießl examines the liability incurred by the Chairman of a sporting club for the latter's fiscal obligations, following a recent decision by

1. General

the German Federal Court of Taxation (Bundesfinanzhof). Club boards very often underestimate the strict implications of income tax liability. This has prompted the author to describe the extent of the club boards' liability in this respect and to sketch out a number of strategies aimed at limiting its effects. This is followed by an article authored by Gregor Reiter, who examines the question of whether players' licences in semi-professional football should be included in the clubs' balance sheet. This is a highly topical issue, since the European Commission is currently investigating certain accounting practices of football clubs in connection with the state aids given to Italian clubs in the shape of the Law on Debt Deferrals. The author arrives at the conclusion that players' licences are marketable commodities. Consequently, their current position in relation to the balance sheet is unlawful since it infringes the principle of creditor protection laid down in the Commercial Code (Handelsgesetzbuch) and as such distorts competition. Finally, Regine Reim, a practising lawyer, describes the emergence of a body of sports law in the countries of Central Asia, focusing more particularly on Kirgistan. She arrives at the conclusion that the increasing commercialisation of sport should enable issues of sports law to be settled in all legal cultures and to become the subject-matter of official regulation.

In the third issue for 2004⁴, the author Rainer Cherkeh concerns himself with the tensions which may arise in the relations between sporting clubs and their key performers, more particularly the rule that participation in top sporting competitions is dependent on the conclusion of a sporting performer's contract (Athletenvereinbarung). This is the practice known as Kontrahierungszwang (obligation to contract), and the author examines the question whether this obligation can be justified taking into account the various conflicts which may arise in this regard, in particular the way in which this can reduce the athlete's marketability. The author Andreas Sauer then analyses the competition law aspects of the way in which television rights to the German Football League (Bundesliga) are centrally marketed. The author examines, in the light of the planned exemption of the German Football Association from the rule prohibiting cartels, the problems which arise from this situation, taking into account the various possibilities which exist for the marketing of broadcasting rights. The question whether this practice is contrary to competition law is examined in the light of Article 81 of the EC Treaty. The author reaching the conclusion that central marketing of these rights remains an infringement of competition law.

Next, Michael Winter examines the problems arising from the practice whereby the organisers of sporting

contests refuse access to those seeking to broadcast brief news reports on the event. Under Article 5 of the State Broadcasting Agreement (Rundfunkstaatsvertrag) the right to broadcast brief news reports is restricted to television broadcasts. The author pleads in favour of an extension of this right to radio broadcasting. In the next contribution, Wulf Hambach examines the current state of the case law on the lawfulness of privately organised sports betting, in the light of the European Court of Justice decision in Gambelli and the a recent judgment of the Bavarian Court of Appeal. The author analyses the lawfulness of the restrictions imposed by the state on the sports betting market, and points to the policy adopted by the ECJ since 1999, namely that only urgent considerations can justify any restrictions on the lawfulness of betting. The author claims that these urgent considerations were not present in the case of the Bavarian Court of Appeal decision, when compared with the leading decisions of the civil and administrative courts.

Finally, Anne Jakob examines the liability for injuries sustained by top sporting performers as a result of mistaken decisions on their ability to play. There are a number of cases in which players have been injured during top sporting competitions and for whom there were significant differences of opinion amongst the doctor, the manager and the federation. The author considers it necessary to establish a clear demarcation between the responsibilities of the relevant consultants and decision-makers in this field. In addition, there needs to be an examination of the factual circumstances attending each individual case in order to arrive at appropriate conclusions as to whom should be adjudged to be liable.

Sport and international relations

"Zimbabwean question" continues to cause havoc in cricketing world

Readers will recall from previous editions of this Journal that the participation of Zimbabwe in the world of international cricket has increasingly come under strain, in view of the serious human rights abuses which have been common practice in that country over the past decade. It will be recalled that the English cricket team decided that their World Cup fixture with Zimbabwe in early 2003 should not go ahead, with serious financial consequences for the England and Wales Cricketing Board (EWCBCB)⁵. Other parts of the cricketing world have also engaged with this issue, to the point where the future of Zimbabwe's participation in the game has become seriously endangered.

The immediate focus was the tour of Zimbabwe by the England team which was planned to take place in

1. General

the autumn of 2004. It was known that many of the players, as well as sponsors, had grave doubts about the tour, and that the British Government was opposed to it. However, as a result of a change in the rules of the International Cricket Council (ICC) cancellation of the tour could mean a fine of £1.1 million for the England team, as well as suspension from international cricket for failure to meet their obligations. It was also feared that preventing the tour from going ahead would endanger London's bid for the Olympic Games in 2012⁶. The only hope for the EWCB seemed to be to persuade the ICC that the British Government's opposition to the tour could be covered by the force majeure clause in the ICC regulations; however, this plea was felt to be unlikely to succeed.

As a result, the EWCB became increasingly reluctant to contemplate cancellation. Instead, it would offer the players the option of withdrawing from the tour, removing advertising logos from the players' kit as a result of the opposition to the tour expressed by sponsors Vodafone, and offering minimal co-operation with official commitments on the tour⁷. Several days later, EWCB Chairman David Morgan confirmed that the Board had abandoned any notions of cancelling the tour, unless the Government officially directed them differently or there were sufficient safety concerns to justify cancellation⁸.

Meanwhile in Zimbabwe itself, trouble was brewing between the Zimbabwe Cricket Union (ZCU) and the nation's leading players, when the ZCU announced that the captain, Heath Streak, had been removed from his position. This followed criticism made by Mr. Streak of the composition of the five-man team national selection panel⁹. More particularly he had expressed the opinion that the panel should be reformed to consist of members who had experience of first-class cricket. This sparked off a furious reaction amongst the other players, who set the ZCU the ultimatum of reinstating Streak or face a mass resignation by virtually the entire first-class team¹⁰. Although the ZCU Board gave a tentative undertaking to examine the composition and structure of the selection panel, they were unmoved on the subject of Mr. Streak. Ten members of the side were dismissed when they failed to report for provincial fixtures, despite having had their absence sanctioned by Vince Hogg, the managing director of the ZCU, who was then overruled by the ZCU Board¹¹.

Not unnaturally, the ICC became increasingly concerned at the turn of events in Zimbabwe, and urged its players and cricketing authorities to resolve the dispute¹². Several days later, 13 leading white cricketers released an open statement criticising the political interference which they claim was eroding the game in Zimbabwe. The players stated that:

"if we do not make a stand, we believe that incalculable damage will be done to the game. We believe that politics should play no part in sport and that the ZCU has fallen prey to a small clique of people who do not have the interests of cricket at heart but are simply motivated by non-sporting considerations. We believe that we have no option but to collectively stand up for our principles. Unless we take action, the cancer that is eroding the game in Zimbabwe will not be dealt with"¹³

Even though initially it seemed that the ZCU were prepared to make certain concessions, negotiations between the ZCU and the leading players collapsed. As a result, the 13 signatories to the statement referred to above made themselves unavailable for the forthcoming one-day fixture against Sri Lanka. As a result, the national side took the field with seven uncapped players and only four who could possibly claim to make the first team in merit. The leading players were hoping that the expected humiliation of the team in that match could prompt a rethink on the part of the ZCU¹⁴. The ZCU also threatened to sue the leading players for breach of contract if they failed to report for practice¹⁵. The 13 players failed to turn up, as a result of which the Board initiated legal proceedings. The players responded by taking out legal proceedings of their own, also based on breach of contract. The two parties were given 21 days in which to settle their differences, failing which the matter would be dragged into the courts¹⁶. In the meantime, two more players, Charles Coventry and Gavin Ewing, had had their contracts terminated by the ZCU after pledging their allegiance to their rebellious colleagues¹⁷.

The dispute took on a new dimension a few days later, when it was revealed that three black players, Douglas Hondo, Dion Ebrahim and Mluleki Nkala, were also giving serious consideration to their future as members of the Zimbabwean Test and one-day squads¹⁸.

Three delegates from the ZCU, Peter Chingoka, Alwyn Pichanick and Ozias Bvute, travelled to London in order to explain their role in the dispute to the EWCB. The Zimbabwean representatives emphasised to the EWCB that Zimbabwean cricket would face serious financial problems if the Board decided to cancel the planned autumn tour¹⁹. Their cause was not helped when it was learned that Mihir Bose, the sports news correspondent of The Daily Telegraph, had been deported from Zimbabwe as he arrived in Harare to cover the Sri Lanka international²⁰. The ECWB, for its part, had in the meantime postponed a crucial vote on the question whether the Zimbabwe tour should go ahead²¹. It was also revealed that the Board would not make a final decision until it had met Foreign Secretary Jack Straw and the Culture, Media and Sport secretary

1. General

Tessa Jowell²². The Foreign office, however, made it clear that it would not deviate from its original course, which was to condemn the tour without actually ordering it to be cancelled. The EWCB's position became even more confused when it was learned that des Wilson, who had been employed by the EWCB in order to develop an ethical stance over the tour, had resigned because of profound differences with the rest of the Board as to the strategy to be adopted²³.

Towards the end of April, the ZCU claimed that it had agreed a mediation procedure with the 15 rebels – only to have this disputed by a player hours later. The ZCU had issued a statement whereby the players had been issued with a proposal that they should make themselves immediately available for selection, and that if this were done, a mediation procedure would be instituted in order to ventilate the players' outstanding grievances before an independent mediator. However, an unnamed player later denied that the mediation process had been confirmed²⁴. Nevertheless, Heath Streak was prepared to consider these proposals, and he announced that Much Musunda, a respected and prominent businessman, had been agreed as mediator between him and the ZCU, and that his name would be proposed to the other players as an acceptable neutral person²⁵.

The next day, it was announced that Mr. Streak and his fellow-rebels had agreed to resume active duties with the ZCU, whilst emphasising that this was by no means to be interpreted as a sign that the dispute with their employers was at an end. They also stressed that they remained united in their determination to have their conditions met²⁶. This move meant that they were no longer in breach of contract and thus removed one of the major planks of the ZCU's case against them²⁷. Any hopes that this heralded a reconciliation between players and authorities were quickly dashed the next day, when the rebels announced that they would not be reporting for practice or making themselves available for the first test against Sri Lanka, scheduled to commence the following day. Following a protracted meeting with their lawyers, the players rejected the ZCU mediation offer on the grounds that only legally binding "arbitration" of their fundamental grievances would work in the long term. The ZCU responded by a statement in which they indicated they were still prepared to accept Much Musunda as mediator, but reprimanded players who had made public statements in contravention of their contracts, as well as denying any racial bias in their selection procedures²⁸.

The rebels then informed the Union that, if they were not granted the legally binding arbitration they sought by the next day, they would tear up their contracts. They indicated their opinion that the dispute

was going nowhere, and that an issue had to be forced one way or another²⁹. Several days later, the ZCU formally dismissed the 15 rebels, claiming that the latter had violated a 21-day breach clause in their contracts by carrying out their threat and failing to return to work by 7 May. This decision was announced as players in the rebel group were meeting their lawyers in order to draft their agreement to the Board's offer of mediation to resolve the dispute³⁰. This meant that the older players amongst them, such as Grant Flower and Heath Streak, had almost certainly played their last international fixture, whereas the remainder were likely to be kept in the wilderness until a new regime was appointed to manage the game in Zimbabwe³¹.

The crisis deepened when the ICC, which was becoming increasingly alarmed at this turn of events, intervened and Malcolm Speed, the ICC Chief Executive, gave the ZCU 24 hours in which to resolve the long-running dispute with the players. Mr. Speed indicated that he could not rule out the possibility of postponing the country's test series against Australia, scheduled to start later that month. Mr. Speed had attempted to assist with the process of ending the standoff between players and selectors, but a scheduled meeting between him and the ZCU had failed to take place. He had been invited to address the ZCU Board, but headed back for London after the ZCU appeared to change its mind and refused to allow him into a meeting. The ICC stressed, however, that Mr. Speed had not been acting as mediator between the two sides³². The ZCU then virtually begged the rebel players to make themselves available for the Australia test, but the latter refused³³.

Meanwhile, the future of Zimbabwean participation in top cricket was cast further into doubt when it was learned that Australian leg spinner Stuart MacGill had decided to pull out of the proposed tour of the country by Australia on moral grounds. He informed a leading newspaper that he would not be able to maintain a clear conscience playing in a country under the regime of President Mugabe. It also emerged that several other Australian players were entertaining severe doubts as to whether they should participate in the tour³⁴. The Australian Prime Minister, John Howard, congratulated Mr. MacGill on his "strength of character" (conveniently omitting his own deficiencies in this department, given that he had failed to give a clear lead on the question whether the tour should go ahead³⁵). Later, a former Cabinet minister of Mr. Howard's Liberal party, Bronwyn Bishop, aired the view that the Australian Government should consider paying the fine which would be imposed for cancelling the tour in order to enable the Australian cricket team to withdraw. She stated that she had serious misgivings about the tour, and that she

1. General

backed Stuart MacGill's decision³⁶. It was also learned that Archbishop Desmond Tutu, the South African prelate, was urging England's cricketers not to tour Zimbabwe because of the human rights abuses under the Mugabe regime³⁷.

Domestically, opposition to visiting tours was also on the increase. In mid-May, Morgan Tsvangerai, the Leader of the Opposition in the Zimbabwean Parliament, called on the EWCB to abandon the autumn visit. Mr. Tsvangerai, a member of the Movement for Democratic Change (MDC), also called on Commonwealth countries to collaborate in order to boycott the ZCU³⁸. Heath Streak himself, who not so long ago was urging England to persist with their tour, now urged the latter to cancel it in view of the many grievances which the players had against the ZCU, as outlined earlier³⁹. The players' international trade union, the Federation of International Cricketers' Associations (FICA), added their voice to the calls for the players of both teams to boycott the forthcoming one-day series against Australia, in a joint show of force aimed at saving the careers of the 15 dismissed players. These dismissals had goaded the FICA into open rebellion against the ZCU board. It hoped that the boycott might prompt the resignation of the current ZCU Board members so that they could be replaced by a more moderate body, which appeared to be a wildly optimistic objective⁴⁰.

The prospect of Zimbabwe having its Test and one-day status removed intensified when the attitudes of the influential Australian cricket board appeared to harden. Cricket Australia's Chief Executive, James Sutherland, indicated that sending Zimbabwe into Test exile was to feature on the agenda of the ICC annual general meeting in June. Earlier, the ZCU had capitulated to pressure from the ICC by postponing the two-Test series against Australia, which had avoided an immediate ICC vote on a motion stripping Zimbabwe of its Test status. It was anticipated that Zimbabwe's Test status would not survive another vote if the dispute with its players was not settled before mid-summer⁴¹.

The future of Zimbabwean cricket was also narrowly linked to the continuing controversy surrounding the planned England tour in the autumn of 2004. It had already been indicated that a definite decision to cancel the tour by the British Government would be the decisive move on this issue, but thus far the Blair government had restricted itself to expressing its opposition without actually ordering its cancellation. In late May, the ICC called on the British Government to take a clear-cut decision on the matter⁴². This was in part to spare the EWCB the crippling financial consequences which would flow from cancellation, as outlined above. However, the British Government failed to change its

position. It then emerged that a deal had been struck in Dubai between Zimbabwe cricket officials and the ICC. Under this arrangement, the tour would still go ahead, but the test matches would be abandoned, leaving only the one-day internationals to be honoured. The Test series against Pakistan was also to be scrapped. However, Zimbabwe would not be stripped of its test status, and the series scheduled for January 2005 against Bangla Desh was still set to go ahead⁴³. The Dubai meeting also addressed the issue of racism, and the ICC representative insisted that the ZCU should submit itself to an independent investigation which would consider the various accusations of racism made by the 15 white rebel players⁴⁴.

It was later confirmed by David Morgan, the Chairman of the EWCB, that England would play five one-day internationals in Zimbabwe during the winter of 2004. This seemed to have drawn a line under the EWCB's prevarications on this matter. The ICC, for its part, remained adamant that Zimbabwe should retain its one-day international status as a "pathway" for the players towards the Test series against Bangla Desh. However, the ICC President indicated that the ICC remained highly critical of the manner in which the ZCU had handled the players' dispute. He issued the ZCU with a 14-day deadline to reach agreement with the rebel players. If that deadline were passed, the ICC would appoint a dispute resolution committee (DRC) in order to examine all the evidence in this matter⁴⁵. The ZCU agreed to take part in arbitration on the issue, but denied that this had anything to do with the deadline set by the ICC⁴⁶.

There the matter rested at the time of going to press. This column pledges itself, as always, to continue to monitor this issue with the keenest of interest.

Sport and the "war on terrorism"

General

Since the 11 September attacks, the US and other countries have embarked on the "war on terrorism", which has since involved the invasion of Afghanistan and Iraq. Naturally, sporting considerations have not been prominent in the events surrounding this war. However, sport is an inescapable social phenomenon which refuses to die down even in the most trying of circumstances, as the countries in question have shown in the meantime.

One unfortunate way in which sport has been dragged into this matter, however, occurred at the start of the Olympic Games, held in Athens over the summer of 2004, when the administration of US President George Bush chose, as part of its campaign for the forthcoming presidential elections, to release an

1. General

advertisement aimed at fitness fanatics. The feature attempted to link the war in Iraq with the Olympic Games, and attempts to build an improbable bridge between the events in Athens and what it described as “positive news and developments out of Iraq and Afghanistan”. Quite what these “positive developments” amounted to was not explained by the advertisement⁴⁷.

Quite apart from the questionable timing and content of this feature, there were a number of legal issues involved. Under US federal law, the insignia, images and trademarks of the Olympic Games may only be used for marketing purposes by the International Olympic Committee and the national Olympic committees. In the US, this means that the Olympics belong to the US Olympic Committee. In fact, this was pointed out by the latter’s officials when they were asked to comment on the advertisement. Its lawyers were reviewing the tape of the advertisement⁴⁸.

Iraq

The sporting performers of Iraq were a beleaguered species even before the invasion of March 2003, since they frequently suffered mental and physical abuse at the hands of dictator Saddam Hussain and his equally unsqueamish relatives and henchmen. The invasion and its aftermath have obviously done little to encourage even those young men and women with an aptitude for sport to make improvement in their performance a priority which superseded mere survival. However, there are hopeful signs that the Iraqi sport has shown itself to be sufficiently resilient to overcome such handicaps.

One of the sporting activities in Iraq to have suffered the dubious attentions of the Saddam clan was wrestling. As part of their preparations for the Olympics, the national wrestling team were allowed a period of training in the US Olympic training headquarters of Colorado Springs. This followed the reinstatement of Iraq’s National Olympic Committee by the IOC in February 2004, along with a pledge given by the US to assist and fund their athletes. This was a far cry from the days when Odai Hussain, Saddam’s son, was in control of sport. When Iraq’s sporting representatives travelled abroad to compete, they were required to sign a paper stating that they would finish among the top three. Those who failed to live up to this commitment were either fined or jailed. Athletes were also frequently interrogated and tortured⁴⁹.

In mid-July, Iraqi sport received another boost when it was announced that racing was to be reinstated. This too had been a sport which had suffered interference by the Saddam regime. The sport was funded by the authorities, but at the price of massive corruption, which ensured that the Arabian ponies owned by

Saddam’s sons Uday and Qusay never lost their races⁵⁰.

However, it was – as could have been predicted – the sport of football which gave sport in Iraq its greatest fillip over the summer months. Here again, we are dealing with a sport which Saddam regime had done a good deal to lay to waste, with the national team being regularly subjected to abuse and torture from the regime for losing matches⁵¹. The team had, however, succeeded in the face of adversity to qualify for the final stages of the Olympics. When the team warmed up for their Olympic campaign by means of a 10-day British tour, there was little to suggest that they were anything other than a modest international side, even though they performed creditably against some semi-professional sides⁵² – which did not include the British Parliamentary team, whom they crushed 11-0 without breaking sweat⁵³.

However, as the Olympic football tournament progressed, it was clear that the Iraqi side were to be no pushovers. This was already apparent from an emphatic 4-2 win against Portugal during the preliminary stages of the tournament⁵⁴. This enabled the team to qualify for the quarter-finals, where they met and beat Australia 1-0, which caused unprecedented celebrations across the nation⁵⁵. It is interesting to note that several members of this team had branded President Bush a “criminal”, and called for the withdrawal of US troops from Iraq, after Mr. Bush’s team used the advertisement referred to above, in which the Olympic spirit was linked to the Iraq invasion⁵⁶.

Afghanistan

Although the representatives of the other country to be invaded by the US were less spectacular, they too performed as creditably as could be expected. There was an added significance to the appearance of a particular athlete, judoka Friba Razayee. Although she lost in 42 seconds to Spain’s Cecilia Blanco, she was the first Afghan woman to take part in an Olympic event. In fact, Ms. Razayee was one of three Afghan women to perform in Athens, the other two being sprinter Robina Muqimyar and Neema Suratger, a member of the country’s Olympic association who carried the Afghan flag during the opening ceremony⁵⁷.

A less happy sporting note was struck in this country when it was learned that an American Football star, who had been hailed as a hero for abandoning a lucrative career in sport and joining the army after the 11 September attacks, had been killed in action. Pat Tillmann, 27, died as a result of an ambush on his Rangers patrol in the south-east of the country⁵⁸. Corporal Tillman received a posthumous Silver Star for combat bravery⁵⁹.

1. General

India and Pakistan resume cricketing relations

The previous issue⁶⁰ has already related some of the difficulties encountered in attempting to revive international cricketing competition between India and Pakistan, who for political reasons had become estranged from each other in many respects, including sporting relations. A Test and one-day series between the two nations was planned for March 2004, but many hurdles and objections had to be cleared before the series could finally go ahead.

When it finally did, the performers rose magnificently to the occasion, and the first one-day international in Karachi yielded the closest possible result, with India emerging victorious by a mere five runs⁶¹. Even more importantly, fears that the tensions on the pitch would spill over into the crowd and cause trouble proved to be unfounded⁶². The remainder of the series was also played in the same spirit of competitive but civilised cricket.

Trouble flares at China v. Japan fixture

This issue is dealt with under the heading "Hooliganism"; see below, p.56.

Chess: the new peacekeeping sport?

In spite of the impact made by superstars such as Bobby Fischer and Garry Kasparov, chess has never been the most newsworthy of sports. In recent months, however, this sport seems to have reinvented itself as a peacekeeping force in the world's affairs. In early May, many of the top female chess players flew into the middle of a bitter conflict, hoping that their calm, measured thought could ease international tensions. The occasion was the World Women's Chess Championship, held in Batumi, the port capital of Adjara, being a breakaway region in the former Soviet republic of Georgia. Violent conflict had been brewing in the region for some months previously because of a tense stand-off between the new Georgian government, headed by President Mikhail Saakashvili, and the head of Adjara, Aslan Abashidze. The latter, who maintains an authoritarian grip on the region with his brutal suppression of political opponents, had refused to recognise the presidency of Mr. Saakashvili.

Matters had reached such a pitch that the Georgian Minister for Sport indicated that the Championship should not be held in Batumi because of the presence of illegally armed groups in the region, so that the authorities could not guarantee the safety of the participants. Tensions had also risen because the Adjarian authorities had ordered a "general mobilisation" of the population, many of whom kept weapons at home, to defend the region. The Georgian authorities in Tbilisi had also mobilised the armed forces close to the Adjara border, bringing the prospect of

violent conflict ever closer⁶³.

The tournament itself passed off peacefully. One of the factors responsible may have been the fact that the head of the International Chess federation (FIDE), Kirsan Ilyumzhinov, had travelled to Georgia to mediate in the conflict. Mr. Ilyumzhinov also happened to be the president of the tiny Russian republic of Kalmykia, a Buddhist enclave on the Caspian sea⁶⁴.

Football attempts to heal wounds in Hutu/Tutsi conflict

Undoubtedly, one of the most horrific war crimes during the second half of the previous century was committed during the Rwandan civil war of the mid-1990s, when no fewer than a million people died in the course of a 100-day period in which the Hutus, incited to a murderous frenzy by their government, set about the extermination of their Tutsi neighbours.

In a remarkable attempt of reconciliation, in April 2004 there took place a football match between a team of 11 confessed Hutu killers and a team of 11 Tutsi survivors. This was the brainchild of Aloisea Inyumba, the female governor of the Kigali province where the massacres took place, and who had previously chaired the National Reconciliation Commission. The fact that football is an extremely popular sport in Rwanda, which cuts across all tribal denominations and operates at all levels, was undoubtedly a prominent consideration when this event was organised⁶⁵.

Olympic torch rouses old enmities in Cyprus

Cyprus is yet another country riven by deep-seated conflict, which even its recent accession to the European Union seems incapable of quelling. As part of the run-up to the Olympic Games, it was thought by the organisers that the passing of the Olympic Torch through the island could possibly be experienced as a symbol of reconciliation between the Greek and Turkish communities, who have lived a separate existence ever since a boundary was drawn between them in 1974. However, these plans fell apart at the eleventh hour on account of a disagreement over welcoming ceremonies. As a result, the sacred Flame was hosted only by the Greek Cypriot administration⁶⁶.

This provoked a furious response from the Turkish Cypriot sports minister, Ozkan Yorgancioglu, who blamed this episode on the "racist and fascist Greek Cypriot administration". This was refuted by Kikis Lazarides, the head of the Cyprus Olympic Committee, who claimed that the Greek Cypriots had been extremely keen on having the torch pass across the island's demarcation line. The sole condition for this was that the Turkish Cypriot authorities should waive passport requirements for the runners and their entourage at the main crossing

1. General

point in Nicosia. Mr. Lazarides claimed that this condition had been agreed to.

The Turkish Cypriot Prime Minister, Mehmet Ali Talat, for his part, stated that the original plan had stumbled over the question whether the Turkish Cypriot North of the country would be allowed to hold a welcoming ceremony which matched that which was planned for the South. This apparently resulted in lengthy discussions as to whether this violated the principle of equality between the two communities, the outcome of which was extremely negative. The Greek authorities in Athens felt that the Turkish Cypriots were attempting to take political advantage of the event by holding an official torch-lighting ceremony of the kind held in internationally recognised countries. Greece is and was opposed to anything which implies direct or even indirect recognition of the self-proclaimed republic of Northern Cyprus. As a result, the torch-bearing formalities were confined to the Greek Cypriot part of the country⁶⁷.

in that they preserved fair competition in the sporting sense. The matter was then referred to the European Commission, which arrived at the same conclusion.

He also points out that part of the Court's work consists in delivering advisory opinions, which are not legally binding but very useful for clarifying points of sports law, and thus avoiding court disputes. All this allows him to conclude that the Court was operating as an effective force in sports law⁶⁹.

Survey of sporting case law in German journal⁷⁰

Writing in a leading German law journal, the author presents a comprehensive and systematically presented survey of the various decisions with sporting implications which have been issued by the German judiciary during the 2002-3 period. This overview is divided into four headings: (a) the law relating to clubs and federations, (b) competition and contract law, (c) employment law and (d) tort liability and insurance.

Other issues

Sporting court "is getting the right results" claims CAS member

June 2004 witnessed a landmark in sports law which has perhaps passed somewhat unnoticed, to wit the 20th anniversary of the founding of the Court of Arbitration for Sport (CAS), established as a supreme forum for the settlement of legal disputes arising from sporting activity. This was the brainchild of Juan Antonio Samaranch, who at the time was President of the International Olympic Committee (IOC). Since those days, the CAS has become respected, equitable and effective forum for the speedy and inexpensive settlement of sporting disputes. One of its prominent members, Ian Blackshaw, who has also contributed regularly to this Journal, took advantage of this anniversary to assess the CAS's progress in a leading daily newspaper⁶⁸.

Mr. Blackshaw focuses on the sound reputation earned by the Court across a broad spectrum the subject areas. Apart from purely sporting matters, such as eligibility criteria and drugs issues, for which it acts as the final court of appeal for the international sporting federations, the CAS has also acquired a reputation for adjudicating in sports-related business disputes. He identifies as a good example of the growing influence by the CAS in this field the time when it was called upon to settle a dispute concerning UEFA restrictions on multi-ownership of football clubs taking part in the European competitions. In that case, the Court ruled that these restrictions did not distort competition, and were justified

2. Criminal Law

Corruption in sport

“Olympics still open to bribes”? BBC claims cause storm

Those who maintain that “Olympic corruption” is a tautology have hitherto been able to quote a good deal of evidence in support of their claim. Examples of unlawful venality on the part of those involved in administering the Games have been too numerous to document here. However, the various clampdowns and initiatives set in motion in order to banish this unfortunate side of the Olympic ideal appeared to have succeeded in heralding a new age in which corruption was to be eliminated slowly but surely. However, recent events have cast some doubts on the effectiveness of this strategy.

With barely a few weeks to go before the start of the Athens Games, the International Olympic Committee (IOC) were forced to launch an investigation into claims that a European IOC member was found to be willing to accept a bribe for assisting London’s chances of acquiring the 2012 Olympics from undercover reporters posing as London-based businessmen⁷¹. The IOC President, Jacques Rogge, referred the allegations, made during a broadcast of the BBC’s flagship programme *Panorama*, to the IOC’s Ethics Commission after they were brought to his attention.

It soon emerged that the IOC member who allegedly agreed to the arrangement was Ivan Slavkov, a Bulgarian representative who had been President of his national Olympic Committee since 1982 and Chairman of the Bulgarian Football Association since 1995. The undercover reporters in question had offered to “look after him” in return for his vote in favour of the British capital’s candidacy⁷². The BBC immediately proceeded to impose a news blackout on this story, and both the British sporting officials and Culture Secretary Tessa Jowell expressed their confidence in the integrity of the London bid⁷³. However, a BBC spokesman claimed that the programme had included details of those agents who can deliver votes for cities seeking to stage the world’s largest sporting event. Their identities were not immediately available, but one of the five short-listed cities, New York, was believed to have been contacted by these agents⁷⁴. In the meantime, the IOC had proceeded to suspend Mr. Slavkov whilst its investigations were pending. The Bulgarian official, for his part, announced his intention to challenge this suspension before the Court of Arbitration for Sport (CAS)⁷⁵. He also indicated he was prepared to sue the journalists involved⁷⁶.

No sooner had the Olympic movement taken in this news, when further revelations appeared on the horizon. August was barely two days old when it was alleged that another IOC member, Abdul Muttaleb Ahmad, had been implicated in the scandal. Mr. Ahmad

had apparently invited the said undercover reporters to his office in Kuwait, and informed them that if they were “extremely careful” he would help them bypass the IOC’s code of ethics⁷⁷. It thus seemed that he had been unmasked as a key operator in the clandestine world of crooked IOC members, and that he had survived earlier scandals. Thus it emerged that, in 1999, he acted as middleman in the infamous “cash for votes” scandal which resulted in the Winter Games for 2002 being allocated to Salt Lake City. He had charged a fee of £34,000 in order to organise the bribes.

Offering to provide a similar service for the BBC reporters, he is believed to have revealed that he knew IOC members prepared to swing the vote in London’s favour. He explained that corrupt members were extremely cautious about whom they dealt with, but he insisted that many of them remained keen to trade their vote for cash and other inducements. He urged the reporters to attend a meeting of the Olympic Council of Asia in Qatar, and mingle with IOC members, but advised them not to offer direct bribes. He claimed to know how best to advise on the manner in which to approach corrupt IOC members, because some were keen on receiving cash, whereas others preferred benefits and incentives in other forms. If Mr. Ahmad was to be believed, the ten members who left the IOC as a result of their involvement in the Salt Lake City scandal represented only one third of the members prepared to trade their vote for bribes⁷⁸.

Another shady figure who was featured in the *Panorama* programme in question was Serbian businessman Goran Takac, who also claimed that almost a quarter of the 124 IOC members were to varying degrees open to bribery in return for their vote⁷⁹. It was, predictably enough, not long before this affair became caught up in IOC politicking. Thus Craig Reedie, the Chairman of the British Olympic Association (BOA) and a director of London’s bid to host the Games in 2012, concluded a pact with IOC President Jacques Rogge which meant that neither would raise the matter at the opening of the IOC’s two-day meeting in Athens on the eve of the Games. The intention was to attempt to take the heat out of the issue. However, Juan Antonio Samaranch Jnr, son of the IOC’s former President, saw an opportunity to make political capital for one of London’s rivals in the bidding process, i.e. Madrid. He therefore requested that a video of the relevant *Panorama* programme be made available to every IOC member⁸⁰.

This move forced Mr. Reedie into an immediate damage limitation operation, and he accordingly informed the other IOC members that he had made private protests against the programme in an effort to distance the London bid from the allegations⁸¹.

There the matter seemed to rest, and it was hoped that it would only resurface in the shape of the

2. Criminal Law

outcome of the IOC investigation. Although the matter did not re-emerge in the course of the Athens Games, there was further bad news in late August, when it was reported that London's 2012 Olympics bid was to be the subject of further investigations by the IOC in the wake of the continuing fall-out from the Panorama affair⁸². It emerged that the IOC Ethics Commission, which was formed in the aftermath of the Salt Lake City affair, had written to all five cities short-listed for the 2012 bid, requesting further information about the meetings and events which their bid teams had attended world-wide during the previous year, and whom they had met in the process. This followed other revelations made in the Panorama programme, which had featured a letter sent by Keith Mills, the Chief Executive of the London bid, to Vitaly Smirnov, Russia's IOC Vice-President. Mr. Mills was travelling to Moscow on private business unconnected with the bid, but had enquired about the possibility of meeting up with the IOC powerbroker over coffee. Although Mr. Mills did not eventually go to Moscow, the programme alleged that this represented an unlawful approach to an IOC Committee member⁸³.

No further details of this development were available at the time of writing.

Olympic chief goes to prison

Even before the news of the Panorama programme referred to above had broken, the world was given an unwelcome reminder of the potential for corruption presented by the Olympic Games with the news that a Vice President of the International Olympic Committee had been jailed.

Previous issues of this Journal⁸⁴ have charted the course of the unsavoury career of Kim Un Yong, who acted as the South Korean sports czar and steered his country's successful hosting of the Games in 1988. He had been found guilty of embezzling £1.5 million which had originally been donated to the sporting organisations operated by him. Prosecutors claimed that he used the cash in order to help finance his candidature for the elections to the IOC Presidency in 2001. In addition, he accepted an illegal payment from a South Korean sports official in order to "provide amenities" for IOC members visiting Seoul. He also diverted cash from a sporting organisation to finance his legal fees and to provide his son, John Kim, with assistance in fighting charges, also related to Olympic impropriety⁸⁵.

Mr. Kim Sr had received a severe warning in 1999 after the IOC corruption scandal surrounding the bidding for the 2002 Winter Olympics. The court sentenced Mr. Kim to 20 years imprisonment, and stated that he had escaped a longer sentence because of his age, high blood pressure and contribution towards South Korean sport⁸⁶.

Cricket corruption scandal – an update

It would seem that, since this column started to report on developments in this matter, the various measures taken by the international cricketing authorities have had a major impact on the corrupt practices which were bedevilling the game and gave rise to, inter alia, the Hansie Cronje scandal – extensively documented in previous issues of this Journal. Nevertheless, the problem has not disappeared entirely, as can be seen from the developments outlined below.

In mid-August 2004, the former Kenyan captain Maurice Odumbe was banned from cricket for five years after having been found to have inappropriate contact with a bookmaker. The Kenya Cricket association (KCA) imposed the ban after a Zimbabwean judge, who presided over a four-day hearing organised by the sport's world governing body, the International Cricket Council (ICC), had made the recommendation a few days earlier. The ban took effect immediately⁸⁷.

Earlier, it had been learned that the former India captain, Mohammad Azharuddin, who had been banned for life for involvement in match fixing, was left out of a pension scheme organised for the benefit of the country's Test players. The plan, under which 174 Test players and umpires will receive 5,000 rupees per month, was announced as part of the 75th anniversary celebrations of the Board of Control for Cricket in India⁸⁸.

Indictment on American football vice claims

In late August 2004, it was learned that a Colorado (US) Grand Jury issued an indictment following allegations that prostitutes had been used in order to recruit American football players to a University team. The University of Colorado in Denver had been under investigation since February of that year, when the allegations had first been made⁸⁹.

In this sport, it is not unusual for teams to offer prospective players an inducement to join them; however, employing prostitutes for this purpose was deemed to be a step too far. The indictment, which is an indication that formal criminal charges are likely, was issued by a grand jury charged with investigating the scandal after a district attorney had alleged that sex and alcohol were used to lure recruits. The allegations are centred on charges made by former escort manager Pasha Cowan that she was contracted by a University sports department official in late 2002 for the purpose of providing prostitutes for the recruits. The investigation came in the wake of seven allegations relating to the team since 1997. Earlier this year, a former woman player with the team had come forward to allege incidents of sexual harassment⁹⁰.

2. Criminal Law

Mafia police investigate betting scandal

Sport is only one of the areas in which Italy can boast many fine traditions. However, one of the less admirable traditions of Italian life has for some time been the way in which organised crime has gained a foothold in virtually every aspect of society. In mid-May 2004, the news broke that the sport of football may have been yet another area in which this nefarious influence had made itself felt, when it was learned that anti-mafia police were preparing to investigate alleged links between Italian clubs and organised crime. More particularly, police were looking into allegations that twelve Italian football clubs had been involved with suspected match fixing. The investigations centred on four Premier Division (Serie A) clubs, i.e. Chievo, Lecce, Siena and Reggina, along with two in the Second Division and six from the Third Division⁹¹.

The investigation was led by a Naples-based anti-mafia unit, and was initiated following interception of several telephone conversations involving five players. The public prosecutor's department alleged that:

"agreements for fixing matches (...) led to illegal ways of gaining money. The investigations want also to prove the involvement of organised crime and mafia in these procedures"

The main evidence was an alleged telephone conversation between former Siena goalkeeper Generoso Rossi and a former team-mate of his, Roberto d'Aversa. When asked by the latter what the results of the forthcoming Sunday's fixtures were going to be, the goalkeeper was said to have answered that Chievo and Ascoli would draw, whereas Crotona and Catanzaro would win. This prediction was later borne out by the results obtained. There were other conversations of this nature, including one in which Rossi talked about the possibility of earning £20-25,000 on a fixture between Siena and Udinese. Questioned by judges on this matter, Rossi refused to comment⁹².

Later, it also emerged that match officials had also come under suspicion, and in mid-July two Premier Division (Serie A) referees were suspended after being drawn into the affair. Marco Gabriele and Luca Palanca, who had officiated at 46 Serie A fixtures between them, were among the group of 14 people named by Naples police⁹³.

A tribunal was then set up in order to investigate the matter. No further details were available at the time of writing, other than the procedural point that the tribunal declared itself unable to penalise clubs, players and officials outside the top two divisions⁹⁴. This column will naturally continue to monitor developments in this regard with the keenest of interest.

Portuguese authorities make arrests over match-fixing allegations

In late April 2004, Portuguese football incurred a blow to its reputation during the build-up to Euro 2004 when police detained the League president, Valentim Loureiro, as well as four members of the referees' panel for questioning over allegations of match-fixing. In all, police arrested 16 people and searched the headquarters of Portugal's football league as part of a year-long anti-corruption operation code-named Golden Whistle. The police also raided the Lisbon headquarters of the Portuguese Football Federation and removed documents from the offices of First Division side Sporting Braga⁹⁵.

The police later explained that the object of the inquiry was to establish the existence of "illicit behaviour which could alter the truth in sporting competitions and their results". The outcome of the case was not known at the time of writing.

Hooliganism and related issues

Violence mars Euro 2004 tournament

Seldom can a football tournament – or indeed any sporting event – have been preceded by such massive precautions and preparations aimed at preventing crowd trouble than the Euro 2004 football competition, held in Portugal during the early summer of 2004. Many of these measures have already been reported in earlier editions of this Journal⁹⁶. As a result, it is fair to state that the tournament passed off in as trouble-free manner as could be expected, given the involvement in the competition of countries whose supporters had in the past given rise to a good deal of mayhem. In spite of this, there were a number of unsavoury incidents which detracted from what was otherwise an extremely enjoyable competition.

One of the countries with an unfortunate reputation for hooliganism referred to above, is inevitably England. The British authorities appear to have done their level best to ensure that the good name of this most traditional of footballing nations was not sullied yet again by acts of mindless yobbery. Thus the courts made full use of the powers conferred upon them by football disorder legislation, and banned a total of 2,188 people from attending any domestic or international football fixtures by ordering them to surrender their passports to the police. Another 500 people had a similar ban imposed as part of court bail conditions. This compared with only 100 people who had been prevented from travelling to the Euro 2000 tournament in Belgium⁹⁷.

The Portuguese authorities had, in addition to the elaborate security measures reported in earlier editions of this Journal, also taken the precaution of restoring

2. Criminal Law

the border controls which they had eliminated in 1991 under the EU Schengen Agreement, which allows total freedom of movement between some EU member states. This meant that passports would be checked and vehicles searched at the frontier with Spain. In addition, British police advisors were to be posted in the North and South of Spain in an attempt to spot hooligans trying to gain access to Portugal⁹⁸.

This array of measures did not prevent trouble from breaking out on certain days. More than 200 England fans ran amok in the Algarve resort of Albufeira during the early hours of 15 June, hurling bricks, bottles and chairs at police, one of whom required stitches to a head wound, and ten fans were treated in hospital for minor injuries. Ironically, the trouble came only 24 hours after the police had praised England's fans for their behaviour following their dramatic last-minute defeat by France during the opening fixture of the tournament⁹⁹.

As a result, ten England fans were deported to their home country in disgrace. Seven of these had received suspended sentences and will undoubtedly be hearing from the British authorities under the aforementioned football disorder legislation. Three others were acquitted on condition that they agreed to leave the country and not to return with a year¹⁰⁰.

However, matters assumed an infinitely more dramatic turn the following week, when the news broke that an England fan, mechanic Stephen Smith, had been stabbed to death as he celebrated England's win over Croatia in one of the Group matches. He had incurred a single stab wound to the heart as he sat with friends outside a bar in Lisbon at 4.00am. The group had been repeatedly approached by a man begging for money for about two hours. When he attempted to steal Mr. Smith's wallet, the victim pushed him away, whereupon the stabbing took place¹⁰¹.

The next day, another stabbing of an England fan took place. It appeared that the 19-year-old victim had been involved in a fight before the stabbing took place¹⁰². Although initially in a serious condition, he survived the experience.

There were other isolated incidents. Thus during the weekend which followed the Portugal v. Greece final, police had to be called in order to control angry Greek fans at the Sheraton Hotel in central Lisbon as hundreds of supporters gathered outside, hurling abuse at the leaders of the Greek football federation. Their annoyance had been caused by the fact that their travel packages did not include seats for the final itself, even after several hours' queuing¹⁰³.

Earlier in the course of the tournament, six Germans had been detained in Oporto for allegedly throwing bottles and glasses at passers-by. The men were released after police took their details at the local station. On the same day, four Swiss men were held

after allegedly hitting and swearing at a police officer in a bar in Figueira da Foz, 90 miles north of Lisbon¹⁰⁴.

Football violence gives rise to three-day riot in Syria

Syria is not a country which has hitherto been noted for excesses of football hooliganism. However, a fight which occurred between Arab and Kurdish supporters of rival Syrian football clubs ultimately led to three days of rioting in the North-east of the country, which left at least 15 people dead and over 100 injured. The violence commenced when fighting broke out between supporters of the al-Jihad and al-Fatwa football teams shortly before a fixture taking place in Qamishli, 450 miles north of the capital Damascus. At least nine people died during the violence and stampede which ensued. The next day, hundreds of Kurds took to the streets of Qamishli in spontaneous demonstrations which rapidly degenerated into further rioting, as well as the looting of shops and state offices¹⁰⁵.

Old hatreds are rekindled at China v. Japan football fixture

It is an unfortunate fact that age-old rivalries and hatred between regions and nations are increasingly being played out in and around football grounds – not only on the field of play, but also amongst the spectators and others taking an interest in the result. The most recent example of this took place in Beijing, China, following the final of the Asia Cup in which the home squad played archrivals Japan. After the match, which Japan won 1-3, hundreds of Chinese supporters clashed with riot police outside the stadium. Supporters threw bottles, shouted obscenities, burned Japanese flags and surrounded the Japanese team bus, which was pelted with missiles and compelled to return to the stadium¹⁰⁶.

Trouble had already been brewing during the match itself, during which fans booed Japan so loudly as to drown out the Japanese national anthem at the start of the fixture. Both governments had pleaded with fans to remain calm ahead of the game, and 6,000 riot police, troops and security staff had been deployed to prevent trouble. At earlier stages of the tournament, the teams had also met in Chongqing, when the Japanese team bus was also held up by an angry mob baying for Japanese blood. These incidents have been a major embarrassment for the Chinese government, and have given rise to some doubts as to whether the country should be entrusted with the organisation of the 2008 Olympics¹⁰⁷.

Rome derby riot and its aftermath

The rivalry between the two main football sides of the Italian capital, to wit Lazio and AS Roma, has been known to end in violence in the past, and this was once again the

2. Criminal Law

unfortunate outcome of the Rome derby held in March 2004. On this occasion, the rioting was so serious that the match had to be abandoned, following rumours that the police had killed a boy outside the stadium.

Before the match, the police and the "ultras", i.e. the extremist hard-core fans of both teams, had been involved in ugly confrontations outside the stadium. Supporters, some of whom attempted to gain access to the stadium without tickets, had repeatedly been dispersed with tear gas. At half time, a rumour began to circulate around the stadium that in the course of the disturbances a child had been run over by a police car and killed. The rumour was without foundation, and was repeatedly denied over the ground's sound system. However, a number of people continued to attach some credence to the story and kept some parts of the ground simmering with anger¹⁰⁸.

With only four minutes gone during the second half, the match was officially stopped, with the score standing at 0-0. Fans hurled burning flares onto the pitch from the banks of seats favoured by the ultras, and other spectators were displaying signs of panic as gas wafted into the stadium. After 15 minutes of total chaos, the referee and players marched off the pitch and the ground was cleared. The man who took the decision to abandon the fixture was Adriano Galliani, the President of the Italian Football League. This gave rise to various conspiracy theories based on the fact that Mr. Galliani is also the Vice-President of AC Milan, who at the time were 10 points clear of Roma at the top of the Premier Division (Seria A) and would therefore stand to gain if the match were abandoned¹⁰⁹. However, Mr. Galliani insisted that the remaining 42 minutes would be played at a later date. In fact, it was later decided that the entire fixture would be replayed, and the date for this fixture was subsequently set for 21 April¹¹⁰.

In all, the clashes between police and fans left 153 police officers and 14 fans with minor injuries. It was the worst incident in the Italian football season, and took place against the background of the severe difficulties facing several Italian clubs threatened by bankruptcy (see below, p.84) and various accusations of corruption (see above, p.55)¹¹¹.

Feyenoord player taken to hospital after attack by fans

Another footballing rivalry which measures high on the Richter scale is that which exists between top Dutch sides Ajax (Amsterdam) and Feyenoord (Rotterdam), and which has also been known to find expression in acts of hooliganism. The unattractive side of this rivalry was once again on display in mid-April, when it was reported that Feyenoord midfielder Jorge Acuna had to be taken to hospital with injuries to his head, neck and

ribs after several players from the Rotterdam side were assaulted by hooligans claiming to support Ajax. According to Feyenoord's official website, a large contingent of Ajax "fans" spilled onto the pitch after an unremarkable reserves match and attacked Chilean international Acuna as well as Robin van Persie¹¹².

The previous Sunday, Rotterdam police made 53 arrests during a Premier league (Eredivisie) fixture between the two clubs¹¹³.

This incident led to renewed calls amongst politicians in the Netherlands for the introduction of legislation modelled on the English Football Disorder Act 2000. In a brief comment in a leading Dutch journal¹¹⁴, the authors Zijlstra and Brouwer dismiss such calls as mere knee-jerk reactions, and maintain that the existing Netherlands legislation on the subject is perfectly adequate. In fact, they compare it favourably to the English legislation as being more flexible. Thus they point to the system of "voluntary reporting" to the authorities on match days, of which convicted hooligans may avail themselves, with the incentive that they will thus commute part of any banning order to a conditional banning order.

Status report on amendments to Belgian law on hooliganism – Belgian academic article¹¹⁵

In this article, the author Godfried Geudens, Assistant Lecturer at the University of Antwerp, examines the state of affairs shortly after the introduction of an important amendment to the Law on Football Hooliganism (Voetbalwet) of 21/12/1998. This legislation imposed a number of administrative obligations on the football clubs, the sport's national federation and the spectators, which were capable of attracting criminal penalties. The Law also created a legal basis for the intervention of football stewards.

Four years after the entry into effect of this legislation, it was amended in some significant respects. In addition to a number of adjustments of a mainly technical character, the amendment also considerably broadened the scope of the legislation, and did so in three important respects: (a) in substantive terms, the number of administrative offences was increased; (b) as regards the relevant time limits, by extending the period in which these infringements can be committed, and (c) in territorial terms, by extending the area in which the legislation is applicable through the introduction of the "perimeter" concept.

The author concludes that the manner in which the legislation was amended seems to indicate that the Belgian Parliament was satisfied with the general manner in which the 1998 Law operated, since its overall effect was to broaden its scope rather than restrict it. This does not mean, however, that the

2. Criminal Law

amendment has not given rise to a few difficulties. Thus he opines that there are legal defects in the manner in which the general obligations of the organisers of matches and of the national federation are defined.

Scope of Belgian anti-hooligan legislation – Belgian Supreme Court decision¹¹⁶

Under the Belgian anti-hooligan legislation described in the previous section, the courts may, pursuant to Article 41 of the 1998 legislation (Voetbalwet) issue banning orders as a result of a conviction for an offence committed inside the football stadium. This order can be for a duration of three months to ten years, which may be accompanied by the duty to report on match days. The Supreme Court in the case under review ruled that this penalty may be imposed not only in the event of an infringement of Article 38 of the Law, but also for any other infringement which has been committed in a footballing context, either under the Penal Code (Strafwetboek) or under any special criminal legislation.

Preventative measures against travelling hooligans. Article in leading German journal

In this brief overview of the existing preventative measures which can be taken against travelling hooligans under German legislation, the author examines the various headings under which these measures can be classified: (a) the restrictions related to passport and other identity documents, (b) the duty to report, and (c) preventative detention. Since the attacks by German hooligans which took place during the 1998 football World Cup, and the riots which took place on the occasion of top political summits in Genoa and Gothenburg in 2001, the German authorities have increasingly opted for passport restrictions and orders to report to the authorities on the date of the event. He concludes that in taking these measures, the German authorities have combined observance of their obligations under international law with the need to respect the fundamental rights to safety on the part of potential victims of hooliganism.

Hooliganism with boules – traditional French game now afflicted with the problem¹¹⁷

Boules is a national institution in France as well as a treasured image which many foreigners entertain of the country, with overtones of beret-clad pensioners whiling away the time in the sun-soaked alleys of Provence in between sips of pastis. It seems that the modern world is catching up with this most traditional of sports, including some of its less attractive aspects in terms of crowd behaviour.

In mid-May 2004, an official at the City hall in Montpellier confirmed that spectator trouble had

compelled the cancellation of one of the major tournaments in the annual calendar, to wit the three-day Comédie de la Petanque, which attracts 4,000 players and is normally held in July. A spokeswoman for the Mayor blamed an increasing climate of intimidation and threats which had seeped into the game, and that henceforth the sport would have to take its championship elsewhere. She added that the atmosphere at the tournament had worsened as supporters of local teams heckled supporters from the away teams and disrupted their game. Calling for a players' charter of good behaviour to be formulated by the sport's governing body, she also admitted that excessive drinking of the local speciality pastis was also a factor which had encouraged this trend¹¹⁸.

This move was actually welcomed by Jacques Théron, Vice-President of the Fédération Française de Boules – the sport's governing body. He claimed, however, that this was an element which was peculiar to Montpellier, and that the other major tournament of the year, in Marseille, there was relatively little trouble¹¹⁹.

“On-field” crime

Concerns over Athens Olympics security: all's well that ends (relatively) well

One of the principal concerns of the organisers of this year's Olympics has undoubtedly been to guarantee the safety of competitors and spectators. Unlike the Euro 2004 tournament, however, the security concerns arose less from the need to curtail crowd trouble than that of ensuring that terrorism should not be allowed to endanger the participants' lives. Even before the attacks of 11 September, Olympic sensitivities on this issue have been extremely high, particularly since the terrorist hostage-taking which occurred during the 1972 Munich Games.

As can be seen elsewhere in this Journal (below, p.71), the immediate run-up to the Athens Games was dominated by concern that the hosts would not complete all the work required to enable the Olympics to taken place in accordance with the standards expected of such an event. As part of these concerns, some observers felt qualms about the security measures which would be in place for the tournament. In fact, by mid-April 2004 an authoritative assessment of the major construction projects for the Games had shown not only that the building was lagging behind schedule, but also that the only way in which the building could be completed would be by cutting corners on security and crowd safety. More particularly the delays incurred would mean that there was less time to erect security fences, install closed-circuit television and train security guards before the opening ceremony on 13 August¹²⁰.

2. Criminal Law

These concerns even prompted the British ambassador to Greece, Sir David Madden, to seek a meeting with the Minister in charge of security at the Olympics, i.e. George Voulgarakis. The latter subsequently dismissed any concerns and emphasised the effectiveness of Greek security, and expressed his dissatisfaction with the media reports which had prompted these concerns. He also firmly ruled out the presence of any armed foreign police on its soil during the Games¹²¹. However, a few days later the Greek government conceded that it was not prepared for a chemical or biological attack on the site, and that the authorities were struggling to assemble a contingency plan for such an attack. The Health Minister, Nikitas Kaklamanis, implicitly put the blame for this deficiency on the previous Socialist government which had been voted out of power six months previously. He alleged that the previous administration had failed to equip Athenian hospitals and health centres to deal with the mass casualties which would result from a terrorist attack¹²².

It was almost inevitable that, at some stage during the preparations, an undercover journalist would test the security arrangements, and one such reporter was Daniel Howden of the Independent. He found the front door to the Olympic Stadium wide open whilst the work was proceeding, and found that the entire Olympic complex was poorly guarded. Thus at the main entrance, the arrival of an unmarked white transit van elicited no reaction from the bored-looking guards. The reporter and accompanying television crew was allowed to drive straight inside without anyone checking his identity. Inside, the signposts read like a menu of potential targets for terrorist attacks. Everybody seems to be solely concerned with meeting the 13 August deadline, at the expense of essential security concerns¹²³.

Fears over security at the Games were heightened when, in late May, Greek police had to defuse a small bomb planted outside a British car dealership in Athens. This had followed an anonymous warning given by telephone. This was in fact the latest in a series of low-level bomb attacks and attempted attacks, which added to these fears¹²⁴. The Greek Prime Minister, Costas Karamanlis, acknowledged that there was room for improvement in the security arrangements, and announced that he had taken personal charge of the Olympic preparations since his Government came to power¹²⁵. In early July, the Greek authorities conducted a thorough "lockdown" operation, with security forces being deployed at all the Olympic venues, after which they were all swept for bombs and constantly monitored before the Games kicked off. However, this operation was still hampered by the considerable delays in the construction work, which continued to plague preparations¹²⁶.

Nevertheless, matters did seem to be advancing and improving steadfastly on the security front. In fact, so visible was the security in the nation's capital, that many locals were beginning to voice their concern that security measures may have gone too far and begun to erode basic civil liberties. It was not only the high-tech and expensive anti-terrorist systems which were irking the locals, but also the extensive surveillance, which was city-wide, round-the-clock and pin-sharp in detail. Looming somewhat menacingly over the city was the airship which had been introduced as the final link in the observation network¹²⁷. Another development which aroused a good deal of opposition from some locals was the "clean-up" operations which saw the removal from the capital's streets of thousands of immigrants, beggars, drug addicts and homeless people. Human rights activists expressed their fear that vulnerable people, including asylum seekers from war-torn countries such as Iraq, were falling victim to this campaign. They went so far as to describe this operation as creating a "climate of terror" on the streets¹²⁸.

During all this time, the question whether contingents of athletes would be allowed to enjoy protection from their own troops and guards had started to cause all manner of ructions in the country. In mid-April it was learned that armed British officers would be despatched to Athens in order to protect the British team at the Games, under plans drawn up by Scotland Yard. This was a reaction to the concerns over safety and security referred to above. This elicited an angry reaction from the Greek authorities, who insisted that no foreign armed police would be allowed on their territory. They pointed out that 202 countries would be represented at the Olympics, which meant that chaos would ensue if all were allowed to deploy their security forces for the event¹²⁹.

In spite of this strong reaction, it was known that the US was preparing to send some 150 federal agents, who were expected to be armed, in order to protect its athletes, with Israel and other nations following suit. It was expected that an unofficial deal would allow security forces from friendly nations, including Britain and the US, to carry guns¹³⁰. It also emerged that the Australian Olympic Committee (AOC) would have two Qantas jets on standby, ready to evacuate their athletes from the Games in the event of a terrorist attack. The AOC was also reported to be considering employing armed guards to protect the team, although he admitted that this would require the co-operation of the local authorities¹³¹. It was also learned that the entire NATO Mediterranean fleet would be part of the Alliance's contribution towards the protection of the Games¹³².

All these statements and preparations were provoking increasing levels of indignation in Greece, and

2. Criminal Law

in mid-May the Government decided to end any speculation in this regard through Col. Eleftherios Ikononou, a spokesman for the Ministry of Public Order. Questioned on this issue by a leading British journalist, he stated that no intervention by foreign armed agents would be allowed, adding:

“Security is our responsibility. It is the Hellenic police that will have the responsibility for the protection of the athletes. We have prepared for their security both at the Olympic sites and when they’re out shopping, for instance. When we have teams which are considered high risk there will be special measures but there is no question of foreign security personnel coming in”¹³³

He added that the special measures protecting athletes from high-risk countries such as the United Kingdom and the US would include personal protection and security escorts, the use of security scouts in certain areas, aerial surveillance of routes taken by athletes and, if necessary, changes to routes if the original ones were deemed to be unsafe¹³⁴.

However, several weeks later it became clear that, for all this brave talk, concessions would eventually be made, and in early June senior officials admitted that Greece could not prevent foreign guards protecting the athletes of high-risk countries from carrying arms outside the main security zone during the Olympics. This was in spite of the fact that any such prospect would in principle be unlawful under the Greek constitution, which bars foreigners from bearing weapons on Greek soil, and thus made this an extremely sensitive issue, all the more so because of some public misgivings over the Games, as has been mentioned earlier¹³⁵. The Government, however, emphatically denied reports in the Greek media that Athens had secretly agreed to allow the US to provide its own armed guards.

In the end, it appeared that the hosts had the matter well in hand, and the Games passed off without any major security alerts – well (as Captain Corcoran would say) hardly any. What should have been the crowning moment for a highly successful Games was marred by a lapse in security which, however, had no repercussions beyond the placing achieved by the unfortunate victim.

During the Marathon event on the last day of the tournament, the Brazilian Vanderlei de Lima was well in the lead when a spectator appeared from nowhere and pushed him off the road. This was enough to make him concede the lead to Italian Stefano Baldini, who went on to win the race with de Lima finishing third¹³⁶. The assailant turned out to be Cornelius Horan a former priest who, as reported in an earlier issue of this Journal¹³⁷, had already caused havoc at another major

sporting event when he ran onto the racing track at Silverstone during the British Grand Prix in July 2003 and was wounded by a marshal wrestling him to the verge. De Lima was later awarded the Pierre de Coubertin medal, the IOC’s highest award, for completing the race¹³⁸. Although some commentators blamed this incident on poor security, this could in no way detract from the undoubted success which all concern had earned in keeping the games as trouble-free as possible.

Mr. Horan was later issued with a one-year suspended sentence for disrupting the marathon. The court could have sentenced the Irishman for five years, but apparently gave him a mere one-year sentence because of his questionable mental state¹³⁹.

Bomb blast at French football stadium

In late May 2004, a bomb blast occurred at Monaco’s main football stadium, damaging offices at the ground. No-one claimed responsibility for the outrage at the Stade Louis II, but no-one was injured as a result of the blast¹⁴⁰.

Thai authorities ban orang-utan boxing

One of the less civilised forms of entertainment on offer in suburban Bangkok of late has been the spectacle of boxing matches between apes staged at an amusement park. Some 110 orang-utans were dressed up in boxing gloves and silk shorts, and forced to spar for tourists at Safari World. Thai police have banned these fights and threatened to confiscate the apes, after Indonesian authorities attended a weekend show and denounced smugglers for supplying the bulk of these fighting apes to Safari World¹⁴¹. Earlier, outraged members of the International Primate Protection League had challenged Safari World’s claims that the show was harmless and that the animal fights were as choreographed as American wrestling bouts. Orang-utans are an endangered species and live wild only on the islands of Sumatra and Borneo¹⁴².

Illegal bookmakers arrested in Hong Kong

In mid-June 2004, it was reported that Hong Kong police arrested nine suspected illegal bookmakers. In the process they seized HK\$ 3.24 million worth of betting slips, in a major crackdown on the surge of illegal betting which had started during the Euro 2004 tournament. Unlawful bookmaking carries a maximum penalty of a HK\$ 5 million fine and a seven-year jail term¹⁴³.

Black market in ticket flourishes during Euro 2004

The majority of matches during the Euro 2004 tournament were fully booked long before they took place, which presented an opportunity for a massive black market in tickets. The news that 50,000 England

2. Criminal Law

fans had flooded into Portugal for the tournament only increased the temptation and the asking prices. For the all-important opening fixture between France and England, the cheapest tickets were £500, whereas for the England fixtures against Switzerland and Croatia they were £325 and £275 respectively¹⁴⁴.

Referee kills football coach who queried his decision

In late July 2004, a South African referee gave new meaning the term "dissent" when he shot dead a coach and injured two players who had challenged one of his decisions. When the referee gave a yellow card to a player during the match, between two local teams in Eastern Cape Province, he elicited protests from the coach and team. The ensuing argument was settled in the most definitive way possible by the referee, with a bullet which hit the coach of the Marcelle club in the chest, as a result of which he died on the pitch. Two players were hit in the hand by the same bullet¹⁴⁵.

"Off-field" crime

Australian tennis coach guilty of abusing 14-year-old girl

In July 2004, it was learned that a top Australian tennis coach, who had trained mark Philippousis and Monica Seles, had been found guilty of sexually abusing a 14-year-old girl. Gavin Hopper, who operates a Queensland tennis academy with former Wimbledon champion Pat Cash, was found guilty by a jury on three counts of indecent assault and six charges of gross indecency whilst being employed as a physical education instructor at a top school in the 1980s. The victim, now aged 33, informed Victoria Crown Court that she had a three-year affair with the tennis coach whilst she was a student at Wesley College in Melbourne. Hopper had kissed and touched the girl at his home, and promised to leave his wife so that they could live together in Queensland after she left school¹⁴⁶.

In his defence, Hopper denied having written a letter to the girl in 1987 inviting her to enjoy an afternoon of "beautiful love-making" or dine by candlelight with Island Cooler, a wine-based drink. He maintained that the love letter had been written to his wife to celebrate the pair's second wedding anniversary in 1981. However, the court was also told that Island Cooler was not available in Australia at that time. Following his conviction, Hopper, through his lawyer, indicated that he would appeal¹⁴⁷.

Bryant trial definitely goes ahead

The sorry affair of Kobe Bryant, the US basketball star accused of sexual misdemeanours, has already been reported in earlier issues of this organ¹⁴⁸. This case has

thus far remained at the preliminary stages, with various procedural issues being thrashed out. However, in mid-August 2004, it was learned that the trial was definitely going ahead, despite a court ruling which allowed the defence to bring evidence about the sexual activity of the woman who has accused him of rape. The prosecutors had attempted to persuade the judge to review the decision to allow details of the complainant's sexual conduct around the time of her encounter with Mr. Bryant. However, without offering any reasons, the Colorado Supreme Court refused to consider the appeal against a ruling by the trial judge, who has stated that the woman's sexual conduct was a factor which was relevant to the case¹⁴⁹.

This column will obviously follow the trial itself with keen interest.

Mistress who killed football star's wife sentenced to death by Iran court

In June 2004, it was learned that the mistress of an Iranian football star had been sentenced to death for murdering the wife of her lover. Following a one-week trial, held behind closed doors, Khadjieh Shahla Jahed was found guilty of the premeditated stabbing of Laleh Saharkizan, the wife of the former football hero and top coach Nasser Mohammed Khani. If the sentence is endorsed by the Iran Supreme Court, she will be hanged¹⁵⁰.

Mr. Khani, who was a star of Iranian football during the late 1980s, was in Germany on a training trip at the time of the killing. Initially, he had been suspected of complicity, and detained for several months. He was released after his jealous lover confessed to having acted alone. The killer had been his temporary wife, which is a practice approved of in the Islamic republic. Their marital status meant that Mr. Khani could escape any charges of adultery. In a practice which is unique under Shia Islam, Muslim males in Iran may take on temporary wives for periods ranging from a few hours to several decades.

Nevertheless, Khani was sentenced to 74 lashes after the judge found him guilty of having taken drugs with his mistress at their love nest in north Tehran. Shahla Jahed also faces the lash before her hanging – for the same offence¹⁵¹.

Chess champion Fischer to be extradited for breaking sanctions

The world of chess is not as a rule redolent of colourful characters, but it is generally agreed that American Bobby Fischer was definitely the exception to this rule. Part of his heritage as a cult figure was the epic battles he fought over the chequered board with Boris Spassky in the 1970s, none more so than the "battle of Reykjavik" in 1972, dubbed by many the "match of the century". Twenty years later, a rematch between the

2. Criminal Law

two players took place in Yugoslavia, which Fischer won again and earned \$3.35 million in the process. However, this happened at the time of the Yugoslav Wars, at a time when Yugoslavia was hit by United Nations sanctions because of its human rights violations in Bosnia-Herzegovina. Soon afterwards, a US Grand Jury charged Mr. Fischer with breach of these sanctions. Actions thus taken against him thus far in pursuit of this charge have included suspending the validity of his US passport. The American authorities had also over the years persisted in their efforts to track him down and take him into custody, and they finally discovered that he was living in Tokyo, Japan¹⁵². Following an application for his extradition, Mr. Fischer was arrested as he tried to board an aeroplane for the Philippines. He was then detained whilst the extradition application ground through its procedures¹⁵³.

Over a month later, the Japanese authorities decided that the extradition was warranted. However, Mr. Fischer's lawyers appealed against this decision¹⁵⁴, the outcome of which was not yet known at the time of going to press.

One person who was totally out of sympathy with the proceedings being taken against Mr. Fischer was his old rival, Boris Spassky. The latter, in a letter address to the Japan Chess Association, called on Washington to display leniency. He pointed out that he too had been party to the sanctions infringement, and therefore should also be penalised. He ended " Arrest me and put me in the same cell as Bobby Fischer. And give us a chess set"¹⁵⁵.

Afghan football internationals disappear – as illegal immigrants?

When the Afghan national football team arrived in Italy on the eve of their first match in Europe for 20 years, the manager suddenly found that nine of the squad had absconded from their training camp in Verona. The fixture against Hellas Verona was intended to mark Afghanistan's emergence from the footballing wilderness and to raise money for charity. It had been organised by the Community for Solidarity among Peoples campaign, and was seen as part of the process of welcoming back Afghanistan into the global football community. Instead, almost half the squad were suspected of having taken the opportunity to join the sizeable Afghan immigrant community in Germany, the players had all handed in their passports, but police said that they could not officially be declared missing until their residence permits expired at the end of the following week¹⁵⁶.

In the event, six of the players were arrested in Germany the following week. The Afghan national side has since been disbanded¹⁵⁷.

Former Springbok kills daughter by mistake

In May 2004, a former Springbok rugby international was charged with murder after having mistaken his daughter for a car thief and shot her dead in the family's driveway. Rudi Visagie assumed that his daughter, Marlé, was asleep when he heard her car being driven away at 5.00am on a Sunday morning. He rose from his bed, took a pistol and fired a shot through the bedroom window. When he went to investigate, he found his daughter slumped behind the wheel having been hit in the neck by the bullet. A blood-stained present on the front seat suggested that she had been on her way to surprise her boyfriend on his birthday without informing her parents of the plan¹⁵⁸.

The case had not yet come to trial at the time of writing.

Former French Rugby captain accused of killing wife

In another case involving a former rugby international, it was reported in August 2004 that marc Cécillon had been arrested for murder after allegedly shooting his wife at a party. Around 60 fellow guests, who had gathered in Bourgoin-Jallieu to celebrate the end of the rugby season, were said to have witnessed Mr. Cécillon pull out a handgun and shoot his wife Chantal three or four times. She was hit in the head and throat. The shots were said to have caused panic amongst the guests. The former rugby player was himself said to have received a head wound in the confusion which followed, and was himself taken to hospital before being detained by police. It appeared that he had been under the influence of alcohol and had not sobered up until the morning¹⁵⁹.

One of the guests later described how she had been aware of a disagreement taking place, and half an hour later saw a man come in with a pistol and start to shoot. Friends also said that the couple had been on bad terms for several years¹⁶⁰. The case had not yet come to trial by the time this issue went to press.

Rising stars of New Zealand rugby jailed for beating pregnant girl

The world of rugby league suffered a heavy blow when it was learned that, in late May 2004, three rising stars of the New Zealand game were jailed after having beaten up a 15-year-old girl who was five months pregnant in an attempt to make her miscarry. Shaun Williams-Metcalf, Geoffrey Ruaporo and Kyle Donovan were said to have lured the girl to a park in Auckland after she became pregnant by Williams-Metcalf. She had driven to the park on the pretext of discussing the pregnancy with the player. However, her attackers smashed open her car door with a rock and dragged her

2. Criminal Law

out before punching her in the head and kicking her in the stomach. They took her mobile phone and then ran off. Fortunately, both the girl and her baby survived the ordeal. Williams-Metcalf and Ruaparo each received an 18-month sentence. Donovan, who was said to have made efforts to halt the attack, was issued with a 15-month sentence¹⁶¹.

The three players had been selected to tour internationally with the New Zealand under-16 side, and were on a fast-track development programme for the Warriors, New Zealand's only team in the Australian National Rugby League¹⁶².

Football captain accused of child smuggling

In mid-March 2004, it was learned that Rwanda's football captain, Désiré Mbonabucya, had been detained by Belgian police, accused of smuggling at least one child from the Central African country. Mr. Mbonabucya is a striker for Belgian First Division team St. Truiden. A Rwandan couple were also detained in connection with this case¹⁶³.

Trinidad kidnap threat to England cricketers

The England cricket team's tour of the Caribbean during the spring of 2004 was undoubtedly a success on the sporting field, but carried considerable risks off it. Before embarking on their tour, the players were warned to be on their guard against kidnapping and violent crime, particularly during their visit to Trinidad for the Second test. The main reason for this was that Trinidad and Tobago have become the second most likely place in the world to fall victim to the crime of kidnapping for ransom. By November 2003, 40 such incidents had taken place since the start of the year, compared to 10 such incidents during the whole of 2001. Whilst the police report that most hostages are released unharmed after payment of the ransom, at least two were killed in 2003, during which time there occurred a record 228 murders on the islands. It was felt that the cricket team's high publicity profile might make them particularly vulnerable to such kidnappings¹⁶⁴.

Former boxing champion found stabbed to death

In mid-August 2004, Robert Quiroga, the former International Boxing Federation super-flyweight champion, was found dead from multiple stab wounds on a motorway near his home in San Antonio, Texas. He was aged only 34. Earlier that night, Mr. Quiroga had been seen drinking with friends in a bar some three blocks away from the place where he was discovered. Police said that there was no apparent motive for the attack¹⁶⁵.

Beckham questioned by French police over minder assault

That the security personnel who surround England football captain David Beckham and his family do not invariably act in the most scrupulous of ways has been known to the general public for some time. However, their actions took on a new dimension in mid-July, when Mr. Beckham was in France. The local police decided to question Mr. Beckham over claims that one of his "minders" threw a photographer into the sea. The alleged victim, François Glories, claimed that he was 15 yards away from the footballer and his family in the French Riviera port of Villefranche-sur-Mer when the bodyguard dragged him to the water's edge and threw him in, along with £7,000 of equipment. He claimed this was totally unprovoked, and that the Beckhams did nothing but stand by and watch¹⁶⁶.

US synchronised swimming star jailed following driving charges

During the immediate run-up to the Olympic Games in Athens, the US party held a series of press conferences in an attempt to introduce the world to all its representatives at the Games. There was, however, one notable exception to this process, to wit a competitor in the synchronised swimming event called Tammy Crow, who was being entirely protected from the public eye until the actual competition commenced¹⁶⁷.

The reason for this anonymity was the fact that Ms. Crow had been found guilty of driving charges which resulted in the death of her two passengers. As a result, she was sentenced to 90 days' imprisonment, even though the judge took the extraordinary step of allowing her to postpone the sentence in order that she could compete at the Olympics. She was also ordered to pay \$23,000 in compensation to the Slinger family. It emerged during the trial that Ms. Crow had been at a party the night before the accident occurred, where she acknowledged that she had been drinking, although she claimed to have done so only in moderation. At 4.40 am the next morning, her boyfriend Cody Tatro woke her and persuaded her to make an early departure for a day's skiing. Also accompanying them was a 12-year-old boy, Brett Slinger, to whom they had previously promised a lift. Because Mr. Tatro was tired, Ms. Crow offered to drive. On an icy road leading to the mountains she lost control of the vehicle, which spun off the road and slammed into two trees. Both Tatro and Slinger were killed instantly¹⁶⁸.

There was considerable controversy on the question whether Ms. Crow should have been allowed to represent the US at the Olympics at all, hence the furtiveness which surrounded her participation in the competition.

2. Criminal Law

Danish athlete charged over car death

Another driving incident with fatal consequences involving an Olympic athlete took place in Athens during the Games themselves. During the first week of competition, a member of the Danish sailing team was charged with manslaughter after a British caterer was run down and killed in one of the city's official Olympic traffic lanes, Errol Strachan, the caterer in question, died instantly after having been struck by a car driven by Nicklas Holm, a sailor competing in the Star class at Athens. Mr. Holm, as well as his team-mate Claus Olsen and their coach Thomas Jacobsen, had been driving from the Athens marina site towards the handball stadium, where the Danish team were scheduled to play, when the accident occurred¹⁶⁹.

Mr. Holm was arrested by traffic police and charged with homicide by misadventure. A blood test was taken following the accident, but after having spent the night in custody he was released following a court hearing¹⁷⁰.

No further details were available at the time of writing.

Serbian football chief shot in Belgrade

In late March 2004, it was learned that Branko Bulatovic, a leading football official in Serbia-Montenegro, was shot in the head in Belgrade. The unidentified gunman escaped. Mr. Bulatovic had previously been arrested in a cash embezzlement inquiry at the time of UN sanctions during the Yugoslav Wars of the 1990s, but was later released¹⁷¹.

No further details were available at the time of writing.

Other issues

German courts stand firm on licensing requirement for sports betting

From previous issues of this Journal¹⁷² it will be recalled that there have of late been a number of court cases in Germany in which the licensing requirement for fixed-odds sports betting (the so-called Oddset betting) was examined from the point of view of the criminal law. Since then, as has also been reported in this organ¹⁷³ this issue has also been brought before the European Court of Justice (ECJ). The decision in that case was expected to have considerable repercussions for the manner in which the courts of the Member States approached the lawfulness of betting licensing requirements. However, judging by the case under review, the German judiciary seem to be unwilling to alter their stance even in the wake of the said Gambelli decision.

In the case under review¹⁷⁴, a sports betting operator who had incurred criminal penalties on account of lacking the required licence had appealed against this

sentence on the basis of the said ECJ case law.

However, the Bavarian Court of Appeal (Bayerische Oberlandesgericht) was unmoved. It ruled that the ECJ had definitely established that, in principle, the licensing requirement infringed the freedom of establishment and the freedom to provide services as laid down in the EC Treaty; however, it remained within the discretion of the national courts to continue to impose restrictions on this type of activity if this was justified on grounds of public policy. Such restrictions were particularly permissible where they were inspired by considerations of social policy, especially the desire to curtail the damaging effects of such practices, as long as these restrictions were not disproportionate.

The Court also pointed out that the ECJ had also ruled out any reliance on such social policy considerations where the national authorities in question encouraged the population to take part in betting activities so that the state's finances might benefit in terms of the income which is derived from betting taxation. This was not the case here.

Tickets to major football fixture linked to surrender of guns (Haiti)

An appearance by the football World Champions Brazil, especially one containing Ronaldo, would be sufficient to induce most football fans to part with considerable sums of money. In the Caribbean state of Haiti, however, those wishing to be in attendance have been requested to part with their guns. In an original approach towards gun control, the new Government in Haiti has decided to issue tickets for a friendly fixture with the Brazilian national side in exchange for guns rather than cash. The Brazilian football authorities declared themselves pleased to co-operate with this strategy in the knowledge that they would thus be helping to reduce gun violence, which has assumed epidemic proportions on the island¹⁷⁵.

3. Contracts

Media rights agreements

[None]

Legal issues arising from transfer deals

Mutu loan fails because of Juventus objections

Adrian Mutu, the successful Romanian striker employed by English premier ship club Chelsea, has increasingly attracted the attentions of other sides. One of these was Juventus, the Turin side, who expressed interest in employing the striker for a limited period of one year. However, the deal came to grief in early August 2004 after the Italian club objected to the possibility that the Romanian international being sold to another club whilst at Juventus. The Italian club had agreed to pay the player's £60,000-per-week salary; however, Stamford Bridge had also demanded that Juventus should pay a £7 million transfer fee at the end of the loan period. This was unacceptable to the Italians, so the deal fell through¹⁷⁶.

"Tapping" rows continue

The practice known as "tapping" is that whereby clubs make illegal approaches to players of different clubs, in contravention of the rules on the subject issued by the world governing body FIFA. Recently, Barcelona and FC Porto have made official complaints to FIFA about allegations of unlawful approaches made by two English Premiership clubs.

In early July, Barcelona president Juan Laporta reported Manchester United over the conditions in which the latter succeeded in signing Gerard Pique. Barcelona were of the opinion that in so doing, the top English side contravened FIFA rules regarding compensation payments for the products of youth academies. United, for their part, denied having acted improperly, adding that any compensation due would be forthcoming¹⁷⁷.

Earlier, Barcelona had lodged a formal complaint with FIFA over the approach made by Chelsea for the services of the Portuguese champions' coach, Jose Mourinho. It was alleged that, when Chelsea owner Roman Abramovich and the club's Chief Executive, Peter Kenyon, were in Vigo, Northern Spain, they had sought to arrange a meeting with Mourinho's agent, Jorge Mendes. The Porto President was incensed about this back-door approach, hence the complaint to FIFA¹⁷⁸. It was not yet known whether this complaint produced any consequences.

FC Metz claim Fulham owe them for Saha transfer

From previous issues of this journal¹⁷⁹ it will be recalled that English Premiership side Fulham are no newcomers to transfer deal controversy, as is

evidenced by the protracted Steve Marlet affair. The sale of Louis Saha from French club FC Metz to the Craven Cottage side appears also to be heading for litigation, judging by recent claims by the French club that Fulham owe them £1.3 million over the deal.

Mr. Saha played for the French club between 1997 and 2000, with a brief spell on loan to Newcastle United, before joining Fulham for £2.1 million. Metz claimed that they had a sell-on clause inserted into the player's contract which guaranteed them 15 per cent of any future transfer fee. Saha was transferred to Manchester United in January 2004¹⁸⁰, and several months later Metz claimed that they had yet to receive any payment from the £12.8 million fee paid for Saha by United. Officials from the French side had attempted to contact their counterparts at Craven Cottage either directly or through the French football authorities, but to no avail. Accordingly, they turned to world governing body FIFA for assistance¹⁸¹.

When asked to comment, Fulham stated that they were aware of the claims, but gave no further details. What is certain is that Fulham will be loath to fall foul of FIFA again after their trials and tribulations over the Marlet affair.

Employment law

Olympics threatened by strikes

One of the more traditional ploys operated by trade unions over the years is to table demands of employers during the run-up to a major event or decision, in order to take advantage of the urgency of the situation. This strategy seems to have been deployed to considerable effect by the Greek unions during the period immediately preceding the 2004 Athens Olympics.

In late March, the largest Trade Union confederation in the country announced that it would press ahead with strike action, starting with a nationwide one-day walkout. This news came as the newly-elected Conservative government indicated that many of the public works associated with the Games could be cut back because of massive budget overruns. The Confederation of Greek Workers warned the Government of further action unless they met demands for better pay and benefits. The threat was particularly serious to the public transport system, which would play a very important part during the Games, particularly the prestigious opening ceremony¹⁸².

With little over a month to go before the opening ceremony, Greek workers threatened to throw more than 800 hotels across the capital into chaos by staging surprise stoppages if their long-standing demands were not met. This had the potential of disrupting the stay of

3. Contracts

thousands of visitors to the Games, including royals and Olympic dignitaries, who would be staying at the city's 40 most expensive establishments. One of the bones of contention in this dispute appeared to be the "Olympic bonus" which had allegedly been agreed by the hotel operators but was not apparently forthcoming¹⁸³. The hotel workers repeated their industrial action with barely a week to go before the Games opened, and threatened once again to repeat such action during the games, although ultimately this did not prove to be the case¹⁸⁴. The Olympic bonus also was the issue at stake when the city's ambulance crews and paramedics staged a four-hour work stoppage to press demands for such payments. On that day, the doctors also started a six-hour strike¹⁸⁵.

Latvian Olympic official dismissed over drunken incident

During the first week of the Athens Olympics, the Latvian Olympic Committee announced that it had dismissed one of its track and field coaches, Gints Bititis, after airport security guards in Prague had to remove him from a flight bound for Greece because he was drunk. The coach has also since been stripped of his Olympic accreditation¹⁸⁶.

G14 clubs confront FIFA on international release fees

One of the long-running sores in relations between the top football sides and their national associations has been the requirement that players be released for international duty whenever the latter so demand. So concerned have some of the leading European clubs become over this matter that they have started to study the legality of FIFA rules on such release for international duty. One of the many contentious issues in this regard is who pays the players for such services. In mid-March 2004, the G14 grouping of the European continent's most powerful clubs met in Valencia, Spain, in order to consider this matter. According to a statement later released, the group had:

"authorised its general manager to try to ascertain if the current provisions of the FIFA regulations by which clubs are obliged to release players for no payment and at conditions unilaterally imposed by FIFA are an infringement of law with regard to fair trading"¹⁸⁷.

The group, which includes AC Milan, Manchester United and Real Madrid, was thus set on a collision course with FIFA President Sepp Blatter, who has always opposed compensation to clubs.

Wales report Stade Français over release clause

In early July 2004, it was announced that the Welsh rugby authorities had called upon the International Rugby Board (IRB) to take action against French club Stade Français for having offered the former Celtic Warriors hooker Mefin Davies a two-year contract on condition that he should retire from international rugby. Mr. Davies, who had been unemployed since May when the Warriors were disbanded by the Welsh Rugby Union, turned down this offer because he wanted to continue to play for Wales. His refusal meant that his chances of securing a professional contract for the following season were greatly reduced¹⁸⁸.

In principle, IRB rules put the international game ahead of everything else. It was not yet known at the time of writing whether the complaint had produced any effect.

Sponsorship agreements

[None]

Sporting agencies

[None]

Other issues

[None]

4. Torts and Insurance

Sporting injuries

Foé relatives taking legal action against French football federation

One of the saddest episodes of the footballing year 2003 was undoubtedly the death of Cameroon and Manchester City midfielder Marc-Vivien Foé during a Confederations Cup game between his country and Colombia¹⁸⁹. Many at the time commented that this event was a glaring indictment of the pressures placed on many of today's players. In July 2004, it was learned that the family of the Cameroonian footballer were to take legal action against the French Football Federation for breaching security rules. An autopsy showed that Mr. Foé died of heart-related problems whilst playing the Colombia fixture¹⁹⁰.

Schumacher (R) plans legal action over broken vertebrae

In June 2004, Formula One racer Ralf Schumacher was involved in a crash at 200 mph during the US Grand Prix in Indianapolis. Several days later, he discovered that this accident had caused two broken vertebrae in his back, and was ordered to wear a corset and rest for a month. He only learned about the extent of his injuries after extensive tests in Germany, and was furious at the delay with which these were established, as well as at the action of doctors in Indianapolis, whom he believed put him at risk of paraplegia by allowing him to fly home with a damaged spine 24 hours after the accident. He was said to be considering legal action over these alleged shortcomings, which could cause him to be inactive over a considerable part of the season¹⁹¹.

Travel agent not held liable for accident by child in sporting area of hotel¹⁹²

In the course of a holiday organised by the defendant, an 11-year-old child followed the example of other holidaymakers and climbed up the lighting pole of the sporting area of the hotel in question. The other holidaymakers who had engaged in this activity had not sustained any injury in the process. The child became injured as a result of the pole snapping at a certain point. The family of the child demanded compensation on the basis of the German Civil Code.

The Court dismissed the claim. It recalled that under the Civil Code provision relied upon, i.e. Article 651, a defect in the planned journey only arose where the actual journey provided by the organiser departs to such an extent from the result set out in the contract that the very nature and objective of the holiday package is called into question. It recognised also that the lack of care and diligence on the part of the organisers of the journey could qualify as such a defect. In addition, in the case under review, it could not be maintained that the

lighting pole in question did not constitute a danger which the journey organiser did not need to take into account. However, the sole fact that the claimant fell over together with the lighting pole did not allow any conclusions to be drawn concerning the steadiness and solidity of the pole.

It is true that, according to the relevant photographs, the lighting pole was already in a rusty condition. However, several persons had already climbed up the pole, and the latter had held firm. Therefore there did not appear to be a danger so obvious as to make the replacement of the pole an immediate necessity, and the hotelkeeper could not be expected to take any special precautionary measures against children at play in that area at 9.00pm. Therefore, the travel organiser could not be held liable for the injury sustained by the child.

Duty of care on those playing "midget golf"; Netherlands Supreme Court decision¹⁹³

The case under review concerned a game of "midget golf" in which a group of around 15 friends took part. They had divided into groups of two or three for this purpose. At a certain point, the claimant had finished playing on his particular track, and ran towards the next one where the defendant was about to tee off, standing at an oblique angle to her left. He saw how the defendant hit the ball, and was following its course when he became aware of a stitch of pain in his right eye. He later established that the edge of the defendant's stick had hit him in the eye. One of the witnesses had also seen how the defendant, after hitting the ball, had swung her club so far to the left that she hit the claimant's eye. The victim brought an action for damages against the person whose action had caused the injury. The first court had awarded the action; the Court of Appeal overturned this verdict. The matter landed before the Supreme Court (Hoge Raad).

The Court dismissed the action. It held that, on the basis of its previous case law on this subject, for the higher threshold which is required for liability in sporting situations to apply it is not necessary that those involved in an accident were competing directly against each other or that the victim of the accident was at the time when it occurred engaging in actions which are characteristic for participation in the sport in question. The victim in this case remained a participant, even if he was not in direct competition with the defendant. The fact that he was merely following the course of the ball once hit by the defendant did not mean that he had lost his capacity as participant. Being a participant, the claimant was deemed to expect certain actions which may to a certain extent be dangerous, badly co-ordinated and poorly timed. The action in question which caused the accident could not therefore be

4. Torts and Insurance

attributed to negligence on the part of the defendant.

The Court accordingly confirmed the Court of Appeal decision.

Operator of riding school held liable for injury to rider: Belgian court decision¹⁹⁴

In the case under review, a 13-year-old girl was injured when she fell from a horse whilst riding at the riding school operated by the defendant. The girl's parents took legal action against the operator, and the first court awarded the action to the claimants. The defendant appealed.

The court upheld the decision appealed against. The action was based on two grounds: contractual and tort liability. As to the former, the Court held that the defendant's contention in the school's advertising literature that all participants were "fully insured" was incorrect, as a result of which the defendant had committed a precontractual fault. In addition, the mere display of a sign stating that the management could not be held liable for any accident could not be pleaded against the claimants, since the defendant could not demonstrate that the claimants were aware of this at the time of concluding the contract, and that they had therefore consented to this escape clause. However, there was no proven causation between the precontractual fault on the part of the operator and the injury suffered by the child. Therefore, the action failed on this ground.

As to that part of the action which was based on tort liability, the Court held that the applicable provision here was Article 1385 of the Civil Code, which deals with the liability for animals. This liability was not transferred from the owner of the animal to the person who uses it on the mere grounds that it is the latter who has the animal under his/her control. For this transfer to take place, it is necessary that the user has acquired "mastery" over the animal, i.e. the degree of control which is equal to that exercised by the owner. Since the victim of the accident was riding the horse under the supervision of one of the riding school instructors, it was the defendant who retained control over the animal. The latter was therefore liable, on a joint basis with his insurer.

Tort liability issues arising from doping: Article in Austrian journal¹⁹⁵

In this paper, the author Klaus Markowetz examines the tort liability issues which may arise from the taking of prohibited drugs in sport. Since the consumption of these substances is capable of producing far-reaching consequences for the health of the person in question, this falls within the scope of Article 1325 of the Austrian Civil Code. One of the difficulties in this regard

is to establish exactly what is meant by "doping", given the various definitions which exist at the level of the International Olympic Committee, the Council of Europe and the Austrian Olympic Committee. One of the main problems to which this question also gives rise in the case of professional sporting performers is the assessment of loss of earnings. The author examines all the various claims which could arise in tort: (a) by the performer (where he/she has been drugged without his/her knowledge), (b) by the sporting club against the performer, (c) by the organisers of the event against the performer, (d) by the spectator against the organisers, (e) by the sponsors against the drugged performer, and (f) against the performer by his/her competitors. When dealing with the claims by the performer, the author also examines the element of consent. Under Austrian law, consent by the victim only removes the unlawful nature of the tortious act where the injury or loss sustained does not infringe public morality. This is very much the case with doping.

Libel and defamation issues

[None]

Insurance

Threat of terrorism and insurance of major sporting events

Attention has already been drawn earlier to the potential for terrorist attack which is presented by various high-profile sporting events and tournaments. This aspect has naturally exercised the minds of the organisers, and not only in terms of the protection which they need to organise to counter this threat, but also the insurance cover they require to cover the possibility of a terrorist attack – and not necessarily one which actually takes place on the site of the Games itself. If an attack such as that which took place in Madrid in March occurred in Athens during or just before the Games, the latter would very probably be called off, with dire financial consequences.

In early May, it was reported that the cost of insuring the Olympic Games had risen sharply as a result of the Madrid bombings which occurred on 11 March 2004 – more particularly the cost of insuring cancellation of the Games. As a result, sponsors and television networks had to pay over 30 per cent more in order to protect their investment in the Olympics. In addition, underwriters had become so concerned about the risk to the luxury vessels in the Piraeus harbour of Athens that they included a special Olympic review clause in policies which allows underwriters to charge extra

4. Torts and Insurance

premiums if they are unhappy with the security measures taken¹⁹⁶.

In all, the Games were insured against losses of over \$1 billion in the event of a terrorist attack, according to industry insiders. That protection amounts to approximately 25 per cent of the loss caused by the Al-Qaeda attack on 11/9/2001. The highest-profile policy written for the Games was that which was brokered by Marsh, the risk and insurance services firm in London, and in April 2004, the International Olympic Committee (IOC) announced that it was purchasing a policy to cover \$170 million by way of potential losses, including liabilities to national Olympic committees. Curiously, this is the first occasion on which the Olympics organisers have purchased terrorism cover, even though the 1972 Munich Games suffered an attack by five Palestinian terrorists. The US news channel NBC, for its part, also bought a policy to cover the possible loss of advertising revenue if the Olympic programme is cancelled. NBC paid \$793 for the right to broadcast the Olympics in the US¹⁹⁷.

The Euro 2004 football tournament, for its part, was not insured against cancellation in the event of a terrorist attack. The tournament organisers believed that the event would not be a target because the US team was not involved. Coming as it did just weeks after the Madrid bombing referred to above, in which 191 people were killed, this decision raised more than a few eyebrows in the game and beyond. However, the tournament organisers stressed that they had taken out adequate insurance against death and injury to spectators, as well as for damage to stadiums and other facilities during the matches¹⁹⁸.

Other issues

Canadian municipal council not held liable for injury suffered by hockey school instructor¹⁹⁹

In the case under review, the claimant was the head instructor at a hockey school in Merritt, British Columbia. One day there occurred a fire alarm, and both students and staff left the building and gathered on the pavement outside the site of the school in order to await the fire-fighters. The claimant took a roll call, then returned, briefly, to the site. When he returned, he stepped on a parking sign which was lying on the pavement, and injured his foot. The instructor sued the City for this injury, claiming that it was liable in nuisance and negligence.

One of the problems in this case was the evidence as to how exactly the parking sign came to be in the position it occupied at the time of the accident. The court accepted that the most probable version was that of the Head of the city's fire department, who saw

several young people and adults milling around in front of the site, and saw several young people tugging and pulling at a parking sign which was mounted on the pavement. None of the adults present intervened. Several moments later he saw the traffic sign lying some three to four feet from the kerb. He then contacted the City's Public Works department and reported the damaged sign, then moved the latter to the edge of the pavement in an attempt to move it out of the way.

One of the grounds on which the claimant based his claim was that the parking sign had been designed in such a way that it would be more prone to fall and cause a nuisance if interfered with. It emerged that the signs in question were designed to break away immediately in being hit by a vehicle, thus causing the minimum amount of damage on impact by a vehicle, and enabling them to be replaced as quickly as possible. The claimant maintained that the installation of such breakaway sign posts in an area where pedestrians could be hit by falling poles created an unreasonable risk of danger.

The court conceded that there were previous decisions in which the courts had made property owners liable for injuries caused in the public highway, but in none of these was the nuisance created as a result of a conscious desire to protect at least some members of the public. It should be remembered that the essence of the alleged nuisance, i.e. the weakening of the sign posts, was the intentional method of protecting car drivers, and that the sign post did not "fall" but was brought down through the application of a certain amount of force.

The court also found that a different type of sign post which the claimant had put forward as a safer alternative was also designed to break away on impact, and that the type of sign post used in this case was also used by other local authorities. Accordingly, it was satisfied that, in this case, the city had not created an unreasonable interference with the public's interest in health or safety, and was not held liable.

5. Public Law

Sports policy, legislation and organisation

Olympics 2012: the race heats up

So intense has the competition to organise the Olympic Games become that the contending cities seem to spend almost as much on the bid as on the Games themselves. This certainly seems to be the case for some of the front runners in the race to host the 2012 tournament.

New York is a case in point. It has announced that it is to buttress its bid for the 2012 Games by constructing a new 75,000 seater stadium which will transform the Manhattan "Far West Side". After months of argument, officials unveiled a \$2.8 billion plan to erect a new home for the Jets (the city's exiled American football team) and nearly double the size of the Javits convention centre adjacent to it. The result will be a development stretching from 30th Street to 42nd Street along the Hudson River, which will be second in scope only to the \$12 billion rebuilding of the World Trade Centre after the 11 September attacks. The city's officials hope that this project will strengthen their hand in its competition with the other Olympic bidders²⁰⁰.

The plans are not without their critics. The Mayor, Mr. Michael Bloomberg, sees this as a major opportunity to revive Manhattan's run-down Far West Side, despite criticism that new office space in the area will draw tenants away from the Downtown area affected by the 11 September attacks, and that the presence of the stadium will create considerable traffic jams²⁰¹.

However, not all the tactics employed by the competitors seem to have been above board. Thus there was considerable criticism of the Madrid bid, because it was Juan Antonio Samaranch junior, the principal backer of the Spanish capital's bid, who requested that the Panorama programme alleging corruption among some officials of the International Olympic Committee (IOC) (see above, p.53) be shown to IOC members. It will be recalled that the undercover reporters acting for the BBC had passed themselves off as businessmen wishing to secure an advantage for London in the bidding process. Having viewed the programme, the members were quite satisfied that London had nothing to do with any attempt at bribery, which led to accusations that Madrid had been attempting to use the programme in order to discredit or damage the London bid²⁰².

Berlin exorcises ghosts of Hitler stadium

In early July 2004, it was announced that Germany had completed the reconstruction of Hitler's Olympic stadium, and planned to put the arena at the heart of its quest to recover its status as a major footballing power. The stadium where Hitler angrily watched the sprinter Jesse

Owens beat the German runners at the 1936 Games fell into disrepair after the war. Now it has been modernised, and will be the centrepiece when Germany hosts the World Cup in 2006. During the restoration work, builders found and defused a 500lb Second World War bomb²⁰³.

The restoration has tapped into a serious and often passionate debate about the rights and wrongs of saving the few Nazi-era buildings left in Berlin. However, it should be recalled that the Olympic site was not exclusively a Nazi preserve. The International Olympic Committee had awarded the Games to Berlin before the Nazis came to power in 1933, and the architect, Werner March, had already worked out the design for the stadium by 1933.

Israel to allow betting on racing after 2,000 years

Some rules in sport have a longer lifespan than others, but some record must have been reached by the ban on race betting in Israel, which dates back to a rabbinical ruling in the oral Torah. The original rule was against pigeon racers, which had come to be interpreted as a religious denunciation of gambling in general. In early August 2004, a Cabinet Committee headed by the Finance Minister, former leader Benjamin Netanyahu, gave its approval to proposals from a group of Israeli and foreign business entrepreneurs to build a £20 million racecourse, called the Hippodrome, in northern Israel.²⁰⁴

This action has, however, angered religious hardliners who believe that gambling is immoral and breeds licentiousness. Some religious authorities also believe that Jewish civil law should be interpreted as implying that gambling profits are tantamount to theft, although there is nothing explicit to condemn gambling as such. For some years, ultra-orthodox parties in Israel have been demanding an absolute ban on gambling at casinos and on horses. Gamblers have circumvented the ban on gambling on land by using floating casinos on ships moored off the Red Sea resort of Eilat.

One concerned minister, Zevulun Orlev, protested that the racetrack would expose the less wealthy to the false hope of easy money²⁰⁵.

Barcelona prepares for total ban on bullfighting

The practice of requiring animals to fight for the delectation of humans has always occupied a questionable position in the world of sport. Even in those countries with well-established traditions in this regard, such practices are becoming increasingly open to question. This is even the case in Spain, where bullfighting has been a form of public entertainment for many centuries. In Barcelona, it looks as though the practice might well be outlawed ere long.

5. Public Law

Opponents of the practice gained an important victory in early April 2004, when the city council won a motion condemning it. This is seen as a first step towards an outright ban. The resolution to oppose the practice came after councillor had received a petition from animal rights groups signed by 245,000 people in 30 countries. It would allow bullfighting to be outlawed in the region of Catalonia, of which Barcelona is the capital. Before the all-important vote was taken, demonstrators had gathered outside the city hall waving placards stating "Barcelona against bullfighting"²⁰⁶.

As a result of the vote, the councillors would now propose a three-point ethical statement to the regional parliament, the Generalitat, aimed at supporting a regional ban. The previous summer, the regional parliament had already banned children under 14 from attending bullfights²⁰⁷.

Russian tennis success: product of public policy

The sensational success of Maria Sharapova, who became Wimbledon singles champion in 2004 at the tender age of 17, is not the first success which the Russians have enjoyed in this sport. Nevertheless, it seems that Ms. Sharapova's success may well be emulated by many of her compatriots in the near future. One of the reasons for this is the fact that Russian sports policy has for some time now been geared towards improving the nation's performance in this sport²⁰⁸.

One of the major turning points in Russia's tennis fortunes was 1988, when tennis became an Olympic sport. The old Soviet system was very much geared towards obtaining success in Olympic sport at the expense of other disciplines, and thus tennis became a priority area. This approach intensified with the accession to power of Boris Yeltsin, a great enthusiast for the sport. Mr. Yeltsin continued his official interest in the sport even after he relinquished power in 1999. It is expected that this guided approach will pay handsome dividends for Russian tennis over the years to come²⁰⁹.

Boules finds its way to the "Bac" (France)

The French education system has always had a reputation for being one of the soundest in the world. This is why several eyebrows were raised at the news that, this year, a dozen school pupils in Provence have become the first to take the secondary education certificate, known as the baccalauréat (or le bac in colloquial speech) in the sport of boules, which has been elevated to the national curriculum in physical education. The Lycée La Floride, a vocational training school in Marseille, persuaded the authorities to approve the sport as a baccalauréat subject for pupils ruled physically unsuited to more arduous disciplines²¹⁰.

Athens Olympics make the deadline – just

This column, in this and previous issues, has charted the course of the various preparations made by the Greek authorities for one of the major events in the sporting calendar, i.e. the Olympic Games, held this year in Athens. However, even those who harboured the most serious doubts as to whether the organisers would meet the deadline have been proved wrong – but only just.

By mid-March 2004, there still seemed plenty of scope for scepticism about the progress made in completing the work scheduled. The main stadium was still a concrete shell which still lacked some of the basic attributes – such as a roof – and the aquatic centre was equally destitute of various essentials²¹¹. Alarm bells were also set ringing when the test event for the swimming competition, which was due to have taken place in mid-April, was cancelled. This decision was taken within days of a meeting between Jacques Rogge, the President of the International Olympic Committee (IOC), and the Greek Prime Minister Costas Karamanlis, at which the organisers were given a two-week deadline to make the "tough decisions" required to ensure the completion of several venues and transport systems in time for the Games to start²¹². Preparations were plunged into further crisis by the news that the main stadium would only be completed three weeks before the opening ceremony. This meant that several test events would be taking place with construction workers still on site²¹³.

Another element which was increasingly clouding the Olympic horizon was the cost of the entire project. By late March it was learned that the Athens Games had already exceeded their budget by £3 billion, and that therefore more projects could be trimmed in order to reduce spending. (This was also one of the reasons why some commentators feared that this posed a further risk to security and vulnerability to terrorist attack – see above, p.58.) One of the reasons for this overrun was that the rush to overcome construction delays had increased costs, and many local commentators feared that this would saddle the Greek population with considerable debts in the future²¹⁴. In fact, it was confidently estimated that it could take Greece over a decade to repay a £24 billion deficit created by the ballooning cost of the Games²¹⁵. Predictably, the new Conservative government blamed all this on the outgoing Socialist administration²¹⁶.

As April turned to May, there were still plenty of signs that preparations would have to take on the form of a hasty operation. Thus the 26-mile course for the last day's showpiece event, the Marathon, remained at a very early stage of construction, with much of the course having been dug up or dotted with duct tape, craters, water pipes and roaming sheep. Yet another factor in the delays was beginning to come to light, in that many small, inexperienced enterprises were given large-scale projects

5. Public Law

on grounds that owed more to nepotism than ability. In addition, several construction projects had been delayed by the discovery of archaeological treasures, or by locals using an inadequate legal system to resort to the courts trying to prevent the construction of various sporting venues²¹⁷. The trepidation felt by the Olympic world at developments was not assisted either when a senior Greek official questioned whether it was right for Athens to be hosting the games at all, given the amount of work involved. Addressing a parliamentary committee, Giorgias Souflias, the Public Works minister, expressed his doubts about Greece being best suited to organising the tournament in the light of the size of the infrastructure projects²¹⁸.

In spite of all these setbacks, hopeful signs were emerging that the organisers had grasped the urgency of the situation and that everyone concerned was making a massive effort to meet the deadline. In mid-May, the much-discussed roof on the main stadium was fitted and found to operate according to plan²¹⁹. With less than a month to go, it became clear that the other building projects were very near completion, thanks to a sudden burst of activity. It was said that the Greek team's unexpected victory in the Euro 2004 football tournament had led to a marked change in the public sentiment, and doubled their determination to make the Games a success²²⁰.

When the big day arrived on 13 August, everything was ready. However, not everyone was happy with the outcome. Not only was there the cost overrun which would settle the Greek citizen with an enormous debt to repay, as has been mentioned above. There had also been some environmental damage in the process of the preparations, and the World Wildlife Fund claimed that Greece had reneged on its promises by irreversibly damaging the environment around Athens in the process²²¹.

Public health and safety issues

Cause of CJD traced back to racecourse (US)

Memories in this country are still fresh of the BSE scare which ravaged the British beef industry and crossed over into the human population, to be followed by its equally lethal variant, Creutzfeldt-Jacob disease (CJD). Thus far, the US seemed to have escaped this disease – or so it was thought until recently. A number of public figures on the other side of the Atlantic have started to make worried noises about the possible extent of the disease in their country. It appears that one of the events which triggered off this concern was a small-time investigation by an amateur sleuth, and centred on a racecourse in New Jersey.

The amateur sleuth in question, Ms. Janet Skarbek,

was neither a veterinarian nor a scientist, but, somewhat incongruously, an avid reader of obituaries of her local newspaper. She claimed that an unusually high number of CJD deaths were occurring in recent years in and around her nearest town, called Cherry Hill. She had noticed that these victims either worked at, or were visitors to, the Garden State racetrack in Cherry Hill which had closed down a few years before. She began to wonder whether these victims had eaten at the cafeteria at the track, and, if so, whether they had partaken of beef contaminated with BSE. Her investigations led her to answer in the affirmative. The decisive moment arrived when she happened upon the case of John Webber, who died in 2000. The medical examiners said that he had been the victim of sporadic CJD. She decided that she had to contact his family. What followed was, as she later described, it, her “eureka” moment. The brother of the dead man confirmed that the latter had a season ticket to the racetrack and that he ate there at least once per week²²².

This led her to contact two prominent members of the US Senate, who in turn demanded an urgent official study by medical experts from the Centres for Disease Control (CDC), based in Atlanta, Georgia. This gives rise to the possibility that the US may be on the brink of the same trauma which afflicted Britain after the first cases of BSE were discovered in the late 1980s, and, ten years later, when CJD also began to cause devastation amongst the nation's livestock²²³.

Nationality, visas, immigration and related issues

Palestinian athlete barred from Olympics

Just before the opening ceremony was to inaugurate proceedings at the greatest sporting festival the world over in Athens, it was learned that the Greek javelin thrower, Sofia Sakorafa, who had gained Palestinian nationality, had been barred from competing in the Palestinian team by the International Olympic Committee. At a news conference, Ms. Sakorafa commented that not to allow her to compete at the 2004 Games infringed the Olympic ideals of friendship among nations²²⁴.

Other issues

Mandela sells tennis racket for charity

In July 2004, an unprepossessing metal-framed tennis racket used by former South African president Nelson Mandela whilst he was imprisoned at the infamous Robben Island went on sale. The proceeds went to the Mandela Trust, an anti-Aids and children's charity²²⁵.

6. Administrative Law

Planning law

Becker bows to Majorca planners over luxury villa

There is a story doing the rounds of this Journal's editorial circles that Boris Becker, the former Wimbledon champion, and the author of this column have concluded a secret pact whereby the latter will have featured under every single heading of this column before their demise. Regardless of the truth of any such rumour, it is a fact that Mr. Becker, following his brushes with the criminal and civil courts featured in earlier editions, has now made it into this rubric thanks to a dispute with the Majorcan authorities concerning his luxury villa on the island.

For two years, Mr. Backer was caught up in an argument with the planning authorities after constructing a £500,000 extension to his house in Arta without official sanction. He was initially fined the sum of £145,000 by way of fine for this infringement. However, the penalty was halved on appeal after he declared himself willing to comply with an order for the demolition of the extension²²⁶.

Judicial review (other than planning decisions)

Complaint against use of church community site as sporting area is administrative matter: German court decision²²⁷

After a church community had allowed youth groups to use their area for regular meetings, matters took on a momentum of their own and the groups in question started using that area for football and other sports. This gave rise to complaints, and inhabitants of the surrounding area brought an action in discontinuation before the local administrative court (Verwaltungsgericht). The latter held this action to be inadmissible since it was not an inherently administrative matter, and referred the claimants to the civil courts. The complainants in question appealed against this decision before the Bavarian Administrative Court of Appeal (Verwaltungsgerichtshof).

The Court allowed the appeal. It accepted that not every activity of a church community governed by public law (kirchliche Körperschaft des öffentlichen Rechts) must fall within the scope of public law merely because of its status. It was also not unusual for these communities to use their powers of disposal over their land to allow these to be used by third parties – in which case the private law would apply. However, this was not the case in the matter under review. We were dealing here with the use of the land in question by church youth groups, of whom it could not be denied that they were public law organs. Therefore, disputes

which arose from such use had to fall within the jurisdiction of the administrative courts.

Municipality ordered to pay damages for sound nuisance emanating from basketball pitch: French Supreme Court decision²²⁸

In this case, the Administrative Court of Appeal (Cour administrative d'appel) of Paris had ordered the municipality of Moissy-Cramayel to pay the sum of FF 50,000 to the inhabitants of an area close to a basketball ground, because of the noise nuisance which the sounds emanating from this ground was causing them. The court had made this order on the grounds that the mayor of the municipality had been negligent by failing to take the necessary measures to restrict access to a sporting ground situated next to their property in order to reduce the sound nuisance which resulted from the use made of that ground. The municipality had applied for review of this decision before the Supreme Administrative Court (Conseil d'Etat).

The Conseil dismissed the application. The municipality claimed in its application that, by basing its decision exclusively on the liability incurred by the municipality for negligence on the part of the mayor to use his policing powers, the Administrative Court of Appeal had committed an error of law and inadequately reasoned its decision. The Supreme Court disagreed. By ruling that the mayor in question had, by failing to use his policing powers and issue a regulation aimed at reducing the noise emanating from the sports ground, committed an error capable of engaging the tort liability of the municipality, without qualifying this as a serious error (faute lourde), the Administrative Court of Appeal had not committed an error of law. Having taken this as the legal basis for its decision, the Conseil was not compelled to reply to all the grounds put forward by the municipality seeking to prove that the mayor had not committed any error, and did not give to the facts a mistaken legal qualification.

The Court therefore confirmed the decision of the Administrative Court of Appeal.

Other issues

[None]

7. Property Law

Land law

[None]

Intellectual property law

Wearing of wrong logo capable of causing spectator ejection at Olympics

With approximately a month to go before the opening ceremony of the Athens games, it was learned that spectators could be forcibly removed from the various stadiums if they wore clothing bearing "obvious logos of competitive (sic) companies to sponsors", under the relevant rules issued by the organisers of the Games. The restriction extended to hats, T-shirts, bags and other "commercial items". However, it was emphasised that spectators would not be ejected for wearing clothing which inadvertently advertised competitor companies. The prohibition was intended as a means of preventing a "commercial coup d'état" (otherwise known as "ambush marketing") in the stadiums²²⁹.

It was intended to prevent sponsors being hijacked in an orchestrated way rather than preventing people wearing a particular T-shirt. In fact, the object was not to target individuals but concentrate on groups. If a party of around 20 people were observed sitting in a row wearing hats of a non-sponsor company they would be removed. However, even this clarification still left some confusion as to what precisely would constitute a "group". This issue had attracted the attentions of the Greek branch of Amnesty International, which feared that freedom of expression could be among the victims of this measure.²³⁰

Ultimately, there were no recorded cases of any ejections made in the circumstances described above.

Edwards sued by rival over round-the-world voyage idea

In late April 2004, the French round-the-world yachtsman Bruno Peyron initiated court proceedings against his rival, British yachtswoman Tracy Edwards, claiming that the latter had stolen his idea of a non-stop, no-limits race around the globe. Mr. Peyron alleges that two competitions planned by Ms. Edwards, with the financial support of the Gulf state of Qatar, for 2005 and 2006 were copies of his 2001 "The Race". Both Mr. Peyron and the "The Race" organisation are suing Ms. Edwards and three of her companies for damages over "unfair competition and prejudice caused to any future editions of The Race"²³¹.

French sources had reported that Mr. Peyron had been compelled to cancel the second edition of The Race, which had been scheduled to start from Marseille in February 2004, because several competitors,

including Ms. Edwards, had withdrawn to take part in the latter's rival event²³².

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

Copyright of photographs taken at two sporting events. French Supreme Court decision²³³

In the case under review, the claimant organised a sporting event every year named Trophée Andros. The CDO company also organised a sporting event on an annual basis called Les 24 heures sur glace de Chamonix. In a report on the Chamonix race, the defendant MPF company used photographs taken during the Trophée Andros from which they had removed all mention of the actual name of the race. In the accompanying article, MPF wrote that the photographs had been taken at Les 24 heures de Chamonix. As a result, the claimant sued MPF for damages under Article 1382 of the French Civil Code (tort liability) and under the French Intellectual Property Code. The Court of Appeal of Versailles had ruled that the claimant's intellectual property rights had not been violated. The claimant applied for review to the Supreme Court (Cour de Cassation).

The Supreme Court ruled that organisers of sporting events owned intellectual property rights over the photographs taken during such events. It accordingly set aside the decision of the Court of Appeal.

Various academic articles on intellectual property rights in sport

In the latest issue of a sister journal²³⁴, the author Jose Rey examines how the relationship between professional football and the media has developed in Spain, and focuses on the club's requirement that their players should, in their contracts of employment, yield their broadcasting and personal image rights. He also notes that the intellectual property position in this regard differs in Spain from that in other EU member states such as France, Germany and Britain. He discusses the current position, which witnesses the two largest clubs in Spain, Real Madrid and Barcelona, conducting negotiations with broadcasters which are separate from other league clubs.

In "Legal principles applicable to the centralised marketing of TV broadcasting rights in German",²³⁵ Martin Schimke examines the background to and legal implications of the negotiations currently held in Germany concerning the media rights to Bundesliga football fixtures. He considers the ownership of such rights, the importance attached to being the organiser of an event and the position of the League Association in this context. He explains why, for the purpose of

7. Property Law

controlling broadcasting rights, each individual club hosting a match forms a legal community with the League Association and has joint utilisation rights under Article 744(1) of the German Civil Code. In addition, he observes that the European Commission is currently examining the consistency with EU law of the centralised system of marketing television broadcasting rights (see below, p.81).

In "Ownership of TV rights in professional football in France", Delphine Verheyden analyses the pressures which are brought to bear by footballing organisations in France to modify the requirements of Law 84-610, which organises sport, including the ownership of television rights. This has resulted in Law 2003/708. The author notes the amendments which have been introduced by the 2003 amendment, with particular reference to the sale of broadcasting rights and the relationship between the clubs, their Association and the Football League.

In "Ownership, exploitation and competition issues", Luca Ferrari examines the legal rules applicable in Italy, via national and EU legislation, to media rights concerning football matches, focusing on the Football League club's ownership of such rights and their commercial utilisation. He uses various tables and diagrams to demonstrate the extent to which these rights are exercised through radio, free-to-air television, and pay-television in the context of the freedom of the press. He discusses the competition issues which arise in connection with the collective selling of broadcasting rights, and considers the implications of involving the new media, such as mobile telephones.

In "Restrictions on the freedom of information in sport", authors Annette Mak and Bert-Jan Van den Akker examine the problems associated with achieving a proper balance between the constitutional right on the part of the general public to the free flow of information, and protecting the intellectual property rights of parties to sporting contracts, with special reference to the Netherlands law. They discuss the approach by the Netherlands towards the issues of protection and copyright, trademarks, database rights and broadcasting rights. In addition, the authors compare the Netherlands approach towards the news media with that of the authorities in Belgium and other member states of the EU.

In "Stadiums for FIFA World Cup Germany 2006 and European law on State aid: a case of infrastructure measures?", Michael Gerlinger examines the project financing mechanisms applied for the purpose of funding the construction of football grounds for the FIA World Cup to take place in Germany in 2006. He argues that the public authorities should enforce a stricter interpretation of the restrictions on state aid under

Article 87 of the Treaty, and specifically that the rules on state aid should be applied to the building of sporting stadiums in those cases where it is clear that such projects are favouring specific clubs rather than the wider public interest.

In "State aid to professional football clubs: legitimate support of a public cause?", Marjan Olfers compares the approach to state aid for sporting organisations taken by the authorities in the US and those in the EU, focusing in particular on the Netherlands. She argues in favour of giving sporting organisations wider social and public interest exemptions from EU competition law, more specifically from the restrictions on state aid contained in Articles 87 and 88 of the EC Treaty.

Finally, in "The professional club leagues in Portugal: what legislative reform?", Jose Manuel Meirim, in a paper given at a conference organised by the Portuguese League of Professional Football at its headquarters in Oporto (April 2003), discusses the Government's proposals for the comprehensive reform of sports law, focusing on the implications for professional leagues of sporting clubs. He analyses the status of Leagues within the existing legal context, their role as regulators of their sport, and their relationship with the clubs, the sporting federations and the state. He asks the question whether the Portuguese government has given serious thought to what would replace the rules which it wishes to reform. He notes some of the issues which would underlie any reform, and concludes that this is more likely to be motivated by action emanating from European governing body UEFA, or by economic pressures.

Those stripes again. European Court of Justice gives definitive judgment in Fitnessworld case

The owner of a trademark having a reputation cannot prevent the use of a similar sign viewed purely as a decorative motif. By contrast, there can be an infringement to the mark with a reputation when the degree of similarity between that mark and the sign has the effect that the public establishes a link between the sign and the mark without necessarily confusing them. That was the verdict of the European Court of Justice²³⁵ in the most recent of the many Adidas case, for which, as was reported in a previous issue of this journal, the Advocate-General had already given his opinion²³⁶.

Adidas is the proprietor of a trade mark, registered in the Benelux, formed by a motif consisting of three vertical stripes running parallel which appear on sports clothing. Fitnessworld markets certain sports clothing bearing a motif similar to Adidas', but composed of two vertical stripes, not three. Adidas brought an action against Fitnessworld before the Netherlands courts,

7. Property Law

claiming a likelihood of confusion between the two motifs on the part of the public. Fitnessworld thus takes advantage of the repute of the Adidas mark and impairs the exclusivity of that mark. Fitnessworld believes that the motif is viewed purely as an embellishment by the relevant section of the public and there cannot, therefore, be an infringement of the mark.

The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the case finally came, referred several questions to the Court of Justice of the European Communities for a preliminary ruling on the interpretation of the Community directive on trademarks. The Court found that it is not necessary for there to exist a likelihood of confusion between the sign and the mark with a reputation in order to claim infringement of that mark. It is sufficient if the relevant section of the public establishes a link between the sign and the mark even though it does not confuse them.

However, the Court has specified that where, according to a finding of fact by the national court, the relevant section of the public views the sign purely as an embellishment, it does not necessarily establish any link with the mark with a reputation. It follows that the proprietor of the mark with a reputation cannot prevent the use of that embellishment by a third party.

Other issues

Another “million dollar baseball” case in the making?

The reader may recall, from an earlier issue²³⁷ the case of the ball hit by baseball star Barry Bonds, which ended up as an extremely expensive court case fought over the question as to which spectator had caught it. History could repeat itself if a similar case is allowed similarly to go down litigation road.

During the third innings of the fixture between Texas Rangers and St. Louis Cardinals in mid-June, a ball came hurtling towards four-year-old spectator Nick O'Brien. As he rose to catch the ball, Matt Starr, a former youth minister, dived across to grab the ball, striking the child on the leg and knocking him over as he stood up to brandish the trophy. However, the aggressive catcher was caught himself – by the television cameras, and Mr. Starr's fellow-spectators were sufficiently incensed to make him leave the match earlier than he would normally have done²³⁸.

It was not known at the time of writing whether this case would see the inside of a court of law.

8. Competition Law

National competition law

G14 group to sue FIFA under Swiss competition law

The increasing disenchantment by the association of top football sides in Europe, known as the "G14" group, with the current state of affairs as regards the terms on which their players are expected to be released for international duty has already been commented on earlier from the point of view of employment law (above, p.000). It would now seem that there is also a competition law angle to this dispute. In early April 2004, the Group lodged a complaint against the Zürich-based world governing body under Swiss anti-trust law over the requirement that players be thus released without compensation for the clubs involved²³⁹.

EU competition law

Italian MEP seeks clarification on legality of remuneration paid to amateur football managers²⁴⁰

In February 2004, Generoso Andria, an Italian MEP, took advantage of the European Parliament's Question Time to seek clarification from the European Commission on the consistency with EU competition law of certain practices operated in Italian football. Mr. Andria pointed out that, in Italy, the chairmen of amateur football clubs often incur considerable expenses without any reward apart from their love for the game. Yet, on the other hand, other directors in Italian football, from the President of the Italian Football League to its board members, are known to receive remuneration of thousand of euros in the form of a per diem allowance in order to cover their expenses – which are questionable from a fiscal point of view – and succeed in circumventing the provisions of Article 10 of the law governing the Italian Football Federation (FIGC), under which the duties performed by its officers may not be remunerated, and under which no office in football may be held by those who derive financial gain from their involvement in football.

Mr. Andria sought to establish whether this situation amounts to a distortion of competition in a particularly sensitive sector, or involves serious irregularities. At the time of writing, the Commission's reply was not yet known.

9. EU Law

Parliamentary questions on discrimination re access to Spanish sporting federations

In late December 2003, various questions were tabled by Spanish MEPs concerning the possibility that the conditions for access to sporting federations in Spain might infringe the non-discrimination principle set out in various EU instruments.

They maintain that, in Spain, there are serious cases of discrimination against children with regard to their access to sporting leagues, in terms of administrative red tape or the refusal on the part of the sports federations to allow them to join on the basis that the situation of their families is not regular or is in the process of being regularised. These affect mainly the children of immigrants. The MEPs allege that this amounts to illegal discrimination under the Convention on the Rights of the Child and the EU's Charter of Fundamental Rights²⁴¹.

Sport to be officially recognised by the EU Constitution

The EU constitution, which is now going through various ratification procedures in the member states, will devote a section to sport, more particularly Article III-182, which reads as follows:

« The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and complementing their action. It shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

- a) developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States;
- b) encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study;
- c) promoting cooperation between educational establishments; d) developing exchanges of information and experience on issues common to the education systems of the Member States;
- e) encouraging the development of youth exchanges and of exchanges of socio-educational instructors and encouraging the participation of young people in democratic life in Europe;
- f) encouraging the development of distance education;

- g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.
4. In order to contribute to the achievement of the objectives referred to in this Article,
 - a) European laws or framework laws shall establish incentive actions, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.
 - b) the Council of Ministers, on a proposal from the Commission, shall adopt recommendations »

EURO 2004 feels free to say no to smoking²⁴²

On the pitch, it was anyone's guess who was going to emerge victorious from the EURO 2004 tournament. However, for all those watching the match, the clear winners were non-smokers – as UEFA has dedicated the day of the match to non-smoking. One of the practical consequences will be that football fans watching their teams in Lisbon's Luz stadium will not be exposed to passive smoking. The symbolic smoke-free EURO 2004 day will be celebrated together with "Feel free to say no", the EU's anti-smoking campaign targeting young people. Two new campaign television commercials were shown on the screens of the stadium to further promote the smoke-free day. Further activities in Lisbon that day included a 17 metre long "Feel free to say no" campaign truck with a stage which will be used for games, quiz shows, competitions and live performances by pop bands. The basis for the symbolic smoke-free EURO 2004 day is a cooperation agreement signed by UEFA President Lennart Johansson and EU Health and Consumer Protection Commissioner David Byrne just before the kick-off of the 2002 World Cup.

David Byrne commented:

"The launch of the 'Feel free to say no' campaign in May 2002 coincided with the kick-off of the 2002 World Cup. So I was very pleased that UEFA teamed up with the EU for the fight to stop young people smoking. 8 out of 10 people who smoke start between the ages of 12 and 18. Once they are hooked by the nicotine, these people no longer have a real choice. They are trapped. That is why we

9. EU Law

want young people to feel free to say no to tobacco while they still have that choice. Well-known footballers – who were later joined by international pop stars – helped us to grab the attention of young people. The credibility of such non-smoking stars supports the message ‘Be cool – don’t smoke’.

New print advertisements

The two television commercials to shown in Lisbon's Luz stadium were broadcast throughout Europe by national and Europe-wide channels such as Eurosport. At the same time, new print adverts of “Feel free to say no” are being published in all major youth magazines in EU Member States. The advertisements have an eye-catching layout and use provocative buzz words such as “Target”, “Victim” and “Slave” to make young people aware of the intentions of the tobacco industry. National versions of the television commercials and the print adverts were produced in close cooperation with the campaign's national headquarters.

European Commission welcomes the adoption of new rules for recreational craft²⁴³

In May 2003, the European Commission welcomed the adoption by the European Parliament and the Council of Ministers of a new directive on recreational craft. This new directive, which amends the recreational craft directive (94/25/EC), extends its scope to include personal watercraft and complements its design and construction requirements with environmental standards in regard to exhaust and noise emission limit values for recreational craft. The new Directive succeeds in meeting both single market and environment protection needs, whilst sustaining competitiveness of the recreational craft manufacturing industry. Following the Parliament and Council agreement, these harmonised emission limits will take effect progressively, from 1 January 2005 to 1 January 2007. It is estimated that the yearly emissions of carbon monoxide, hydrocarbons, nitrogen oxides and various other pollutants from recreational craft within the EU will be reduced by over 50% once the limits are fully implemented.

Enterprise Commissioner Erkki Liikanen commented:

“I am pleased that the Parliament and the Council have supported our innovative proposal, which aims at combining environmental and industrial policy objectives in an internal market directive. The adoption of this directive will contribute to maintaining and enhancing the competitiveness of the European recreational marine industries by further removing possible technical barriers to trade, whilst at the same time ensuring that the environment and human health and safety remain adequately protected.”

Over 95% of the 800,000 recreational craft produced each year worldwide are motorboats. These boats are frequently used in recreational areas in coastal zones and in lakes, where low ambient noise is often a significant but scarce natural resource. Furthermore, the use of these boats is largely concentrated during the summer period, leading to high levels of local air and water pollution caused by their exhaust gases. To reduce this negative environmental impact, the Commission proposed in October 2000 to amend Directive 94/25/EC with a view to limiting emissions of air pollutants and noise originating from such craft.

The new Directive also requires the European Commission to study the possibilities of further improving the environmental characteristics of recreational craft engines. The Commission will submit a report on its findings by the end of 2006, and if appropriate, submit legislative proposals to the European Parliament and the Council of Ministers by the end of 2007.

In addition, the amending directive introduces a number of modifications to the basic requirements of Directive 94/25/EC, with the aim of further enhancing the free movement of recreational craft and their components within the internal market.

These modifications extend the scope of the Directive to personal watercraft, and provide for an extended range of conformity assessment modules leaving a wider choice to boat and engine manufacturers to demonstrate that their products comply with the design and construction requirements of the Directive.

Bathing Water Report 2003: continued quality improvements in the EU15²⁴⁴

Just ahead of the summer holiday season, the European Commission presented the annual report on the quality of Europe's bathing waters. Overall, the picture is good: bathing water quality in the EU continues to improve. The annual report is based on the requirements of the 1976 Bathing Water Directive and issued every year before the summer holiday season to allow citizens to check the quality of the bathing water in their favourite holiday destinations. In 2003, 98.6% of the EU coastal bathing waters and 92.3% of all fresh waters complied with the Directive. This confirms the positive trends of recent years. Many Member States are now very close to full compliance with the quality standards and the monitoring requirements under the Directive. However, one worrying aspect remains: in some Member States, there is a tendency to ban bathing or declassify bathing sites when there are problems, rather than removing the source of pollution.

Commissioner for the Environment Margot

9. EU Law

Wallström commented:

“Bathing water quality is still improving in the EU! This is good news for citizens in general and especially for parents of young children, who want to enjoy Europe’s seas and lakes. It is particularly welcome that most bathing sites do not just comply with the legal minimum standards under the Directive, but that they also meet the stricter recommended standards. But now we need to stop the practice of declassifying bathing sites as a remedy for pollution problems. The right approach is to deal with the pollution, and not to cancel people’s bathing opportunities! I urge the Council and the Parliament to adopt speedily the proposal for the revised Directive, which the Commission put on the table in 2002. It will not only provide an even higher level of protection, but also involve citizens more in the management of bathing sites.”

Overview of the 2003 results

The Bathing Water Directive (76/160/EEC) from 1976 sets “imperative” water quality standards that must be complied with, as well as higher “guide values” that Member States are encouraged to meet. These include a range of key parameters (including indicators of the presence of faecal bacteria and three physico-chemical parameters). The Directive also details the requirements for how bathing water quality should be monitored and reported. As a rule, sampling should be carried out every fortnight, plus one additional sample 14 days before the start of the locally defined bathing season.

The respect of these criteria is important for human health as bacterial contamination resulting from inadequate treatment of waste water or animal wastes entering directly into the water can give rise to gastro-enteritis or even respiratory illnesses in persons bathing in contaminated waters. Throughout the EU, there are 19,371 bathing waters covered by the Directive, out of which 70% are coastal (sea) waters and 30% are fresh waters. As the report covers the year 2003, data for the new member states is not yet included. Such data will be included from next year onwards.

In 2003, 96.8 % of all EU coastal waters complied with the “imperative” standards. This is a 1% rise compared to last year. The percentage of fresh waters conforming to the imperative standards has also risen by 1 percentage point, to 92.3%. During the 2003 bathing season, 89% of coastal waters and 68% of freshwater sites were meeting the guide values compared to 87% and 64%, respectively, the previous year. Member States have also improved the monitoring of their bathing waters. At less than 0.5% of bathing water sites is the monitoring regime below the standard required by the Directive.

There is, however, one significant negative development: The number of bathing sites where the site was de-classified (put outside the scope of the Directive) or where bathing was prohibited rose sharply during the last bathing season. The Commission strongly disapproves of this approach. Some of these “forbidden” bathing waters remain banned for many years, and thus Member States get away with bad water quality. At the same time, not enough efforts are made to bring these bathing waters back into good condition and to tackle the source of pollution.

Revision of the Bathing Water Quality Directive

Following an extensive period of consultation, the Commission in October 2002 proposed a revision of the 1976 Bathing Water Directive. The revision (COM(2000)581) aims:

- to improve the level of protection so that the chances of medical problems as a result of swimming are further reduced;
- to improve the application of the Directive so that efforts are directed towards managing risks rather than simply monitoring and reporting. This will enable good bathing waters to benefit from reduced monitoring requirements;
- to simplify the Directive so as to focus more on the real threats to health, which are considered to be essentially bacteriological rather than chemical;
- to ensure that the requirements of the Bathing Water Directive are coherent with the obligations of the Water Framework Directive;
- to make sure that new techniques for the communication of information are fully exploited so that citizens receive fast and reliable information;
- to ensure citizens’ involvement in the management of bathing waters.

After a first reading in Parliament, the proposal is still being discussed in the Council.

Ireland: Commission pursues legal action for breaches of environmental law in nine cases²⁴⁵

The European Commission has decided to pursue infringement proceedings against Ireland in nine cases involving EU environment law. Several of those cases relate to insufficient protection of Ireland’s rich biodiversity. But Ireland has also failed to deal adequately with unlawful, environmentally damaging waste operations, and to properly implement other EU laws aimed at providing Europe’s citizens with a healthy environment. In two cases, Ireland has already been condemned by the European Court of Justice. Some of these concern the installation of sporting facilities at the expense of wildlife.

9. EU Law

The Commission is now following up these judgments as Ireland has still not changed its legislation and practices. Commenting on the decisions, Environment Commissioner Margot Wallström said:

“One important objective of EU environmental law is to protect Europe’s biodiversity. Ireland’s nature is stunningly beautiful. It is important to preserve this richness for future generations, as well as for the tourists that visit Ireland. Full implementation of EU conservation legislation will ensure this. Ireland also has to continue to fight against illegal waste operations and clean up the damage they have created to give its citizens the quality of life they have the right to expect.”

Failures to protect nature and wildlife: sporting facilities at the expense of wildlife

The Commission has also decided to refer Ireland to the Court for another problem of nonconformity of Irish legislation with the Habitats Directive. It is based on the investigation of a complaint that use of rough-terrain motor vehicles known as quad-bikes was causing erosion within Irish sites proposed for Natura 2000. Many of these sites have fragile peat soils. The Commission found that Irish legislation does not provide for proper controls over potentially damaging recreational activities in Natura 2000 sites, such as jet skis. As the necessary additional legislation has still not been sent to the Commission, the Commission has now decided to address the Court of Justice.

Breaches of EU nature conservation law by construction of skiing infrastructure²⁴⁶

Italy has failed to respect the Habitats Directive and the Birds Directive in four cases. The Habitats Directive protects a range of rare and endangered animals and plants, as well as a selection of habitat types, by making them part of the EU’s network of protected areas known as Natura 2000. Among other things, the Directive requires the assessment of potentially damaging plans and projects that may affect Natura 2000 sites before they are carried out. Similar to the Habitats Directive, the Wild Birds Directive creates a comprehensive nature protection scheme, but focuses on the EU’s wild bird species. Italy failed to assess the potential impact of the following construction projects within protected sites and the Commission will therefore send final written warnings to Italy.

The four cases are:

1. The development of an industrial zone in the area of Manfredonia (Foggia) with an impact on the nature site “Valloni e steppe Pedegarganiche”.
2. The construction of a forestry road (“Koferalm”,

municipality of Campo Tures, Natural Park Vedrette di Ries-Aurina) and an equipped path (“via ferrata” between Vallelunga and Alpe Stevia, in the municipality of Selva di Val Gardena, Natural Park Puez-Odle) both in the Dolomites in the Bolzano Province of the Trentino Alto-Adige region.

3. Construction of new skiing infrastructure which is being built in view of the 2005 alpine skiing world championship in the Stelvio National Park. This National Park founded in 1935 is one of the largest and most ancient natural parks in Italy and displays a great range of Alpine biodiversity.
4. Several potentially damaging activities have taken place in “Lago di Mezzola e Pian di Spagna” (North of Lake Como). In particular, they include the building of a film-set in a delicate reed-beds area, its use during birds’ breeding season and its destruction by a fire when it was no longer needed; and a tourist infrastructure in “La Punta”, used in particular during summer. All these developments cause severe disturbances to the habitat hosting 74 bird species, many of which are migratory.

Free movement of services: Commission inquires into Danish restrictions on sports betting²⁴⁷

The European Commission has decided to send Denmark an official request for information on its legislation, adopted on 26 March 2003, which prohibits the supply or advertisement of, and the facilitation of participation in, gambling services offered by providers licensed in other Member States. Danish law restricts in particular the provision of sports betting services. The Commission intends to verify the compatibility of the ban in question with the provisions of the EC Treaty on the free movement of services and on the freedom of establishment. The Commission’s request will take the form of a letter of formal notice, the first step of an infringement procedure under Article 226 of the EC Treaty. Denmark will be asked to respond within two months. If the Commission were not satisfied with the response, it could send a formal request (known as a reasoned opinion) for the system to be changed and if Denmark did not comply, the Commission could take the case to the European Court of Justice.

The prohibition introduced by the Danish Act on Certain Games, Lotteries and Bets (Lov om visse spil, lotterier og væddemål, Law no 204 of 26 March 2003) renders it illegal for any service provider, operating under a gambling licence of another Member State than Denmark, to advertise, facilitate participation in or supply gaming services. The prohibition of advertising

9. EU Law

and the sale of advertising space to gambling providers applies to printed media, radio, television and information society services. The Danish law also prevents suppliers of the services concerned from providing them into Denmark from another Member State. The Commission is concerned that this could contravene Article 49 of the EC Treaty on the free movement of services.

The Danish legislation also makes it impossible for EU based providers of sports betting services to establish a presence in Denmark for example by setting up an office and to supply their services via that presence. In the Commission's view, this could contravene the principle of the freedom of establishment set out in Article 43 of the EC Treaty.

The Commission is therefore concerned that, on the basis of the available information, the Danish legislation in question could give rise to restrictions on establishment and on the cross-border provision of services which are disproportionate to general interest objectives recognised by the European Court of Justice (such as the protection of consumers or the maintenance of public order).

The Court's case law (see C-243/01, *Gambelli*) provides that national measures that may give rise to restrictions must seek to protect general interest objectives such as the protection of consumers or the maintenance of public order and that such restrictions must, in any event, seek to limit gaming services in a consistent and systematic way. In particular, the Court's case law indicates that a Member State cannot invoke the need to restrict its citizens' access to gambling if at the same time public authorities in that Member State incite and encourage people to participate in lotteries, games of chance and betting to the financial benefit of the public purse.

Commission asks Italy to change its rules on accounting by professional sports clubs ('Salva calcio')²⁴⁸

The European Commission has decided to ask Italy formally to change its "Salva-Calcio" law on financial reporting by professional sports clubs, including Serie A football clubs. The Commission believes that the legislation breaches EU accounting laws in that the balance sheets of a number of sport clubs fail to provide a true and fair view. The Commission's request takes the form of a "reasoned opinion", the second stage of EC Treaty infringement procedures (Article 226). Unless a satisfactory response is received within two months, the Commission may refer the case to the Court of Justice.

The effect of the February 2003 "Salva-Calcio" Act is that some professional sports clubs, especially major

football clubs for which players' contracts are the biggest item of expenditure, may be able to submit accounts which underestimate their true costs in a given year, hide real losses and give a misleading picture to investors.

In technical terms, the "Salva-Calcio" Act allows sports clubs to place in a special balance sheet item under assets the capital losses arising from the decreased value of the rights to exploit the performances of professional players, as determined on the basis of a sworn expert valuation. This item is accounted for among the assets in the balance sheet and amortised. The "Salva-Calcio" Act specifies that companies opting for the special rules introduced by the Act must proceed, for accounting and fiscal purposes, to amortise the balance sheet item in ten yearly charges of equal amount, even if rights established by contracts with the players concerned last for, say, only two or three years.

The 4th (78/660/EEC) and 7th (83/349/EEC) Council Directives (Accounting Directives) on companies' annual and consolidated accounts require athletes' contracts, where treated as intangible assets, to be written off over their useful economic life, which generally would be the term of those contracts. The contract may not be written off over a longer period than the duration of the contract itself. In addition, the Accounting Directives provide that value attributed to fixed assets must be adjusted downwards to their real value on the balance sheet date if it is expected that the reduction in their value will be permanent. The Directives also set out the fundamental principle that financial statements should show a true and fair view of the companies' assets, liabilities, financial position and profit or loss.

Therefore the Commission believes that the "Salva-Calcio" Act breaches the Accounting Directives by allowing a number of athletes' contracts, to be written off over a longer period than their useful economic life and by allowing sports clubs not to make value adjustments in respect of their contractual rights over professional athletes, even if those athletes have ceased to perform at the level expected from them, for example through injury. Financial statements presented in such a manner cannot show a true and fair view and so depart from the "prudence principle" of the 4th Directive.

Though the Italian authorities have underlined that the "Salva-Calcio" Act was conceived as a "one off" measure, the Commission notes that it continues to affect the accounts of the sports clubs in question and that no measure has up to now been taken by the Italian authorities to put an end to these effects. In these circumstances, the Act is still in breach of the EU Accounting Directives.

9. EU Law

Freedom to provide services and freedom of establishment: infringement procedures against Spain, Italy and France²⁴⁹

The European Commission has decided to bring Spain before the Court of Justice of the European Communities in connection with its legislation on the transfer of insurance portfolios between operators, which the Commission regards as discriminatory against non-Spanish insurers. The Commission has also formally asked Italy to amend its legislation on “labour consultants” (‘consulenti del lavoro’) and extrajudicial debt collection. Italy has also been asked to bring the rules of Italy’s central gliding club into line with the EC Treaty by deleting the provisions that constitute discrimination on the basis of nationality and an obstacle to the freedom of cross-border establishment. In addition, the Commission has asked France to apply its arrangements for aerial photography without discrimination. Under the system as it stands, only non-French nationals are required to obtain authorisation. These requests are in the form of reasoned opinions – the second stage in the infringement procedure provided for in Article 226 of the EC Treaty. Should a Member State that has received a reasoned opinion fail to give a satisfactory response within the deadline (usually two months), the Commission may refer the matter to the European Court of Justice. The Commission has also terminated two infringement procedures against Belgium (satellite dishes) and Portugal (laboratories), which have been satisfactorily resolved.

Services account for around 70% of GDP in the European Union. If national regulations impede the free movement of services, businesses, and particularly SMEs, are deprived of outlets, and their potential clients – be they private individuals or other businesses – are deprived of choice and, in many cases, better value for money. The competitiveness of the European economy is therefore compromised.

Italy – Aero Club centrale di volo a vela

The Commission has also decided to send the Italian authorities a reasoned opinion on the grounds that the rules of the Aero Club centrale di volo a vela (central gliding club) are incompatible with the EC Treaty. Article 17 of these rules stipulates that membership of the elective bodies is restricted to Italian nationals. This is incompatible with Article 12 of the Treaty, which sets out the general principle of prohibiting any discrimination on grounds of nationality, and with the freedom of cross-border establishment (Article 43), in that it prevents any non-Italian Community national from occupying elected posts and hence from performing the functions associated with these posts as part of the activities of the club. Exclusion on grounds of nationality

therefore has the effect of discouraging nationals of other Member States and limiting their scope for stable and continuous integration into economic life in Italy.

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

Other issues
[None]

Italian clubs face bankruptcy

The chill financial winds which have been swirling round the corridors of Europe's professional football clubs seem to be seeping into every corner of the game, even in those areas which were hitherto regarded as virtual goldmines. Thus a number of clubs in that Shangri-La of professional football, Italy, have recently been experiencing financial problems to the point of facing the real possibility of extinction.

Thus the Southern club of Napoli was declared bankrupt in early August 2004. The debt-ridden former league champions, who were refused a licence to play in the second division (Serie B) because of their debts, which are estimated at round £48 million, were issued with the order by a bankruptcy court²⁵⁰. At the time of writing, it was not clear exactly what future – if any – faced the club.

The case of Parma, however, is untypical, in that its dire financial plight has been caused by factors which have nothing to do with what has happened in the club boardroom. It will be recalled from the previous issue²⁵¹ that top club Parma threatened to go under because of the Parmalat global food company having been declared bankrupt. Towards the end of April 2004, a court declared the club insolvent – the 28th unit of the scandal-struck company to assume bankruptcy-protection status²⁵². The club is £212 million in debt, and will face bankruptcy unless these liabilities can be managed.

Another club whose financial affairs have come under the scrutiny of the authorities as a result of a wider scandal is Lazio Rome. In mid-March 2004, the club, which was being investigated as part of the investigation into the collapse of the Italian food company Cirio, announced that its net losses had widened to £46 million during the July-December 2003 period. The club was also affected by a slump in capital gains made on player sales. The club was preparing to issue new shares, in the second recapitalisation to occur in less than a year, in order to cover the shortfall²⁵³.

Greek side face total collapse

In early July it was learned that Greek club AEK Athens were on the verge of financial collapse and the possible relegation to amateur status, after a court ruled that the Athens club's state debts were incapable of reduction. The court's decision raised a major obstacle in the path of the attempts made by international striker Demis Nikolaidis to purchase the financially stricken club²⁵⁴.

11. Procedural Law and Evidence

[None]

12. International Private Law

[None]

13. Fiscal Law

Canadian baseball team's claim for tax exemption awarded²⁵⁵

In the case under review, the applicants were a professional baseball team whose home base was in Ontario, Canada. They played approximately half their regular season games at non-Ontario venues. In addition, all or some of the teams trained and played pre-season and post-season matches in and outside Ontario. At the non-Ontario venues, the teams had exclusive use of dressing, coaching and training rooms in the host team's facilities. They also brought their own equipment to the non-Ontario venues.

The Employer Health Tax Act 1990 required Ontario employers to pay a health tax assessed on the basis of an employer's total Ontario remuneration, but exempted remuneration paid to employees who report to the employee's permanent establishments outside Ontario from the base. Section 1(2) of the Act defines the term "permanent establishment" as any fixed place of business. Paragraph (e) thereof provided that an employer is deemed to have a permanent establishment in the place where the employer uses substantial machinery or equipment.

The club made an application for a declaration that each of the venues at which they trained and played, including non-Ontario venues, constitutes a permanent establishment. Accordingly, remuneration paid to their employees for work in non-Ontario venues would be exempt from the base.

The Ontario Superior Court of Justice awarded the application. It conceded that the applicants' argument based on s. 1(2)(e) failed, since they did not use substantial equipment at the non-Ontario venues. However, their argument based on the main definition succeeded. Each team carried on business together, and in conjunction, with all other teams in their respective leagues, since they depended on each other to perform and produce income. Accordingly, even where a team played in an away venue, it was carrying on business in that venue, and that was the case even though it might not share in the gate receipts. Furthermore, whenever it played in an away venue, its fixed place of business and,

thus, its permanent establishment, was at a place assigned to it in that venue.

14. Human Rights/Civil Liberties

Racism in sport

[None]

Human rights issues

Human rights issues at Athens 2004

The Athens Olympics may have been a tremendous success on the field, yet did not fail to attract plenty of controversy off it, as has already been indicated elsewhere in this column. Not only have there been corruption and doping scandals, but human rights issues also served to cloud the Olympian horizon for the two-week tournament.

With a week to go before the opening ceremony, the Greek government decided to refuse admission to Belarus team chief Yuri Sivavkov. This was in line with a call to that effect made by the European Union (EU), which had called on all member states to ban Mr. Sivavkov because of various instances of alleged human rights abuses whilst the latter was Minister of the Interior in Belarus. This put the Greek government at odds with the International Olympic Committee (IOC), since one condition for hosting the Games is that Olympic credentials automatically count as a visa to enter the host country. This elicited an angry reaction from IOC President Jacques Rogge²⁵⁶.

During that same week, hundreds of factory workers from eight Asian countries gathered in Bangkok, the Thai capital, for a one-day "Workers' Olympics" in order to raise awareness about labour conditions in sportswear factories across the region. This event, which was held at a sports stadium in a slum area of the city, was part of the year-long Fair Olympics campaign by an alliance of international labour unions and non-governmental organisations to ensure companies who make goods sanctioned by the International Olympic Committee treat their workers properly²⁵⁷. Concerns on this score have been featured in this Journal in previous issues²⁵⁸.

Highlights of the event included a torch relay, the hitting of a large "capitalism" jar to release balloons signifying workers' demands, as well as sports and co-operative shops. Competitors came from the Philippines, Indonesia, India, Sri Lanka, Pakistan, Bangladesh, Cambodia and Thailand, where much of the world's sportswear is produced²⁵⁹. Large manufacturers such as Nike, Adidas and Reebok claim that they do everything in their power to ensure that labour conditions in factories used by them meet international standards. However, Oxfam spokesman Tim Conors, who attended these "games", alleged that factories operating satisfactory conditions were the exception. He also said the object of this event, as well as a similar event to be held in Athens the following

day, was to show that the life of a garment worker is one long competition to work faster and faster²⁶⁰.

In mid-July 2004, it was learned that human rights organisation Amnesty International had criticised a ruling by the organisers of the Athens Games that spectators could be ejected from the stadiums if they were found to be wearing clothing bearing the logos of companies which rival the official sponsors²⁶¹.

For more details, see under the heading "Intellectual Property Law", above, p.74.

Gender issues

Transsexual fears follow new Olympic ruling

It will be recalled from a previous issue of this Journal²⁶² that the International Olympic Committee (IOC) recently ruled that transsexuals were to be allowed to compete at the Athens Games. Athletes who are legally recognised in their new gender were allowed to compete. This decision has drawn criticism from a surprising source – more particularly Renée Richards, the tennis player who made the headlines over 25 years ago by changing her gender and then being allowed to play female professional tennis. She warned that unscrupulous competitors could use the new ruling to change from men to women in order to increase their chances of success. She commented:

"It's ironic that everyone has tried so hard to keep a level playing field – from corked bats to doping – but now the IOC has come up with a decision that defies fairness in a similar vein. Sex-reassignment surgery is based on putting materials into your body"²⁶³

Dr. Richards, who was born Richard Raskind, was an amateur tennis player as a man, but following surgery she was barred from women's events until a court decision opened the way for her to compete in 1977. She reached a sufficiently high standard to reach the last eight of the US Open the following year.

It is a fact that hormone treatment applied to transgender athletes may diminish certain differences. However, the skeletal advantages – and possibly also the capacity of the lungs and heart – are left unchanged. This could give transsexuals a considerable advantage. There have in the past been cases where it has been suspected that males are competing unfairly as females. One of the best-known examples was that of the Press sisters (Tamara and Irina) from the Soviet Union, who shared five Olympic titles in the shot and hurdles respectively, but disappeared when gender tests were introduced following the 1964 Games²⁶⁴.

The Olympic rule change may very well have

3. Contracts

repercussions beyond Olympic sport. Thus it was learned in late June 2004 that Mianne Bagger, the transsexual golfer who competed at the Australian Women's Open earlier this year, wishes to play on the Ladies' European Tour next summer, and has written to Ian Randell, its Chief Executive, requesting that the rule stating that players must be female by birth should be changed. Here again, some players on the tour have expressed concern that anyone born a man might have a powerful advantage²⁶⁵.

Equal rights for women gaining ground on the golf course

It is widely felt that, with the possible exception of Sumo wrestling, golf is one of the more sexist popular sports in existence. The disquiet experiences in many quarters at this fact has been aired on various occasions in previous issues of this Journal, notably with regard to the campaign waged to end the bar against women at the Augusta National Golf Club, which hosts the renowned annual Masters tournament²⁶⁶.

However, there are signs that the battle for equal rights on the golf links is gradually being won. In early April 2004, it was learned that the Augusta club could soon have women competing in a men's major championship in the future. Even Hootie Johnson, the chairman of a club which has no women members, conceded that, if Michelle Wie, the 14-year-old bright prospect from Hawaii, could qualify for the event, the club would be pleased to welcome her. In spite of this, Mr. Johnson has remained obdurate as regards the issue of allowing the club to have women members²⁶⁷.

A blow for gender equality was also struck recently in Ireland, where an exclusive Dublin golf club lost its licence to sell alcohol for refusing to accept female members. This represented the first occasion on which penalties have been applied the Equal Status Act. The Dublin District Court ruled in February 2004 that the exclusive Portmarnock club was in breach of this legislation by banning female members. The club have appealed to the Irish High Court, claiming that the legislation in question infringes the Irish constitution²⁶⁸. The outcome of this appeal was not known at the time of writing.

Trinidad could pay heavy price for continued discrimination

The world of cricket has come a long way since the role of women in the game was considered to begin and end with making the players' tea. The game's authorities have taken steps to outlaw gender discrimination in the game – so much so that a member of the International Cricket Council (ICC) might find itself barred from organising the next World Cup

because of its policies in this regard. Whilst even the MCC started to allow women members to its ranks, the Queen's Park club, which owns the Queen's Park oval on which international fixtures are played, still has a policy whereby no women can become members²⁶⁹.

This creates the potential for preventing Trinidad from hosting a game in the next World Cup, due to be played in the West Indies in 2007, in spite of the fact that, with a 30,000 ground capacity, the Queen's Park Oval is the most obvious candidate for hosting at least one of the fixtures. Regulations governing this event expressly state that no venue may practise gender discrimination. Queen's Park has no express rule banning women, but appears to discriminate in practice. When Vaneisa Bahksh, a local freelance journalist, applied to join the club in 1997, her application was rejected in spite of her long-standing interest in cricket. She applied to join a second time four years ago, but has yet to receive a definite response from the club in spite of her regular inquiries²⁷⁰.

Other issues

Palio horse death gives rise to concern

The Palio is a centuries-old horse race organised twice per year by the citizenry of Siena, Italy. Increasing concern has of late been displayed by animal rights activists at the manner in which the horses are treated during this race. This concern turned to fury in mid-August when one of the horses in question was killed. Ambroso, an eight-year-old, was killed when he struck a street sign and died soon afterwards. Italy's Anti-Vivisection League, which has campaigned for some time now to have the race outlawed, indicated its intention to lodge a complaint of cruelty against the race organisers²⁷¹.

This is not the first occasion on which horses have perished during the race. In 2003, two horses were killed, and 46 have died in accidents since 1970²⁷².

Thai authorities investigate kickboxing ape deaths

In early August 2004, it was learned that police in Thailand had commenced an investigation into reports that over 40 orang-utans may have died in Safari World, near Bangkok²⁷³.

For more details, see under the heading "criminal law" above, p.60.

15. Drugs legislation and related issues

General, scientific and technological developments

Athens Olympics may have witnessed new human growth hormone test...

With only a few weeks to go before the opening ceremony of the Athens Olympics, anti-doping officials indicated that some competitors at the Games may be tested for human growth hormone (hGH) for the first time. However, even at that critical time officials at the World Anti-Doping Agency (WADA) refused to confirm whether athletes would actually be screened for this substance, which has the same effect as steroids, on the basis that it is better to keep those taking drugs guessing. Nevertheless, in its annual report, WADA confirmed that a test aimed at detecting excess levels of hGH has been finalised, whilst research on blood doping tests is well advanced. It states:

*"The research funded by the agency to date has already yielded significant results. Research groups have developed methods to detect human growth hormone when used to enhance athletic performance. These groups worked throughout 2003 to finalise a test that will detect hGH external (sic) to what is naturally produced by the body. In addition, significant progress was made in research on blood doping, including that of haemoglobin-based oxygen carriers and blood transfusion, whereby an athlete receives compatible blood from a donor just prior to competition. Work is well under way to finalise detection methods for these types of blood doping, with implementation foreseen in the near future."*²⁷⁴

This report adds weight to the view expressed by Professor Peter Sonksen, the scientist who led the development of the test, that the time is ripe for introducing it at the Olympics²⁷⁵. Dick Pound, the President of world governing body WADA, has indicated that tests for hGH could take two months to be analysed. Samples are frozen and examined at a recognised laboratory. HGH became a banned substance in 1989, after one athlete to have admitted to having taken the substance was Ben Johnson, the Canadian sprinter who forfeited his gold medal at the 1988 Olympics in Seoul after a positive test for anabolic steroids²⁷⁶.

... as well as new designer tests unknown to testers

Also as the start of the Athens Games became increasingly imminent, the US Anti-Doping Agency (USADA) expressed the fear that competitors would be

using designer drugs as yet unknown to testers. Terry Madden, the USADA Chief Executive, announced that his office had received information and evidence at least three times per month alleging the use of banned drugs by some of the US's top athletes²⁷⁷.

This news is likely to have produced a disheartening effect on the anti-doping authorities, not only in the US, but also world-wide. It was only the previous summer that USADA was able to develop a new test for the designer steroid tetrahydrogestrinone (THG) after a syringe containing a sample was sent to Dr. Don Catlin at the University of California by an unnamed coach. It emerged that the coach in question was Trevor Graham, who had previously worked with athlete Marion Jones and the world record holder over 100 metres, Tim Montgomery, both of whom are linked to the BALCO scandal, which has already been extensively covered in this organ, both in previous issues²⁷⁸ and the present edition (below, p.90). Dr. Catlin is convinced that just because USADA has developed a test for THG, this does not mean other scientists are not attempting to develop new drugs²⁷⁹. In addition, there had been rumours on the European circuit all summer that top athletes had been using new drugs for which they believed that they could not be tested²⁸⁰.

Genetically modified bodies: the new performance enhancer?

As if the developments mentioned in the previous two sections, and in previous editions of this column, were not enough to cause alarm amongst those seeking to maintain reasonable standards of integrity in sport at all levels, news has recently broken of a new trend which may make the other pale in comparison. In early July 2004, it was learned that several athletes of international standard had approached leading US scientists, requesting them to modify their bodies genetically in order to transform them into unbeatable sporting performers. This revelation has come as a shock to sporting organisations the world over, indicating as it does that sporting performers are already attempting to use ground-breaking genetics techniques – aimed at saving patients' lives by altering the composition of their DNA – in order to boost physique and stamina²⁸¹.

Olympic authorities have already indicated their fear that genetically-enhanced sprinters, swimmers and other contestants will become commonplace. The controversy has been heightened by the admission made by Len Sweeney, a leading gene therapist, that several athletes had already asked him to use the technique in order to give them greater power and

15. Drugs legislation and related issues

speed. Professor Sweeney, an expert in physiology at the Pennsylvania University School of Medicine, has refused to name them, but admitted that some coaches had also offered their runners as guinea pigs for his experiments, even though his research up to that point had only involved mice. One coach even offered his entire high school football team.

The problem has been highlighted by Prof. Sweeney in an academic article which recently appeared in an issue of the Scientific American. He writes:

“This kind of gene therapy could transform the lives of the elderly and people with muscular dystrophy. Unfortunately, it is also a dream come true for athletes bent on doping. The chemicals are indistinguishable from their natural counterparts and are only generated locally in the muscle tissue. Nothing enters the bloodstream, so officials will have nothing to detect in a blood or urine test”²⁸²

Sweeney’s work has involved engineering a harmless virus in such a way as to carry a gene known as insulin-like growth factor 1 (IGF-1), which is vital for muscle growth and repair. Injected into healthy mice, the virus carried the gene into the animals’ cells, where it was incorporated in their DNA. The muscles of the mice grew in size and strength by up to 30 per cent. In one particular experiment, Sweeney’s team injected IGF-1 into the leg of a rat which had to climb ladders in order to reach its food. At the conclusion of the experiment, the gene-affected leg was nearly twice as powerful as the untreated one. It also retained its strength for much longer after the end of the experiment. Such experiments are at the cutting edge of genetics. The temptations for ambitious athletes are obvious.

Doping issues and measures – international bodies

WADA chief blames governing bodies for increase in drug abuse

Although the situation might have turned out worse, the Athens Olympics were not free from drugs scandals. However, both Olympic organisers and anti-doping officials expressed their confidence that the detection of these cases would produce positive results in the long term, as they indicated that the “clean” athletes were being protected. However, Dick Pound, the head of the world governing body in doping control, WADA, also indicated that matters should never have been allowed to reach this stage²⁸³.

For this, Mr. Pound put the blame on the various sports’ governing bodies, stating that they had allowed the matter to “get out of hand”. He added that, if

people raised their eyebrows at certain performances, this was the price to pay for not having a robust anti-doping programme²⁸⁴.

IOC to blame for delays in effective drugs testing? Expert speaks out

Officially and ostensibly, the International Olympic Committee (IOC) has always been to the forefront of the fight against doping. However, not every insider in this area is impressed by these continuous protestations – least of all Prof. Peter Sonksen, who has performed ground-breaking work in finding methods of catching out athletes using the human growth hormone (hGH) referred to above. He recently stated his opinion that the IOC could have introduced a test for this drug four years ago, but instead allowed athletes to continue using it without fear of detection²⁸⁵.

Professor Sonksen, who carried out four years of research into the drug before the Sydney Olympics of 2000, claimed that there was nothing new in the recent science on the subject – it was merely a question of “the dotting of a few i’s (sic) and crossing a few t’s (sic)”. Professor Sonksen headed a research project entitled GH2000, and alleges that his team’s findings, issued six months before the 2000 Games, were as advanced as any subsequent work on growth hormones. He used to be a member of the IOC anti-doping commission, but resigned. He pronounces himself very much let down by the IOC, who gave a \$1 million grant to him and his team to finish the work four years ago, then took it away for what he alleges are political reasons. This was caused by a disagreement between Prince Alexandre de Merode, the then head of the IOC’s anti-doping commission, and Juan-Antonio Samaranch, the then IOC President. Prof. Sonksen explained:

“Prince de Merode did a lot of good things during his time in office, but he also let himself down badly on a number of occasions. It was the Prince who got the funding for the research work in the first place, but if it wasn’t for him taking back that grant, we could have had a growth hormone test in place four years ago”

Prof. Sonksen also criticised the British anti-doping body UK Sport for compelling the head of its ethics department, Michelle Verroken, to resign, because she had called for an independent anti-doping agency in Britain²⁸⁶.

Doping issues and measures - individual countries

[None]

15. Drugs legislation and related issues

Doping issues – individual sports

Athletics

Greek athletes' missed doping test sours opening of Athens Olympics

During the run-up to the Olympic Games of 2004, the host country faced many organisational difficulties, which are outlined elsewhere in this journal. These were eventually overcome, and the Games started and proceeded according to schedule. However, even before the Games got under way there was an undercurrent of concern about the possibility that some of the host nation's athletes might themselves sully the latter's reputation by failing to meet doping requirements.

It was even as the opening ceremony progressed that the news gained currency that Kostas Kenteris and Katerina Thanou, the Greeks' brightest hopes for medal-winning performances in the athletics events, had both failed to present themselves for a random drugs test in Athens. More will be said on this subject later. However, even before this particular bombshell hit the Games, there had been concerns about the host nation's probity in this regard. Indeed, with three days to go before the opening ceremony, the news broke that two of the Greek baseball players had tested positive. Andre Brack and Derek Nicholson, both originally US citizens, had failed a test for the steroid Stanozolol (Brack) and the diuretic hydrochloro-thiazide (Nicholson). Both had been caught during out-of-competition tests²⁸⁷.

It was in the context of this affair that it came to light that the World Anti-Doping Agency, the world governing body in drugs testing, was seeking to establish the whereabouts of all the competitors who would represent Greece at the Olympics. This focused interest once again on the mysterious residential habits of the two Greek athletes referred to above. Ever since Kenteris won a gold medal in the 200 metres event at the Sydney Olympics in 2000, his identity and whereabouts have proved elusive. Even his name was the subject-matter of uncertainty, since at a certain point he seems to have changed it from Kenteris to Kederis. His personality was also surrounded by a controversy centred around a succession of circumstances which seemed to undermine the Greek sporting authorities' insistence that none of their athletes were using questionable methods in their preparation for the Games²⁸⁸.

One of the aspects of Mr. Kederis's career which had already been the subject-matter of speculation and suspicion was the athlete's apparent unwillingness to compete outside his native land. Cynics suggested that the main reason for this was his unwillingness to face the drug testers. This is a suspicion which has also been raised against Ekaterini Thanou, the country's best hope

for a medal in the women's 100 metre event. The national coach, Odysseas Papatollis, indignantly refuted these suspicions, and pointed to the generous funding by the Greek government, thought to be worth \$100,000 for each athlete, which was instrumental in keeping the athletes away from the lucrative Grand Prix circuit²⁸⁹.

However, the Greek cause was not assisted by an alleged connection between this affair and the Balco scandal currently threatening to destabilise US athletics. The evidence against Balco executive Victor Conte and Remi Korchemny, who acted as coach to some of the main protagonists in this scandal, includes emails which suggest that elite Greek track and field stars were on Balco's roster. In one particular email, which has names deleted by US federal agents, Conte had written:

"We might also want to somehow get this information to the coach for the Greek athletes [name deleted] and [name deleted] so that nobody tests positive"²⁹⁰

In the meantime, it emerged that the reason given by Kederis and Thanou for missing the drugs test was that they had been involved in a motorcycle accident, which had caused them minor injuries and to be detained in hospital. Both had been summoned to an IOC disciplinary commission, but were allowed to defer the hearing until medical certificates could be received. In the meantime, the Greek Olympic Committee refused to bow to pressure to expel their star athletes from the Games, but suspended the athletes pending the outcome of the disciplinary hearing²⁹¹. In the meantime, some more allegations were being made about the two athletes' previous behaviour in this regard. It appeared that, on two occasions in Chicago (10 and 11 August) they had failed to meet testers, and that they were also absent without notice from the Olympic Village on 13 August²⁹².

Because the two athletes were still recovering in hospital at the time when the hearing should have taken place, they sent representatives instead, and were granted a second and final 48-hour period in which to recover. In the meantime, it was learned that Greek prosecutors were considering criminal charges against the two sprinters, over claims that they faked the motorcycle incident in question²⁹³. Mr. Kederis, in the meantime, pronounced himself totally innocent of any charges that could be brought against him²⁹⁴.

In the event, the two athletes "jumped before they were pushed", and forfeited their places in the Games "in the national interest". This made them liable for possible two-year bans for evading drugs tests, and the IOC also recommended that action be taken against Christos Tzekos, the athletes' coach, as well as any other persons or organisations who may have

15. Drugs legislation and related issues

contributed towards this alleged infringement²⁹⁵.

Inevitably, the press started to take a greater interest in the background to this case, as a result of which more facts began to emerge. It appeared that the premises owned by coach Tzekos had been raided by drugs squad officers, who had discovered quantities of supplements containing the banned substance ephedrine as well as "advanced anabolic steroids". The raid had been effected as part of a Greek criminal investigation into the question of whether Mr. Tzekos had been distributing controlled substances without a licence through his nutritional supplements business. Reuters news agency claimed that the drugs squad raid had discovered 1,400 boxes of nutritional supplements, many of which contained performance-enhancing steroids²⁹⁶. Doubts were also cast on the motorcycle incident which was alleged to have caused the missed drugs test, when Greek police arrested a man who had given a witness statement about the incident. Ever since the accident had been reported on 12 August, hours after drug inspectors were seeking the athletes in the Olympic village and failed to find them, doubts had been expressed as to whether the incident actually took place²⁹⁷. Prosecutors also seized hospital records of the sprinters²⁹⁸. Days later, Mr. Kederis appeared in court as a witness. He stated that he would reveal all at the end of the judicial process²⁹⁹.

The International Association of Athletics Federations (IAAF), following a long discussion and after consultation with its lawyers, decided merely to start an investigation. If their inquiry found the athletes had a case to answer, they would ask the Greek athletic federation to hold an investigation, which could result in a two-year ban³⁰⁰.

Jones linked to Balco scandal

The reader will recall from the previous issue³⁰¹ that several top athletes had been involved in the scandal involving the Bay Area Laboratory Co-operative (Balco), which was alleged to have supplied the THG drug. As the scandal deepened, it appeared that Marion Jones, the Olympic medal-winning sprinter, was involved in this affair. Suspicions in this regard deepened when it emerged that Marion Jones's bank account showed that \$7,350 had been paid to the laboratory's founder³⁰². She was also forced to defend her reputation after the US Senate agreed to release US drugs officials' information concerning athletes alleged to have used banned performance-enhancing drugs³⁰³. The powerful US Senate Commerce Committee had begun to investigate the matter and subpoenaed the trial documents³⁰⁴. US anti-doping officials later presented Ms. Jones with copies of an annotated ledger and calendar which they believed could be a schedule of her drugs use³⁰⁵. Ms.

Jones's lawyers made the documents public in an attempt to show the weakness of any effort to link their client to the consumption of prohibited substances³⁰⁶.

In mid-June, Ms Jones called a press conference to demand that a public inquiry be organised in order to clear her name³⁰⁷. The clouds of suspicion hanging over her refused to lift, as the authorities stepped up their investigation into her links with the laboratory at the centre of the US drugs scandal. She later withdrew from the 100 and 200 metre events at the US Olympic trials. Her decision meant that she would not represent the US at the Olympic Games in Athens³⁰⁸. However, this was not the end of the road for Ms. Jones as far as her involvement in the drugs scandal was concerned.

In late July 2004, lawyers acting for her rebutted claims by her former husband that she had used a number of illegal substances during the 2000 Olympics in Sydney. The claims of the former husband in question, C J Hunter, himself a top US athlete became public knowledge when the San Francisco Chronicle reported that it had obtained investigators' memos containing the allegations by Mr. Hunter, which also stated that he had sometimes personally injected his former wife with banned performance-enhancing drugs³⁰⁹. Her lawyers rebutted any such claims³¹⁰.

Cathal Lombard tests positive for EPO

One of the major shocks to reach the world of athletics during the run-up to the Olympic Games was the news that Cathal Lombard, the record holder for the 10,000 metres event, had tested positive for the EPO drug³¹¹. Unusually, instead of formulating a defence, Mr. Lombard, through his lawyer, confessed to having taken the drug in order to have an equal chance with the other athletes³¹². He said that, accordingly, he would not be contesting the positive finding³¹³.

Other cases

Irina Korzhanenko. The Olympic women's shot put champion tested positive for an unidentified drug during the second week of the Athens Olympics³¹⁴. She was thus stripped of the gold medal she had won in this event³¹⁵.

Vita Pavlysh. The Ukrainian shot putter was stripped of her world indoor title and banned for life after testing positive for steroids for the second time. She failed a test during the world indoor championships in Budapest in March 2004³¹⁶.

Robert Fazekas. With half an hour to go before the medal ceremony for the men's discus event at the Athens Olympics, the IOC stripped Robert Fazekas, the Hungarian who the an Olympic record of 70.93 metres,

15. Drugs legislation and related issues

of his gold medal. The athlete had refused to provide sufficient urine for a doping test³¹⁷.

Adrian Annus. The Hungarian hammer throw champion was stripped of his gold medal for having failed to take a follow-up drug test at the 2004 Olympics³¹⁸.

Mihaela Melinte, Claudia Iovan and Ana Mirela

Termure. Just before the Olympics began, the International Olympic Committee upheld a decision by the Romanian Olympic Committee to exclude these athletes from their national Olympic team because of previous doping offences³¹⁹.

Cycling

The Cofidis scandal

In early April 2004, the news broke that two French cyclists in the Cofidis team, which is led by British rider David Miller, were put under formal investigation on drugs charges. The former Tour de France stage winner and yellow jersey holder Cedric Vasseur and Mederic Clain had been accused of breaching French anti-doping laws³²⁰. As a result of this investigation, the Cofidis team decided to suspend all its riders from racing for the immediate future pending further developments in the police inquiry into alleged drug taking and distribution within the team³²¹.

Matters took on a dramatic turn several days later when the former Cofidis cyclist Philippe Gaumont made a series of serious allegations against the team. Among them, he accused the team doctor, Jean-Jacques Menuet, of having given cortisone and human growth hormone injections to riders. Gaumont also accused David Miller, a former world champion, of doping himself and helping to supply others³²².

Mr. Gaumont also alleged that advances in drugs testing were meaningless because cyclists and their trainers had devised methods which were guaranteed to evade the various tests. He confirmed that, among top cyclists, blood transfusions aimed at maintaining the red-cell count had taken over from the use of the red-cell blood booster EPO. Mr. Gaumont claimed that EPO was only used when the cyclist knew he would not be tested – a test introduced in 2000 means EPO is capable of being detected within three days of consumption³²³.

As a result of the police investigation, Mr. Miller was detained by plain-clothes police officers two months later, and his flat was searched. Police sources revealed that Mr. Miller was being questioned as a witness into the Cofidis investigation³²⁴. He was later ejected from the Tour de France, which was about to take place as the arrest occurred³²⁵. Cedric Vasseur was also dropped from the Tour by his team after being charged with

doping offences. His ban on competing was later upheld by a French court³²⁶. Mr. Miller was later banned for two years by the British Cycling Federation³²⁷.

Spanish cycling in turmoil over Manzano revelations

Cycling as a sport has had, over the years, to face some hard truths about the doping practices which at least some top performers have engaged in. Hitherto, however, Spanish cycling has been relatively free from such accusations. This may be about to change, if the revelations made by a top professional rider in mid-March are proved to be true.

Jesus Manzano is a cyclist who used to ride for the Kelme team, and he recently chose to reveal a number of alleged illegal medical practices within his team on the occasion of a recent television programme. He claimed to have had personal experience of such practices during the Tour of Portugal and the Tour de France, and that he had been kicked off a train in Valencia because he “was half-dead” (presumably from drug use)³²⁸. More particularly he claimed that, at the end of 2003, two half-litre sachets of his blood were removed in a clinic in Valencia and retained for the 2004 Tour. The system whereby blood is removed and re-injected prior to a major race enables cyclists to raise their red-cell count without using the EPO hormone. He claimed that his health had been endangered by a failed second transfusion, to prepare him for the Tour of Portugal³²⁹.

In a second interview, the Spanish rider went on to list a large number of banned substances, ranging from human growth hormone to animal growth hormone, corticoids and testosterone, complete with prices and methods used in their application, all of which he claimed had been used at some point in the course of his four-year career. He also denounced what he described as a deliberate policy on the part of world governing body UCI to minimise the number of riders providing anomalies in their health checks³³⁰.

As a result of these revelations, his former Kelme team were banned from the 2004 Tour de France by the latter's director, Jean-Marie Leblanc³³¹. All this did not, naturally, endear Mr. Manzano to his former teammates, and he claimed that he had received several death threats³³².

Armstrong doping rumours refuse to die down

By any standards, Texan rider Lance Armstrong is an outstanding athlete. Having won the Tour de France five times after having won a battle with cancer must stand out as one of the more remarkable feats of sporting endeavour ever recorded. Yet his performances have sometimes come under suspicion, much to the US rider's annoyance – to the point where he has resorted

15. Drugs legislation and related issues

to the courts in order to deny these rumours. However, his in this regard attempts have not invariably been successful.

In late June, on the eve of the sport's showpiece event, a court in Paris dismissed Mr. Armstrong's request that a book detailing suggestions of doping should include a denial by him. Judge Catherine Bezio rejected his request for an emergency order to this effect after a hearing with Mr. Armstrong's lawyers and those representing the publishers of the book. The ruling stated that the accusation contained in the book did not necessarily constitute defamation, because of a French law which exempts certain allegations made in good faith or which later turn out to be true³³³.

The book, by a British and French journalist, quoted Emma O'Reilly, a former member of Mr. Armstrong's team, as saying that the cyclist requested her to dispose of used syringes and to lend him make-up in order to conceal needle marks on his arms³³⁴. Mr. Armstrong commented that he would bring separate libel actions in Britain and France³³⁵.

Cocaine overdose officially blamed for Pantani death

It will be recalled from the previous issue³³⁶ that the death of Italian top cyclist Marco Pantani had attracted speculation that drugs could have been at least a contributory factor to his death. In fact, it was later learned that the coroner's report into Mr. Pantani's death had reached the conclusion that the 1998 Tour de France winner died as a result of an overdose of cocaine³³⁷. Later, police in Rimini arrested three men and a woman suspected of supplying Pantani with the drugs in question. Police in the Italian resort had conducted an investigation centred on local drug dealers following Pantani's death³³⁸.

Dajka fails in doping appeal

In August 2004, it was learned that cyclist Jobie Dajka had failed in his appeal against his exclusion from the Australian Olympic team after the Court for Arbitration in Sport dismissed his application. The Commonwealth Games gold medallist had been dropped from the team after admitting lying to a doping inquiry³³⁹.

Police once again raid Giro hotel rooms

The Giro d'Italia race, which is one of the most prestigious competitions the sport can offer, has once again attracted controversy as regards illegal drug-taking. In late May, fraud squad detectives made a pre-dawn raid of the hotel rooms of eight competitors and searched the homes of over 100 competitors and officials in a variety of sports across the country. Although no drugs were found in the town of Brunico,

where the riders were having a rest day, medical files were removed. Colonel Stefano Ortolani, of the paramilitary carabinieri anti-doping squad, said that 15 professional cyclists were among the 138 people who had come under investigation³⁴⁰.

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

Tennis

ATP blamed for players avoiding drugs bans

The taking of unlawful substances has reached the majority of high-performance sports. And even tennis has had its controversies in this regard, of which the Greg Rusedski case, adumbrated in the previous issue, was the most notorious example³⁴¹. This case focused attention on the sport and the extent to which its practitioners had become embroiled in this seamy aspect of sport.

More particularly the role of the Association of Tennis Professionals (ATP) has come under scrutiny here. This body has in the past strenuously maintained that the sport was virtually drug-free with only very few exceptions. However, in mid-July it was forced to concede that tests showing low levels of the anabolic steroid nandrolone were continuing to surface, with three new cases emerging since March that year. The world governing body in drug-testing, WADA, strongly criticised the ATP for having exonerated on clearly unsuitable grounds seven players who tested positive between August 2002 and may the following year³⁴².

Bohdan Ulihrach of the Czech republic was initially banned for two years after failing a drugs test for nandrolone, but was cleared after the ATP stated that it could not be sure whether its own trainers had not distributed contaminated electrolytes. Six other players, who remain anonymous, had been similarly let off. It has, however, emerged since that the ATP trainers were not responsible for distributing this substance, although the source of the nandrolone was never discovered. As well as these positive tests, there have by now been more than 50 elevated test readings, with a further 23 this year. WADA praised the ATP for its continued efforts to trace the source, but has advised handing over the process to an independent scientific body³⁴³.

Football

FIFA anti-doping agreement avoids expulsion from Olympics

The anti-doping code agreed by anti-drugs agency WADA last year was intended to apply to all sports. However, some sports have remained reluctant to embrace this set of rules, and none more so than

15. Drugs legislation and related issues

football. FIFA President Sepp Blatter had warned that he was not prepared to accept the mandatory two-year suspension required by WADA for a doping offence. This raised the very real possibility that football would be banned from the forthcoming Olympic Games³⁴⁴.

However, this danger receded when FIFA decided to sign up to WADA – at least tentatively. It was announced that “common ground had been found” and that the signing was merely a declaration of intent rather than the precise form of an agreement. However, a FIFA spokesman insisted that the only matters which remained to be settled were “legal formalities”³⁴⁵. It later emerged that in fact professional football had been allowed to opt out of the two-year ban as part of the agreement. It was explained that “football was a special case”, although exactly why remained unclear³⁴⁶.

16. Family Law

[None]

17. Issues specific to individual sports

Football

Abolish draw, urges Blatter

In late April 2004, the most senior figure in football called for drawn matches to be abolished, and that every game should yield a winning team. Where a match ends with scores level, the issue should be settled on penalties. This is but the latest in Mr. Blatter's somewhat eccentric proposals, which have included widening the goalmouth and making women footballers wear skimpier kit³⁴⁷.

Mr. Blatter has also stated his belief that artificial pitches are the future of football, and called upon countries to build more of these in order to improve their standards. One of the main reasons why he supports this notion is that artificial pitches would mean fewer players become injured³⁴⁸.

UEFA plan maximum squads of 25.

Football at the top level is experiencing a number of problems, the most serious being the lack of identification of fans with their local teams and clubs going heavily into debt in the pursuit of success. European governing body UEFA have been attempting to tackle at least some of these problems, and made a series of proposals which may well become mandatory ere long. The most significant of these proposals is that squads should have a maximum size of 25, and that sides should have at least eight home-grown players on their books³⁴⁹. If they become implemented, these plans would revolutionise the sport by compelling clubs to survive with much lower staffing levels, and to use players qualified to represent the host country of the club in question.

However, Europe's leading clubs, including the powerful G14 group, may attempt to block these measures, which would drastically reduce their numbers if the UEFA plans become reality³⁵⁰.

Shirt-lifting celebrations to be penalised

In June 2004, FIFA issued a ruling whereby players removing their shirts in post-goal celebrations would be guilty of "unsporting behaviour" and automatically be booked. The new rules came into effect on 1/7/2004³⁵¹.

Disciplinary measures during Euro 2004

Francesco Totti, the Italian striker, was suspended for three games by UEFA after having been found guilty of "unsporting behaviour" i.e. spitting at the Danish player Christian Poulsen during the 0-0 draw which the two teams played out during the Euro 2004 tournament³⁵². The player decided not to appeal against this measure, and apologised to UEFA³⁵³.

Also during this tournament, Alexander Frei was suspended for 15 days for having spat at England player

Steven Gerrard during the Switzerland v. England game³⁵⁴.

The Netherlands international Ruud van Nistelrooy was banned for two World Cup qualifying matches for having insulted Swedish referee Anders Frisk after his side's defeat by Portugal in the semi-finals³⁵⁵.

Round-up of other items (all months quoted refer to 2004, unless otherwise stated)

Lomana LuaLua. In April, the captain of the Democratic Republic of Congo was dropped by his country after having been sent off during an African Nations Cup fixture³⁵⁶.

Cameroon. The Cameroon national side had six points deducted from their forthcoming World Cup qualifying campaign, after they had ignored the world governing body and worn their controversial one-piece kit during the knockout stages of the African Cup of Nations³⁵⁷.

Jose Mourinho. The former Porto manager was issued with a 10-match suspension by the Portuguese Football Association following a flare-up with Sporting Lisbon defender Rui Jorge in February³⁵⁸.

Cricket

ICC to relocate to Dubai

In mid-May 2004, the International Cricket Council (ICC) took a step closer to quitting its traditional headquarters at Lord's in London and relocating to Dubai. This move is seen as another blow to the deteriorating relationship between English cricket and the sport's world governing body³⁵⁹.

ICC to expand role of third umpire

During the prestigious Champions' Trophy, held in mid-September, the International Cricket Council (ICC) introduced a major innovation, i.e. the calling of all front-foot no-balls by the third umpire watching a television screen, rather than by the on-field umpires. The innovation had a successful trial during the Videocon tri-series in Australia between Australia, India and Pakistan³⁶⁰.

Footnotes

- 1 *The Times* of 17/5/2004, p. 20.
- 2 *The Independent* of 20/4/2004, p. 34.
- 3 *Neue Juristische Wochenschrift* 18/04, p. XXIV
- 4 *Neue Juristische Wochenschrift* 24/04, p. XX
- 5 [2003] 2 *Sport and the Law Journal* p. 14-15.
- 6 *The Guardian* of 2/4/2004, p. 36.
- 7 *The Guardian* of 3/4/2004, p. 23.
- 8 *The Daily Telegraph* of 12/4/2004, p. S14.
- 9 *The Daily Telegraph* of 8/4/2004, p. S6.
- 10 *The Guardian* of 9/4/2004, p. 29.
- 11 *The Daily Telegraph* of 12/4/2004, p. S14.
- 12 *The Times* of 15/4/2004, p. 72.
- 13 *Ibid.*
- 14 *The Daily Telegraph* of 16/4/2004, p. S1.
- 15 *Ibid.* p. 1.
- 16 *The Independent* of 17/4/2004, p. S13.
- 17 *The Times* of 17/4/2004, p. 35.
- 18 *The Mail on Sunday* of 18/4/2004, p. 106.
- 19 *The Guardian* of 20/4/2004, p. 34.
- 20 *The Daily Telegraph* of 21/4/2004, p. 1.
- 21 *The Daily Telegraph* of 20/4/2004, p. S8.
- 22 *The Independent* of 21/4/2004, p. 51.
- 23 *The Guardian* of 28/4/2004, p. 1.
- 24 *The Independent* of 27/4/2004, p. 55.
- 25 *The Daily Telegraph* of 27/4/2004, p. S8.
- 26 *The Times* of 29/4/2004, p. 89.
- 27 *Ibid.*
- 28 *The Daily Telegraph* of 5/5/2004, p. S5.
- 29 *The Guardian* of 6/5/2004, p. 30.
- 30 *The Independent* of 23/3/2004, p. 29.
- 31 *The Times* of 11/5/2004, p. 67.
- 32 *The Independent* of 19/5/2004, p. 51.
- 33 *The Daily Telegraph* of 20/5/2004, p. S8.
- 34 *The Guardian* of 22/4/2004, p. 34.
- 35 [2004] 1 *Sport and the Law Journal* p. 11.
- 36 *The Daily Telegraph* of 27/4/2004, p. S8.
- 37 *The Independent* of 26/4/2004, p. 16.
- 38 *The Guardian* of 13/5/2004, p. 29.
- 39 *The Observer* of 23/5/2004, p. S8.
- 40 *The Guardian* of 22/5/2004, p. S11.
- 41 *The Mail on Sunday* of 23/5/2004, p. 52.
- 42 *The Independent* of 24/5/2004, p. 61.
- 43 *The Guardian* of 11/6/2003, p. 30.
- 44 *Ibid.*
- 45 *The Daily Telegraph* of 2/7/2004, p. S8.
- 46 *The Daily Telegraph* of 10/7/2004, p. S5.
- 47 *The Daily Telegraph* of 14/8/2004, p. 8.
- 48 *The Guardian* of 24/8/2004, p. S7.
- 49 *The Times* of 22/4/2004, p. 76.
- 50 *The Guardian* of 17/7/2004, p. 13.
- 51 [2001] 2 *Sport and the Law Journal* p. 71.
- 52 *The Independent* of 29/5/2004, p. 17.
- 53 *The Times* of 21/5/2004, p. 31.
- 54 *The Guardian* of 13/8/2004, p. 30.
- 55 *The Daily Telegraph* of 23/8/2004, p. 7.
- 56 *The Guardian* of 21/8/2004, p. 59.
- 57 *The Guardian* of 19/8/2004, p. 38.
- 58 *The Daily Telegraph* of 24/4/2004, p. 15.
- 59 *The Times* of 31/5/2004, p. 34.
- 60 [2004] 1 *Sport and the Law Journal* p. 11-12.
- 61 *The Independent* on Sunday of 14/3/2004, p. S9.
- 62 *The Daily Telegraph* of 13/3/2004, p. S6.
- 63 *The Observer* of 2/5/2004, p. 21.
- 64 *Ibid.*
- 65 *The Independent* of 12/4/2004, p. 20.
- 66 *The Times* of 8/7/2004, p. 34.
- 67 *Ibid.*
- 68 *The Guardian* of 3/6/2004, p. 32.
- 69 *Ibid.*
- 70 Fritzweiler, J., "Rechtsprechung zum Sportrecht in den Jahren 2002 und 2003" [2004] 14 *Neue Juristische Wochenschrift* p. 989 et seq.
- 71 *The Guardian* of 30/7/2004, p. 29.
- 72 *Daily Mail* of 30/7/2004, p. 87.
- 73 *The Times* of 30/7/2004, p. 1.
- 74 *Ibid.*
- 75 *Daily Mail* of 31/7/2004, p. 76.
- 76 *Daily Mail* of 11/8/2004, p. 72.
- 77 *Daily Mail* of 2/8/2004, p. 60.
- 78 *Ibid.*
- 79 *The Independent* of 4/8/2004, p. 50.
- 80 *Daily Mail* of 11/8/2004, p. 72.
- 81 *Ibid.*
- 82 *Daily Mail* of 27/8/2004, p. 89.
- 83 *Ibid.*
- 84 [2004] 1 *Sport and the Law Journal*, p. 20.
- 85 *The Times* of 4/6/2004, p. 48.
- 86 *Ibid.*
- 87 *The Guardian* of 18/8/2004, p. S15.
- 88 *The Guardian* of 29/4/2004, p. 35.
- 89 *The Guardian* of 23/8/2004, p. 11.
- 90 *Ibid.*
- 91 *The Guardian* of 12/5/2004, p. 3.
- 92 *Ibid.*
- 93 *The Independent* of 13/7/2004, p. 28.
- 94 *The Independent* of 19/8/2004, p. 32.
- 95 *The Daily Telegraph* of 21/4/2004, p. S3.
- 96 See e.g. [2004] 1 *Sport and the Law Journal* p. 22-23.
- 97 *The Times* of 27/5/2004, p. 17.
- 98 *Ibid.*
- 99 *Daily Mail* of 16/6/2004, p. 8.
- 100 *The Times* of 18/6/2004, p. 4.
- 101 *The Daily Telegraph* of 23/6/2004, p. 3.
- 102 *The Daily Telegraph* of 24/6/2004, p. 5.
- 103 *The Daily Telegraph* of 5/7/2004, p. S2.
- 104 *The Guardian* of 22/6/2004, p. S11.
- 105 *The Independent* of 15/3/2004, p. 22.
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Footnotes

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Sport and the Law Journal

Reports Index

(2004) SLJR 1-6 are reported in the Sport and the Law Journal, Volume 12 Issue 1

(2004) SLJR 1

RAIT v LUNN

Personal injury – assessment of damages – adverse effects on sporting career

(2004) SLJR 2

WATTLEWORTH v GOODWOOD ROAD RACING COMPANY LTD & OTHERS

Motor Racing – duty of care to competitors – tort

(2004) SLJR 3

SOUTHAMPTON LEISURE HOLDINGS PLC v AVON INSURANCE PLC & OTHERS

Insurance – football – knee injury – whether disablement occasioned solely and independently of any cause other than the knee injury

(2004) SLJR 4

AVELLINO v ALL AUSTRALIA NETBALL ASSOCIATION LTD

Australia – elite netball player prevented from playing in interstate competition by competition rule as to state of residency – whether rule was void as an unreasonable restraint of trade

(2004) SLJR 5

HAMBURGER SPORT-VEREIN E.V – v – ODENSE BOLDKLUB

Football – training compensation on transfer – FIFA Regulations – quantification

(2004) SLJR 6

IN THE MATTER OF THE WIMBLEDON FOOTBALL CLUB LIMITED (In administration)

Football – insolvency – company voluntary arrangement – unfair prejudice

(2004) SLJR 7

TOOMEY (OF SYDICATE 2021) v BANCO VITALICIO DE ESPANA SA DE SEGUROS Y REASSEGUROS

Football Club – Television Rights- Avoidance of Reinsurance relating to Relegation – Materiality of Misrepresentation to Prudent Underwriter

(2004) SLJR 8

BLAKE v GALLOWAY

Personal injury – duty of care – injury caused during unregulated sporting activity

(2004) SLJR 9

BADRICK v BRITISH JUDO ASSOCIATION

Interim injunction – judo – selection dispute – application for referral of decision to arbitration

(2004) SLJR 10

COMITE NATIONAL OLYMPIQUE ET SPORT FRANCAIS and ors v FEDERATION EQUESTRE INTERNATIONALE & Anr

Field of play decisions – jurisdiction – reversal of decision by sporting referee

(2004) SLJR 11

SHAW v SHROPSHIRE COUNTY PREMIER FOOTBALL LEAGUE

Amateur footballer – Racial Discrimination – Section 12 of Race Relations Act 1976

(2004) SLJR 12

BRADLEY v JOCKEY CLUB

Jockey Club – disciplinary committee – review – basis of jurisdiction – contractual and non-contractual claims – supervisory jurisdiction of the Court

(2004) SLJR 13

JJB SPORTS PLC v OFFICE OF FAIR TRADING; ALLSPORTS LIMITED v OFFICE OF FAIR TRADING

Competition Appeal Tribunal – Judgment on liability – price fixing of replica football shirts – Appeal from decision of the OFT – Section 2 of the Competition Act 1998

(2004) SLJR 14

MECA-MEDINA & ANOTHER v COMMISSION OF THE EUROPEAN COMMUNITIES (SUPPORTED BY THE REPUBLIC OF FINLAND)

Competition – freedom to provide services – anti-doping legislation adopted by the IOC – purely sporting legislation

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(2004) SLJR 7

Football Club – Television Rights- Avoidance of Reinsurance relating to Relegation – Materiality of Misrepresentation to Prudent Underwriter

TOOMEY (OF SYDICATE 2021) v BANCO VITALICIO DE ESPANA SA DE SEGUROS Y REASEGUROS

[2004] All ER (D) 239 (MAY)
Court of Appeal (Civil Division)
18 May 2004 (Reporter: MO)

Facts

1. Club Atletico de Madrid ("the Club") was insured in respect of economic loss arising from the relegation of their first team from the first division of the Spanish football league. A television company had required the policy to protect the repayment of advances made against payments that would become due in respect of television rights. Prior to accepting the reinsurance, the reinsurers were not shown the underlying policy taken out by the Club. They were simply given a slip policy which provided: "This insurance to indemnify the assured for their net ascertained loss of contracted television rights arising directly as a consequence of the relegation of the assured...Limit: pts 2,900,000,000.

2. The Club's first team was relegated at the end of the 1999/2000 season. The insurers settled the claim and payment was made to the television company. However the reinsurers claimed for rescission and for a declaration that they had avoided the policy. They alleged the insurers had made a material misrepresentation as to the nature of the underlying insurance in that the underlying policy was a "valued policy" and not "an unvalued policy" as represented in the description of the interest.

3. The Judge decided in favour of the reinsurers and the insurers appealed. On appeal there was no challenge to

the Judge's findings that (i) there was a representation that the underlying policy was an indemnity with a limit of pts 2.9bn and not a valued policy; (ii) the policy was an indemnity agreed at 2.9 bn pts even if that amount exceeded the Club's actual loss; (iii) there had been a misrepresentation and the reinsurers had been thereby induced. The issue in the appeal was whether it was realistically possible that the net ascertained loss in the event would be less than pts 2.9bn and therefore whether the misrepresentation was a material one.

HELD (Dismissing the Appeal)

4. The Reinsurers were entitled to avoid the reinsurance. The misrepresentation would have been material to a prudent underwriter. The contingent obligation to refund the sum of Pts 500m for failure to qualify for the European competition was part of the overall scheme for payment for television rights. It could be valued and therefore taking it into account, on the figures, there was a realistic possibility that the net ascertained loss could have been less than Pts 2.9bn.

Commentary

5. In the law of insurance and reinsurance, it is not enough for an insurer or reinsurer to show that it was induced by a misrepresentation to provide the insurance or reinsurance. As an important protection to the insured the insurer or reinsurer must also show that the misrepresentation would be material to a prudent underwriter. The question of materiality was addressed by the parties in their expert evidence. The experts agreed that if the original policy was a valued policy for Pts 2.9bn, then that was a material fact to know if there was a realistic possibility that the net ascertained loss in the event of relegation might be less than Pts 2.9 bn

6. Given the agreement of the experts, the question of fact for the court was whether there was such a realistic possibility. The issue turned on the terms of the contract between the Club and the television company, which could be summarised as follows:

- a) it covered five seasons from 1998/9 to 2002/3;
- b) for the right to broadcast the Club would be paid annually a minimum of Pts 2bn;
- c) the Club would also be paid a further Pts 1bn if it finished the season among the top four teams in the first division;
- d) if the first team was relegated, the Club would be paid only Pts 150m for all broadcasting rights of the home games in the second division.

7. There was an amendment on 16 August 1996 which increased the amount to be paid to the Club annually but removed the bonus and required the Club to repay Pts 500m to the television company if it did not finish among the top four teams. There was then a further amendment on 30 July 1998 providing that the obligation to repay would be triggered by failing to qualify for the European competition.

Sport and the Law Journal Reports

8. There was a separate agreement for broadcasting rights in respect of the second team which provided that the Club would be entitled to no payment if the second team was relegated to the third division (which would happen automatically upon relegation of the first team). The reinsurers argued that the obligation to repay the Pts 500m should be taken into account, but not the loss relating to the relegation of the second team, and the Club may be able to reduce its loss through negotiation with the television company.

9. The Court of Appeal upheld the Judge's findings. The Club was insured against the economic loss which arose from the Club losing its status as a member of the first division in relation to the contract with the television company. This loss, the "net ascertained loss of contracted television rights", could only be determined by calculating the difference between what the Club would have earned in the first division and what it would have earned after relegation. The Court found that for this purpose the contingent liability to repay the sum of Pts 500 had to be brought into account, even though the contingency of the Club not qualifying for the European competition was not an insured risk. This is because such qualification was an integral part of the scheme for the payment of broadcasting rights. The retention or repayment of the sum of Pts 500m would have had a significant bearing on the Club's earnings.

(2004) SLJR 8

Personal injury – duty of care – injury caused during unregulated sporting activity

BLAKE v GALLOWAY

Court of Appeal (Sir Andrew Morritt VC, Clarke LJ, Dyson LJ) [2004] EWCA Civ 814; [2004] All ER 315; The Times, 19 July 2004 24 June 2004 (Reporter: RC)

Facts

1. The Claimant and the Defendant were both about 15 at the time of the accident giving rise to the claim, and they played in a jazz quintet with three other friends of the same age. They were practising one day and stopped for a short break. They went outside to the grounds of the house in which they were practising, and they started to engage in horseplay.

2. The game involved throwing bits of bark chippings and twigs at each other: these were lying all about. At first the Claimant simply stood to one side and watched, but soon he joined in. At one stage he picked

up a piece of bark and threw it at the Defendant, who was standing a few metres away and on higher ground. It hit the Defendant on the lower body. The Defendant picked up the same piece of bark and threw it back. It hit the Claimant in the eye, causing significant injury.

3. There was no suggestion that the injury was anything other than accidental. Nobody, including the Defendant, had been aiming at the others' heads, or at any other specific area of the body. The bark was thrown by the Defendant as part of the game. There was no suggestion that there was any malice in the manner in which it was thrown.

4. The Claimant issued proceedings against the Defendant for negligence and battery. At the hearing the defence advanced arguments of contributory negligence and *volenti non fit injuria*. At trial the judge rejected the suggestion of *volenti*, but held that the Claimant was contributorily negligent as to 50%.

5. The Defendant appealed. At the hearing of the appeal the primary argument advanced on behalf of the Defendant was that there was no negligence at all because there had been no lack of reasonable care on behalf of the Defendant.

Held (allowing the appeal)

6. The court started with the question of breach of duty. First it went back to the dicta of Diplock LJ in *Wooldridge v Sumner* [1963] 2 QB 43 where it was held that a spectator of a sport takes the risk of any damage caused by any act of a participant, including any error of judgment or of skill, unless the act shows a reckless disregard of that spectator's safety.

7. The court then referred to *Condon v Basi* [1985] 1 WLR 866 where Sir John Donaldson MR, addressed the question of the duty of care between participants in a sporting event, and held that although there is a general duty of care to be exercised towards those around you, the degree of care to be expected depends on all the circumstances, including, of course, the nature and rules of the game the parties are engaged in, but that some departure from the rules was also to be expected.

8. The last case considered by the court was *Caldwell v Fitzgerald* [2001] EWCA Civ 1054, in which the Court of Appeal held that in a claim for negligence arising in the course of a sporting event, the threshold for liability was high. It will not be met simply by a momentary lapse in skill (and therefore care) in the heat of an event, and will be difficult to prove in the absence of conduct that points to reckless disregard for a fellow contestant's safety.

9. The court characterised the horseplay in the present case as being in the nature of informal play governed by tacitly agreed conventions, which the Claimant would have been aware of prior to joining in. There was no expectation that skill or judgment would be exercised.

10. This horseplay was analogous to organised sport in three ways:

- (i) they both involve consensual participation in an activity which involves physical contact or the risk of it;
- (ii) decisions are expected to be made quickly and often instinctively; and
- (iii) the nature of the activity makes it difficult to avoid the risk of harm.

Accordingly Diplock LJ's formulation applied to this case, slightly expanded such that there is a breach of the duty of care owed by one participant to another only where that participant's conduct amounts to recklessness or a very high degree of carelessness.

11. Given that the Claimant had consented to join in the horseplay with its inherent risks, the Defendant could not be liable in battery.

Commentary

15. This case does not make any new law so far as sport is concerned: its application is more to consensual, but unregulated, activity such as the horseplay in question. However, it is a welcome restatement of the principles applied in assessing the standard of conduct of participants in sporting events, and whether that conduct gives rise to legal liability.

16. The judgment also highlights one other matter, albeit one that is found in the earlier judgments cited by the court. This is that in assessing conduct, although regard must be had to the rules, there are no means determinative. If here regard must be had to the conventions tacitly agreed between the teenagers involved, so in the context of sport must regard be had to the tacit conventions of the sport, even if they amount to foul play under the rules. It looks like business as usual for front row forwards.

(2004) SLJR 9

Interim injunction – judo – selection dispute – application for referral of decision to arbitration

BADRICK v BRITISH JUDO ASSOCIATION

*High Court of Justice, Chancery Division, Lightman J.
1st July 2004 (Reporter: DM)*

Facts

1. Jean-Rene Badrick ("the Claimant"), 14 years old, brought an application by his litigation friend, his mother, after he was not selected by the British Judo Association ('the BJA') to compete in the 2004 Judo European Cadet Championships ('the Cadet Championship'). The application requested the Court to refer the dispute to arbitration by the Sports Dispute Resolution Panel ('the SDRP').

2. The BJA is responsible for the organisation and management of competitive judo in Great Britain including the selection of teams for the Cadet Championship. The Cadet Championship was due to commence in Holland over the weekend of 3 – 4 July.

3. On 11 June 2004, the BJA announced the team for the Cadet Championship; a Mr. Stuart was selected ahead of the Claimant. The BJA informed the Claimant that a factor in the decision not to select him was his decision not to compete in the British Cadet Championship (the Claimant had competed in a different event instead).

4. The Claimant appealed the decision by letter dated 11 June 2004 and the BJA said it would apply the BJA's published selection procedure in relation to junior championships. The Claimant then made his appeal and sent a cheque for £50 for the appeal fee. On 21 June 2004, the appeals panel rejected the appeal.

5. Correspondence ensued in which the Claimant requested a further appeal before an arbitrator. That request was rejected. On 30 June 2004, a telephone request was rejected and the Claimant then made his application which was listed for the next day. The application was without notice although the BJA attended.

Held

6. The Court made no finding in relation to the decision of the appeals panel since there was insufficient evidence before it.

7. The BJA was obliged to afford the Claimant the full protection of the published selection appeals procedure applicable to junior players (there was no appeal procedure in relation to cadets). Such an obligation was implicit in the correspondence between the parties and the acceptance of the £50 cheque.

8. The Court construed the relevant term from the selections appeals procedure. The provision was badly drafted but the Court concluded that an appeal would only be referred to the SDRP if all interested parties signed up

Sport and the Law Journal Reports

to the process. In the absence of such consent, there was no right to determination by an arbitrator.

9. Neither the BJA (who refused to consent) nor Mr. Stuart (who as a matter of common-sense had nothing to gain by such consent) had signed up to the process. Therefore the Claimant was bound by the decision of the appeals panel.

10. Even if the Claimant had established an arguable case, the Court concluded it would not have granted relief in any event. There was unpardonable delay from the decision subject to challenge.

11. Where determination by the Court was required in time to enable substitution to be effected at a championship to be held 3-4 July, a delay in making an application to court prevented justice being done. Specifically, the BJA had not had time to put in full evidence and secondly, as a matter of practicality, the prospects of an arbitrator making a decision (on a complicated matter), upon which Mr. Stuart would have to be heard (when he was due to leave the country the following day), in time for it to be effective, was highly doubtful.

Commentary

12. Sports litigation is prone to revealing an unpalatable tension between the Corinthian ideal that sport is supposed to be a pleasurable pastime, pursued for the love of the game, and the reality where winning is all that matters and all avenues, including litigation, are considered justifiable means towards that essentially selfish end. This case reveals just such a tension. It is faintly depressing to think that a 14 year old amateur judo competitor ends up in the High Court by his litigation friend his mother, in order to dispute his non-selection for a prestigious cadet championship.

13. The Court steered well clear of making any such emotive comment on the presence of the parties before it. In the end, the application was defeated as a matter of construction of the relevant provisions of the BJA's rules and as a matter of practicality due to the delay in making the application when the championship was looming in a matter of days in a different country.

14. The case emphasises the need for special urgency in the case of selection disputes. When a short time frame constricts such disputes, the aggrieved party may need to reduce its pre-action correspondence to the bare minimum and take the risky plunge into litigation with all the attendant costs risks.

(2004) SLJR 10

Field of play decisions – jurisdiction – reversal of decision by sporting referee

COMITE NATIONAL OLYMPIQUE ET SPORT FRANCAIS and ors v FEDERATION EQUESTRE INTERNATIONALE & Anr

Court of Arbitration for Sport, Ad hoc Division – Games of the XXVIII Olympiad – Athens
CAS arbitration No. CAS OG 04/007
21 August 2004 (Reporter: JR)

Facts

1. In the 3 day eventing competition at the Athens Olympics, the Ground Jury ruled that a time penalty be imposed on the German eventer Bettina Hoy for failing to complete a jumping event within the required time limit.

2. In accordance with the rules of the Federation Equestre Internationale ("FEI"), the eventing competition is judged by a Ground Jury comprising three persons. One of its responsibilities is to rule on all times and penalties in the show jumping events. The FEI Rules provide that a bell is used to signal the start of the round for the particular competitor. After the bell has been rung the rider has forty five seconds within which to cross the start line and is regarded as having started when he or she crosses the start line, or when the forty five seconds have elapsed, whichever is the earlier. At the Athens Olympics a computerised timing device was automatically triggered and measured the time taken by the rider to complete the course. This must be accomplished within a maximum of ninety seconds after the starting line has been crossed. Simultaneously with the computerised device, the stadium clock in the arena is started by a member of the Ground Jury. This clock may be stopped and restarted when the need arises.

3. Bettina Hoy competed in the first round of the show jumping, the bell rang and the forty five second countdown commenced. She crossed the start line thereby automatically triggering the computerised timing device, but as she approached the first jump she turned her horse away and made a wide circle which brought her once again behind the start line. She then proceeded to cross the start line a second time. Immediately before she did so the stadium clock was reset to zero and indicated her time from the moment of her second crossing of the start line. However the computerised device continued to measure her time from the moment of the first crossing with the effect that, although the stadium clock indicated that she had completed the course in less than the allotted ninety seconds, her actual time was 12.61 seconds slower.

4. The result of the Ground Jury ruling was that, in the individual competition, Leslie Law of Great Britain won the gold medal, Kimberly Severson of the USA won the silver and Pippa Funnell of Great Britain the bronze. In the team competition France won the gold medal and the silver and bronze medals went to Great Britain and the USA respectively.

5. This prompted Ms Hoy and the National Olympic Committee of Germany ("NOCG") to appeal to the FEI's Appeal Committee on the same evening. The Appeal Committee considered whether it had jurisdiction to entertain the appeal and the three members of the Appeal Committee were unanimously of the view that they had jurisdiction pursuant to Art 163.6.1 of the FEI Rules in that the case turned on the interpretation of the FEI Rules. In exercising its jurisdiction the Appeal Committee concluded that the countdown had been restarted, resulting in a clear injustice to Ms Hoy. The Appeal Committee therefore set aside the Ground Jury's decision and removed the time penalties with the effect that Bettina Hoy was awarded the gold medal in the individual competition while the German team received the team gold. As a consequence Law and Severson were downgraded to silver and bronze respectively in the individual competition, while in the team competition France and Great Britain were demoted to silver and bronze positions.

6. The French, British and United States National Olympic Committees ("NOCs") and their National Equestrian Federations appealed to the Court of Arbitration for Sport, Ad hoc Division, and argued that:

- The FEI Appeal Committee erred in holding that the appeal before it involved a question of the interpretation of the FEI Rules in that no Rule had been cited in its decision and no interpretation was carried out. Therefore the issue was simply one of fact.
- The Appeal Committee had failed to apply due process by not giving notice to the various bodies and individuals affected by the appeal.
- In any event the CAS has previously ruled that the CAS does not review decisions taken or rulings made on the playing field except in cases where bad faith or malice had been demonstrated or was otherwise involved cf. *Segura v IAAF* (CAS OG 00/013 para 7 and 23); *KOC v ISU* (CAS OG 02/007 para 5); *FFE v FEI* (TAS 2003/A 490 para 29); and *CPC v IPC* (CAS 2000/A/305 para 5).

7. The FEI submitted that the Appeal Committee had correctly held that the issue was one of interpretation rather than fact. It was not in issue that Ms Hoy had crossed the line twice. What was in issue was whether the time measured by the computerised timing device

should be accepted. Such an issue depended on an interpretation of the relevant rules.

8. The NOCG argued as follows:

- The CAS Ad hoc Division lacked jurisdiction to hear the present appeal in that Art 170.2.2 of the FEI General Regulations provided that appeals against the decisions of the Appeal Committee on appeal from the Ground Jury were not appealable.
- Art 203.1.2 of the FEI Rules entitle the Ground Jury to interrupt the 45 second countdown should unforeseen circumstances arise. The existence of unforeseen circumstances was a question of interpretation and not fact.
- There had been no violation of due process at the hearing before the Appeal Committee as the other competitors had no right to be heard and could not have made any contribution to the case.

Held (allowing the appeal)

9. The ruling of the Ground Jury in deciding to impose a time penalty on Ms Hoy was of a purely factual nature within its exclusive jurisdiction. There was therefore no merit in the argument that the case involved an interpretation of rules. If the issue had been one of interpretation, there would have been an express reference in the Appeal Committee's decision to the relevant rule or rules giving rise to the issue. The mere assumption by the Appeal Committee that the case concerned an interpretation of the rules could not have the effect of creating such an issue. It therefore followed that the Ground Jury's ruling was unappealable in the light of Art 163.6.1 and Art 170.2.1 of the FEI Rules and that the Appeal Committee lacked jurisdiction to entertain the appeal brought by Ms. Hoy and NOCG. Accordingly the Appeal Committee's decision was a nullity.

10. On the basis of the finding on jurisdiction, it was not necessary to consider the submission that there had been a failure of due process (although this appeared to be persuasive on its face). Similarly the Court did not have to deal with the merits of the Ground Jury's ruling which was a "field of play" decision within its competence in the course of an event under its exclusive control.

11. Therefore the decision of the FEI Appeal Committee was set aside and the ruling of the FEI Ground Jury was reinstated.

Commentary

12. Apart from being an important precedent specific to the application of the FEI Rules on the question of jurisdiction, this decision highlights the ever increasing importance of the legal application of sporting rules and

Sport and the Law Journal Reports

the significant role it plays in deciding the outcome of sporting competitions after the event. With the increase in sporting competition and the need to regulate events to uphold the integrity of the result, a courtroom can be just as important as the field of play in deciding the outcome even in a competition such as the Olympics whose ideals are stated to be rooted in the latter.

(2004) SLJR 11

Amateur footballer – Racial Discrimination – Section 12 of Race Relations Act 1976

SHAW v SHROPSHIRE COUNTY PREMIER FOOTBALL LEAGUE

[2004] All ER (D) 98 (Sep)

Employment Appeal Tribunal

16 September 2004 (Reporter: MO)

Facts

1. The Appellant was an amateur footballer and played in a team which was part of the First Respondent's football league. The First Respondent was responsible for the discipline and governance of its teams. The Second Respondent was the county football association that set rules and standards for the league. It acted under the authority of the Football Association which in turn was linked to FIFA. This meant that a player banned from playing locally would be banned nationally and internationally.
2. None of the players in the league were semi professional or professional players, but the league was a "feeder league" for the larger West Midlands league which included some semi-professional players.
3. On 23 February 2002 the Appellant was reported by a referee of a match involving his team as a result of his conduct as a spectator. He was reported to the Second Respondent for breach of their Rules of Conduct and after a disciplinary hearing was suspended from competitive football for a total of 35 days. The suspension was due to end on 5 April.
4. The First Respondent then resolved to suspend the registration of the Appellant from 5 April to the end of the season in May 2002. This prevented the Appellant from playing in the First Respondent's league. Upon attempting to re-register for the new season, the Appellant was summoned before the First Respondent for a hearing relating to his previous misconduct.
5. The Appellant brought a claim for discrimination under section 12 of the Race Relations Act 1976 before

the Employment Tribunal complaining of the suspension imposed by the First Respondent from 5 April to the end of the season and its refusal to renew his registration for the next season.

6. Section 12(1) provides that:

It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a person:

- (a) in the terms on which it is prepared to confer on him that authorisation or qualification; or
- (b) by refusing, or deliberately omitting to grant, his application for it; or
- (c) by withdrawing it from him or varying the terms on which he holds it.

7. Section 78 defines "profession" as "including any vocation or occupation"

8. The Tribunal concluded that section 12 did not apply and the Appellant appealed to the Employment Appeal Tribunal.

Held (dismissing the appeal)

9. There was no jurisdiction for the Appellant to bring a claim under section 12. The circumstances of the case did not appear to relate to the employment field, even in the wide sense.
 10. Neither of the Respondents was a body that granted some qualification or authorisation to a person who has satisfied appropriate standards of competence to practice a profession, calling or trade. An amateur footballer does not carry out a profession, calling or trade: *Triesman v Ali* [2002] IRLR 489
 11. The Respondents had limited powers of organisation and discipline which could not affect the Appellant's overall status as a footballer.
- Commentary**
12. The Appellant argued that playing competitive amateur football could lead to semi-professional or professional status and was therefore was a profession or trade which fell within section 12. The Appellant argued that registration with the league and with the National Football Association, through the Second Respondent, was a gateway to the profession because it was necessary to take these steps in order to play competitive football in a league in Shropshire. It was argued that the Respondents were "authorities or bodies" under section 12 because they had powers of registration which is a form of authorisation or qualification.

13. The Appellant relied on *British Judo Association v Petty* [1981] IRLR 484 which concerned a female judo instructor who had obtained a certificate from the Association as a qualified and paid referee. The Association instituted a policy of not allowing women to referee men's competitions. She complained that the Association amounted to discrimination in relation to a qualification which allowed her to work as a paid instructor.

14. The EAT, Brown-Wilkinson J presiding, dismissed the appeal against her successful claim. It held that section 13 of the Sex Discrimination Act 1975 covered all cases where the qualification in fact facilitated employment, whether or not it was intended by the authority or body conferring the qualification.

15. The Respondents argued that neither Respondent was a body covered by section 12 since they did not have the ability to confer a qualification or status which would enable the Appellant to call himself a practising footballer. It was argued that an amateur footballer cannot be said to be part of a profession or vocation, despite playing in a competitive league.

16. The Respondents successfully relied upon *Triesman v Ali* [2002] IRLR in which the National Executive of the Labour Party suspended two of its members from office within, or representation of, the Party. As a consequence neither could be nominated as a candidate and brought a claim under section 12 alleging they had been treated less favourably on the grounds of race.

17. The Court of Appeal in *Triesman* held that the Party's selection of a candidate for local government elections or nomination to the pool of prospective parliamentary candidates was not covered by section 12. The Court of Appeal found that the Labour Party was not the type of qualifying body to which the section was intended to apply. Its activities were carried out for its own political purposes and there was no conferring of status in any meaningful sense. To apply section 12 would be artificial because:

- a) section 12 was not intended to cover a circumstance that does not relate to employment; and
- b) the obvious application of section 12 is to bodies granting qualifications to "a person who has satisfied appropriate standards of competence, to practice a profession, calling or trade" such as in the medical field.

18. Interestingly, the Court of Appeal said that being a Labour Party Councillor was not to be engaged in a profession and whilst being entitled to allowances some of the time, it is not an activity from which the councillor will earn his living or receive a salary. In effect, however,

the Court of Appeal found that section 12 was "not intended" to cover this type of situation and it is this approach that the EAT employed in the present case.

19. This case can be compared to decisions in which courts have had to construe whether the "restraint of trade" doctrine applies to sportsmen who do not necessarily rely on sport for a living. In *Gasser v Stinson* (15 June 1988, QBD), for example, Scott J focused on the structure of an individual's rights and obligations and the prospect of earning income through sponsorship linked to an athlete's participation in competition. In *Avellino v All Australia Netball Association Ltd* [2004] SASC 56 the South Australian Supreme Court held that whilst a netballer's activities did not provide her with her main source of income, they were sufficiently significant for her to be regarded as a professional player. It seems that the capacity to earn money from sport is too arbitrary an indicator as to whether a sportsperson can be found to be carrying on a profession or trade and therefore entitled to have his/her activities protected by the Courts.

(2004) SLJR 12

Jockey Club – disciplinary committee – review – basis of jurisdiction – contractual and non-contractual claims – supervisory jurisdiction of the Court

BRADLEY v JOCKEY CLUB

High Court (Queen's Bench Division), Richards J [2004] EWHC 2164 1 October 2004 (Reporter:TP)

Facts

1. The claimant ("B") had been a jockey until 1999 and since retiring he had carried on business as a bloodstock agent.

2. During 2001, B gave evidence in support of the defence case in the trial of a number of persons accused of importation or supply of cocaine. Part of the defence case was that the defendants' involvement together related not to drugs but to the provision of information about racehorses for the purposes of a gambling organization. B gave evidence at the Crown Court to the effect that he had supplied confidential information to various persons in return for financial reward.

3. B was notified by the Jockey Club that a formal inquiry would be held into a number of matters arising from his evidence given in the Crown Court. In 2002 he was charged with breaches of the Rules of Racing ("the Rules"), and a disciplinary inquiry was held, the committee comprising 3 members of the Jockey Club

Sport and the Law Journal Reports

and a legal assessor. The charge was that B had provided information regularly for reward between 1984 and 1999, and was based primarily on the transcript from the Crown Court. B was represented by Counsel and solicitors. He was found guilty by the disciplinary committee of providing privileged information for material reward, and other offences under the Rules, and the disciplinary committee imposed an 8 year disqualification.

4. B appealed to an appeal board constituted under the Rules of Racing, which comprised a retired High Court Judge and 2 members of the club. The appeal on liability was dismissed; the appeal against sentence was allowed in part, and the sentence was reduced to a 5 year disqualification.

5. By these proceedings, B challenged the imposition of the penalty as disproportionate and unlawful. It was common ground that the court had jurisdiction to review the decision made on the appeal, irrespective of whether the parties were in a contractual relationship, but the parties were not agreed as to the correct approach on either the contractual or non-contractual basis or on the precise nature of the court's function in such case.

Held (dismissing the application)

(i) Non-contractual jurisdiction

6. It was held that, in accordance with the principles stated in *Nagle v Felden* [1966] 2 QB 633 and *Modahl v British Athletics Federation* [2002] 1 WLR 1192, in a non-contractual context the courts exercise a supervisory power and can grant declarations and injunctions should the regulatory body in question act unlawfully. Following *Stevenage Football Club v Football League* 9 Admin LR 109 and *Newport Association Football Club v Football Association of Wales* [1995] 2 All ER 87, the court held that this supervisory jurisdiction exists despite the doubts expressed by Hoffmann LJ in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 All ER 853 to the effect that there was an "improvisatory air about this solution". The court held that the jurisdiction exists both in relation to "expulsion" cases, as in *Nagle v Felden*, and "forfeiture" cases, although in the latter case it was likely that a contract would also exist between the parties.

7. The learned Judge held that, as for the precise nature of this supervisory jurisdiction, the most important point to make was that it was supervisory. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function very similar to that of the Court on judicial review. Indeed, it would

be surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so on.

8. The learned Judge drew on a long line of authority, culminating in the contractual case of *Wilander v Tobin* [1997] 2 Lloyd's Rep. 293, in which Lord Woolf MR held that the Court could intervene if the appeals committee of the ITF failed to act fairly, for example, by failing to take into account material considerations or took into account irrelevant considerations or misdirected itself in law or if there was no evidential basis for the decision.

9. He also considered the decision of the Court of Appeal at the interlocutory stage in *Modahl*, in which Lord Woolf MR started that he could see no reason why there should be any difference as to what constitutes unfairness between public and private law bodies or principles, or why the standard of fairness required by an implied term should differ from that required of the same tribunal under public law.

10. The learned judge held that, although these authorities concerned the issue of fairness of the decision, rather than the proportionality of a sentence, they underlined the importance of recognizing that the Court's role is supervisory rather than that of the primary decision-maker. The Court's role is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be. The court paid particular regard to the fact that the appeals board included members who are knowledgeable about the racing industry and therefore better placed than the court to decide on the importance of the rules in question and the precise weight to be attached to breaches of those rules.

(ii) the contractual jurisdiction

11. The court considered the circumstances and held that there was a contract between the parties which arose out of an exchange of correspondence. B's counsel submitted that the Jockey Club impliedly undertook that any penalty they imposed would be proportionate and that it was open to the court to

determine the issue of proportionality, and if it decided that the penalty imposed was not proportionate it could impose a lesser penalty in accordance with its views.

12. The court rejected B's submissions in this regard. The Judge considered the Wilander and Modahl (nos 1 and 2) decisions again, this time in a contractual context, in support of the proposition that the role of the court is supervisory, even in a contractual situation. Although the decision of the Court of Appeal in Modahl (no 2) concerned a substantive decision rather than a challenge to the penalty, the Judge nevertheless considered it 'very relevant' on the issue of what terms should be implied by the court. Finally, the court considered the decision in Colgan v Kennel Club, unreported, 26 October 2001, and rejected the submission that Colgan was authority for the proposition that the court could step into the shoes of the appeal board and determine the appropriate penalty.

13. The learned Judge held that the contractual and non-contractual claims called for the adoption of the same approach towards the issue of penalty. In each case the court's role is supervisory and the question for the court is whether the appeal board reached a lawful decision, in particular whether the appeal board's decision fell within the limits of its discretionary area of judgment.

(iii) proportionality

14. The court considered the evidence and the findings of the appeal board and held that the approach adopted by the appeal board was impeccable and that none of its findings went beyond what was reasonably open to it on the evidence. The appeal board was entitled to reach the decision it had reached and the Claim was dismissed.

Commentary

15. The decisions of the Court of Appeal in the Wilander and Modahl (Nos 1 and 2) cases indicate that the basis of the court's supervisory jurisdiction is the same as the approach of the Court when dealing with a judicial review of the decision of a public body – the underlying concept is whether the affected person received a fair hearing, whether there was procedural unfairness in any material respect and whether the decision was perverse. It is to be noted that the court will allow a considerable margin of latitude or tolerance to the decision-making body, which is better placed than the court to make a decision on whether or not there has been a breach of its Rules.

16. This case extends that approach to the question whether the penalty imposed by the sports disciplinary body was proportionate, and as such it is a significant decision. It clarifies somewhat the possible ambiguity in approach which might appear from the decision in Colgan v

Kennel Club, and rejects the notion that the court is entitled to put itself in the position of the tribunal in the event that it takes the view that the tribunal was wrong in its decision as to sentence. Thus, in any given case the decision on sentence may well be wrong, but the court may only interfere with that decision if the tribunal stepped outside the limits of its discretionary area of judgment. In practice, this is likely to prove a difficult hurdle to overcome.

(2004) SLJR 13

Competition Appeal Tribunal – Judgment on liability – price fixing of replica football shirts – Appeal from decision of the OFT – Section 2 of the Competition Act 1998

JJB SPORTS PLC v OFFICE OF FAIR TRADING; ALLSPORTS LIMITED v OFFICE OF FAIR TRADING

Competition Appeal Tribunal, Sir Christopher Bellamy (President), Mr Barry Colgate, Mr Richard Prosser OBE [2004] CAT 17
 1 October 2004 (Reporter: TP)

Facts

1. In decision number CA 98/06/2003 dated 1 August 2003 ("the decision"), the OFT found that a number of undertakings had engaged in price fixing of replica football kits during 2000 and 2001, contrary to the Chapter 1 prohibition imposed by Section 2 of the Competition Act 1998 ("the Act").

2. Section 2 provides what is known as "the Chapter 1 prohibition" in the following terms:

"2(1) subject to Section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the UK, and (b) have as their object or effect the prevention, restriction or distortion of competition within the UK, are prohibited unless they are exempt

2(2) subsection (1) applies, in particular, to agreements, decisions or practices which (a) directly or indirectly fix purchase or selling prices or any other trading conditions, (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no

Sport and the Law Journal Reports

connection with the subject matter of such contracts.”

3. In the decision, the OFT imposed substantial penalties (in some cases amounting to several millions of pounds) on the relevant undertakings, pursuant to Section 36 of the Act. The respondents which were subject to these penalties included Umbro Holdings Limited (“Umbro”), Manchester United PLC (“MU”), the Football Association (“the FA”) and a number of companies specializing in the business of high street sports retail shops including the appellants, JJB Sports PLC (“JJB”) and Allsports Limited (“Allsports”).

4. Umbro and MU appealed against sentence but not liability, and the judgment under consideration does not deal with the issues of the appeals against sentence.

5. The infringements held by the OFT to have been established were alleged agreements or concerted practices between a number of undertakings relating to the fixing of retail selling prices of England and MU replica shirts. The essence of these appeals was that JJB and Allsports denied the existence of the agreements or concerted practices alleged against them.

6. In the course of a lengthy Judgment (which runs to 300 pages or so), the tribunal considered a number of significant legal issues, notably (i) what was the appropriate standard of proof in respect of alleged infringements under the Act, and (ii) the law on agreements and concerted practices under Section 2 of the Act.

Held (dismissing the appeal of Allsports and allowing the appeal of JJB in part)

7. That, in accordance with Section 60 of the Act, the meaning of the phrase “agreements or concerted practices” is to be determined in a manner consistent with decisions of the European Court of Justice, the Court of First Instance or the Commission of the European Communities under Article 81(1) of the EC Treaty, the wording of which is followed in Section 2(1) of the Act.

8. The Tribunal considered the following leading cases in support of an analysis of the European case law which emphasized the broad range of circumstances which are capable of leading to a conclusion that there has been an agreement or a concerted practice: *ICI v Commission* [1972] ECR 619; *Suiker Unie v Commission* [1975] ECR 1663; *Commission v Anic Partecipazioni* [1999] ECR I-4125; *Bayer v Commission* [2000] ECR II-3383; *Cimenteries v Commission* [2000] ECR II-491, and *Tate & Lyle v Commission* [2001] ECR II-2035. By way of example, in the *Cimenteries* case,

the Court of First Instance stated that, although the concept of a concerted practice implies the existence of reciprocal contacts, that condition is met where one competitor discloses its future intentions or conduct on the market to another where the latter requests it or, at the very least, accepts it.

9. The Tribunal held that an “agreement” under Section 2 of the Act could be made out by an expression of the parties’ joint intention to conduct themselves on the market in a particular way, and that the concept centres around the existence of a concurrence of wills. It could also be manifested by one party’s tacit acceptance of another party’s wish to achieve an anti-competitive goal. It can be constituted by an understanding, even if there is nothing to prevent that party from disregarding or going back on that understanding.

10. As for a concerted practice, this is collusion which falls short of an agreement which knowingly substitutes practical cooperation between the parties for the risk of competition. “Each economic operator must determine independently the policy which he intends to adopt on the market including the choice of the persons and undertakings to which he makes or offers or sells”, which “strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to a competitor a course of conduct which they themselves have decided to adopt or contemplate adopting on the market”. “In particular, a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market.” “The fact that only one participant reveals his future intentions or other competitive information does not exclude the possibility of a concerted practice, since the recipient of the information in question cannot normally fail to take that information into account when formulating its policy on the market.”

11. The Tribunal considered in detail what standard of proof was applicable to alleged infringements of the Chapter I prohibition (the burden of proof being on the OFT to prove the infringements in question). The Tribunal considered the decision in *Napp v Director General of Fair Trading* [2002] CAT 1, in which the Tribunal had held that (i) the Director-General’s concession that the proceedings were ‘criminal’ for the purposes of Article 6 of the European Convention on Human Rights had been made properly, particularly since the penalties under the Act are intended to be severe and to have a deterrent effect, (ii) the fact that Article 6 applied did not of itself lead to the conclusion that the

proceedings must be subject to the procedures and rules that apply to the investigation and trial of offences classified as offences under UK domestic criminal law, (iii) the standard of proof to be applied under the Act was to be decided in accordance with the normal rules of the UK domestic legal system, (iv) the structure and wording of the Act indicated that Chapter I and II prohibitions should be proved to the civil standard of proof, (v) applying the well-known Speech of Lord Nicholls in *Re H*, there was no 'intermediate' standard in English law between civil and criminal standards of proof, and (vi) since cases under the Act involving penalties were serious matters, it followed that strong and convincing evidence would be required before infringements are made out, even to the civil standard.

12. The Court considered more recent cases on the standard of proof such as *B v Chief Constable of Avon & Somerset* [2001] 1 WLR 640, *R v Crown Court of Manchester* [2003] AC 787, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, *Gough v Chief Constable of Derbyshire Constabulary* [2002] QB 1213, *Re E T* [2003] 2 FLR 1203 and *Re T* [2004] EWCA Civ 558 and held that the balance of probabilities standard should apply to all issues arising under the Chapter I prohibition, whether the issue is one of 'primary' fact or not. According to the Tribunal, Nothing in the post-Napp cases should lead to a modification of the basic approach set out in that case.

13. The Tribunal held that (i) JJB and Allsports were both liable for infringing Section 2 of the Act in relation to the sale of England replica shirts and in relation to the sale of MU replica shirts; (ii) applying the standard of proof and taking into account the presumption of innocence in favour of JJB as a starting point, the evidence was not sufficiently convincing to establish that JJB was a party to a relevant agreement or concerted practice to fix the price of the new England replica shirt launched in April 2001, (iii) JJF was party to a concerted practice having as its object or effect the maintenance of the retail price of the MU Centenary shirt at launch in July 2001, (iv) the evidence did not make out the charge against JJB in relation to a further alleged agreement in relation to England replica shirts after March 2000.

Commentary

14. This case is significant in examining and highlighting the numerous ways in which an agreement or concerted practice can be said to arise under the Competition Act 1998. Active, as opposed to passive, involvement in the concerted practice is not necessarily required. The Tribunal will require convincing evidence of infringement, given the serious nature of the

allegations and the very substantial penalties at stake, but the criminal standard of proof is not required in order for the OFT to make out an infringement. As stated above, the Tribunal examined all the recent authorities on the issue of the relevant standard of proof and conducted a useful analysis of these authorities not limited to competition-related cases

(2004) SLJR 14

Competition – freedom to provide services – anti-doping legislation adopted by the IOC – purely sporting legislation

MECA-MEDINA & ANOTHER v COMMISSION OF THE EUROPEAN COMMUNITIES (SUPPORTED BY THE REPUBLIC OF FINLAND)

Court of First Instance of the European Communities, H. Legal, President, V. Tiili and M Vilaras, Judges, 30 September 2004 (Reporter: TP)

Facts

1. The applicants were international long-distance swimmers, who were subject to the Rules of FINA, the International Swimming Federation. The applicants tested positive for the prohibited anabolic substances, nandrolone. The FINA anti doping rules contain a strict liability doping offence which is punishable with a 4 year ban for a first offence, and the applicants were duly banned for a period of 4 years following a hearing of a FINA doping panel.

2. In order to account for the possibility of endogenous (therefore innocent) production of nandrolone, the concentration required in order to make out a doping offence was defined at 2 nanogrammes (ng) per milliliter (ml) of urine). The levels found in these athletes bodies were 9.7ng/ml and 3.7ng/ml respectively. After the athletes were suspended, scientific experiments showed that nandrolone's metabolites can be produced endogenously by the human body, as a result of consumption of certain foods such as boar meat, at a level which can exceed the accepted limit.

3. In view of this development, the applicants and FINA consented to refer the case anew to the CAS for reconsideration. By an award dated 23 May 2001, the CAS reduced the penalty to 2 years' suspension. Decisions of the CAS may be appealed to the Swiss Federal Court, but the applicants did not appeal the decision of the CAS.

4. The applicants filed a complaint with the Commission, alleging a breach of Articles 81(1) and 81(2) of the EC Treaty. They challenged the compatibility of IOC and FINA regulations and practices with the Community rules on competition and the free movement of services. They alleged that fixing the limit at 2ng/ml was a concerted practice between the IOC and its accredited laboratories. They also argued that the strict liability mechanism in the anti-doping rules and the lack of independence of the tribunals strengthened the anti-competitive nature of that limit. They argued that the application of the rules leads to the infringement of the athletes' economic freedoms, guaranteed by Article 49 EC and infringed Articles 81 and 82 EC.

5. The Commission rejected the applicants' complaint. Accordingly, the applicants brought this action before the Court of First Instance. They raised three arguments:

- (a) that the Commission erred in finding that the IOC was not an undertaking within the meaning of Community law;
- (b) the Commission erred in finding that the limitation of the athletes' liberty resulting from the anti-doping legislation is not a restriction of competition within the meaning of Article 81 EC;
- (c) the Commission erred in finding that there was no infringement of Article 49 EC.

6. The Commission submitted that the action was manifestly unfounded as it sought to challenge, for reasons based artificially on the law of competition, a sporting penalty and scientific criteria established for the campaign against doping. It also stated that it had found that the IOC could be treated as an undertaking for the purposes of competition law, and sought to justify its decisions under Articles 49, 81 and 82 EC. The Republic of Finland contended that sporting activities, which included anti-doping rules, fall outside the scope of Community competition law.

Held (dismissing the application)

7. The Court held that the central question raised by the application was whether anti-doping legislation could be challenged under Article 49 EC on the freedom to provide services and what consequences were to be drawn regarding Community competition law.

8. According to the Court's settled case-law (in particular the cases of *Walrave* [1995] ECR 1405, *Dona* [1976] ECR 1333, *Bosman* [1995] ECR I-4921, *Deliege* [2000] ECR I-2549 and *Lehtonen* [2000] ECR I-2681), having regard to the objectives of the Community, sport is subject to Community law only in so far as it

constitutes an economic activity within the meaning of Article 2 EC. Where a sporting activity takes the form of paid employment or a provision of a remunerated service, it falls within the scope of Articles 39 EC and 49 EC. The prohibitions of the Treaty apply to the rules of sport which concern the economic aspect which sporting activity can present, for example, the rules providing for the transfer of players between clubs or those which limit the number of nationals of other Member States which can appear for clubs in matches.

9. On the other hand, the Treaty does not apply to purely sporting rules which have nothing to do with economic activity, for example, rules on the composition of national teams, rules which regulate the selection of competitors by national federations and 'the rules of the game' in the strict sense.

10. The Court observed that although in the previous cases it had not had to rule on whether the sporting rules in question were subject to Treaty provisions on competition, the principles in those cases as regards the application of Community provisions on the freedom of movement of persons and services are equally as valid as regards Treaty provisions relating to competition. The fact that the sporting legislation has nothing to do with economic activity with the result that Articles 39 and 49 EC do not apply, means also that it has nothing to do with the economic relationships of competition, which means that it does not fall within the scope of Articles 81 and 82 EC.

11. In the Court's view, the campaign against doping does not pursue any economic objectives. It is intended to preserve the spirit of fair play and safeguard the health of athletes. In this way, the prohibition of doping, as a particular expression of the requirement of fair play, forms part of the cardinal rule of sport. Further, since sport is essentially a gratuitous act, even when played professionally, the prohibition on doping and the anti doping legislation concern exclusively a non-economic aspect of sport.

12. Accordingly, the Court held that since the prohibition on doping is based purely on sporting considerations and has nothing to do with economic considerations, anti-doping rules cannot come within the scope of the Treaty provisions on economic freedoms, and in particular, Articles 49 EC, 81 EC or 82 EC. The Court held that this approach must apply to the anti-doping rules in issue.

13. The Court noted that the mere fact that the application of the anti-doping legislation would have economic

repercussions on the applicants was not sufficient to mean that it concerned an economic activity for the purposes of the Treaty. It is precisely because sporting rules have economic repercussions for professional sportsmen that the dispute arises on occasions whether the rule is sporting in nature or whether it covers the economic aspect of sporting activity.

14. The Rules do not have a discriminatory purpose. Therefore, even if the rules were excessive, they would not cease to be sporting rules and become rules whose lawfulness depends on an assessment according to economic criteria under competition law.

15. The Court rejected the suggestion that the fixing of an ng/ml limit for nandrolone which was too low served the economic interests of the IOC, on the basis that the argument was not sustainable or convincing.

16. The Court rejected the 3 pleas for annulment of the decision of the Commission. It also noted that the applicants had not exhausted their avenues of appeal under Swiss law.

Commentary

17. This decision of the Court of First Instance is the first decision of a European Court to the effect that anti-doping rules and regulations made by the IOC and adopted by international federations are not subject to scrutiny under Articles 49, 81 and 82 EC as they concern purely sporting, as opposed to economic, activities. The decision does not represent a surprising development, but it is a welcome clarification of the law.

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British Association for Sport and Law: Report and financial statements

For the year ended 31 December 2003

Pridie Brewster Chartered Accountants

Allied House, 29-39 London Road
Twickenham, Middlesex
TW1 3SZ

British Association for Sport and Law: Officers and professional advisers

Officers

M. Watkins	President
M. Rosen QC	Chairman
M. Goldberg	Vice Chairman
G. Boon FCA	Hon. Treasurer
K. Vleck	Hon. Secretary

Committee Members

D. Bailey	P. McInerney
W. Cairns	S. Rush
E. Grayson	K. Singh QC
P. Harris	J. Taylor
T. Kerr QC	R. Verow

Mr. R. Farrell resigned from the position of the Association's Secretary on 9 June 2004.

Registered Office

C/o Pridie Brewster
Allied House
29-39 London Road
Twickenham
Middlesex, TW1 1SL

Bankers

The Royal Bank of Scotland
City of Manchester Group
PO Box 320
St. Ann Street
Manchester
M60 2SS

Auditors

Pridie Brewster
Allied House
29-39 London Road
Twickenham
Middlesex
TW1 3SZ

British Association for Sport and Law: Independent auditors' report to the members of British Association for Sport and Law

We have audited the accounts for the year ended 31 December 2003 on pages 3 to 7 which have been prepared under the historical cost convention and the accounting policies set out below.

This report is made solely to the members as a body. Our audit work has been undertaken so that we might state to the members those matters we are required to state to them in an auditor's report and for no other purpose. To the fullest extent permitted by law, we do not accept or assume responsibility to anyone other than the Association's members as a body, for our audit work, for this report, or for the opinions we have formed.

Respective responsibilities of Committee and Auditors

The Committee is responsible for preparing the Annual Report and the financial statements in accordance with applicable law and United Kingdom Accounting Standards. In preparing them the Committee are required to select suitable accounting policies and then apply them consistently, make judgements and estimates that are reasonable and prudent, and to prepare the financial statements on a going concern basis unless it is inappropriate to presume that the Association will continue. The Committee are responsible for taking reasonable steps for the prevention and detection of fraud and other irregularities.

Our responsibility is to audit the financial statements in accordance with relevant legal and regulatory requirements and United Kingdom Auditing Standards.

We report to you our opinion as to whether the financial statements give a true and fair view and are properly prepared.

Basis of opinion

We conducted our audit in accordance with Auditing Standards issued by the auditing Practices Board. An audit includes examination, on a test basis, of evidence relevant to the amounts and disclosures in the financial statements. It also includes an assessment of the significant estimates and judgements made by the Committee in the preparation of the financial statements, and of whether the accounting policies are appropriate to the Association's circumstances, consistently applied and adequately disclosed.

We planned and performed our audit so as to obtain all the information and explanations which we considered necessary in order to provide us with sufficient evidence to give reasonable assurance that the financial statements are free from material misstatement, whether caused by fraud or other irregularity or error. In forming our opinion we also evaluated the overall adequacy of the presentation of information in the financial statements.

Opinion

In our opinion, the financial statements give a true and fair view of the state of affairs of the British Association for Sport and Law as at 31 December 2003 and of its deficit for the period then ended and have been properly prepared in accordance with the Constitution of the Association.

Registered Auditors

Pridie Brewster Chartered Accountants, Allied House, 29-39 London Road
Twickenham, Middlesex, TW1 3SZ

18 October 2004

British Association for Sport and Law:
Income and expenditure account for the year ended 31 December 2003

Income	12 months to 31 December 2003	18 months to 31 December 2002
Members Subscriptions	26,659	46,882
Journal Subscriptions and Sponsorships	2,871	1,368
Annual Conference	8,141	11,274
Annual Dinner	–	1,529
Bank Interest	755	1,566
Miscellaneous Income	837	105
Licence fees	1,634	–
	<u>40,897</u>	<u>62,724</u>
Expenditure		
Journal	15,684	37,479
Journal Editors Honorarium	2,750	3,000
Indemnity Insurance	1,050	1,150
Conference Expenses	8,494	7,350
Annual Dinner	–	6,914
Anniversary Celebration	3,339	–
Secretarial Services, Bookkeeping and Accountancy	6,415	8,987
Legal and Professional costs	2,735	2,500
Sundry Expenditure	140	61
Travelling	688	1,380
	<u>41,295</u>	<u>68,821</u>
Deficit for period before Taxation	<u>(398)</u>	<u>(6,097)</u>
Taxation charge:	(159)	(142)
Deficit for period after Taxation	<u>(557)</u>	<u>(6,239)</u>
Accumulated surplus brought forward	27,709	33,948
Accumulated surplus carried forward	<u>£27,152</u>	<u>£27,709</u>

British Association for Sport and Law: Balance Sheet for the year ended 31 December 2003

	2003	2002
Fixed assets		
Computer Equipment	1	1
Current assets		
Debtors and Prepayments	900	5,307
Cash at Bank	29,042	24,988
	<u>29,942</u>	<u>30,295</u>
Current liabilities		
Sundry Creditors and Accruals	1,615	1,739
Members' Subscriptions in Advance	1,176	848
	<u>2,791</u>	<u>2,587</u>
Net current assets	27,151	27,708
Net assets	<u>£27,152</u>	<u>£27,709</u>
Represented by :		
Accumulated funds		
Accumulated Funds carried forward	<u>£27,152</u>	<u>£27,709</u>

The Accounts were approved and signed on behalf Board on 18 October 2004.

M. Rosen - Chairman

K. Vleck - Secretary

G.W. Boon - Treasurer

British Association for Sport and Law: Notes to the Financial Statements For the year ended 31 December 2003

1. ACCOUNTING POLICIES

The financial statements are prepared by the Committee in accordance with applicable accounting standards. The particular accounting policies adopted are described below and have been applied consistently.

Accounting convention

The financial statements are prepared under the historic cost convention.

Income and Expenditure

Income and expenditure is accounted for on an accruals basis.

Members subscriptions

Members' subscriptions are payable in respect of the calendar year. Members' subscriptions received in prior accounting periods were apportioned over the calendar year with a proportion of income deferred to the following accounting period.

Journal subscriptions

The "Sport and Law Journal" is sent free of charge to each member. Non members can subscribe for the journal through the Association's distributors. Income from journal subscriptions is shown net of the distributors charges.

Sponsorship

The Association is essentially a voluntary organisation dependent upon the unpaid efforts of many individual members.

The Association's administrative and editorial office is situated at the Manchester Metropolitan University. Various office expenses which would otherwise have to be paid by the Association are borne by the University.

No attempt has been made to reflect the value of these services within the income and expenditure account.

Taxation

The Association is liable to corporation tax on any profit arising on the provision of services to non-members and on bank interest received.

Tangible fixed assets

Depreciation is provided on cost in equal annual instalments over the estimated useful lives of the assets. The rates of depreciation are as follows:-

Computer equipment - 33 $\frac{1}{3}$ straight line

British Association for Sport and Law:
Notes to the Financial Statements For the year ended 31 December 2003
(continued)

2. TANGIBLE FIXED ASSETS

	Computer Equipment
	£
Cost	
Brought forward and carried forward	1,249
	<hr/>
Depreciation	
Brought forward and carried forward	1,248
	<hr/>
Net Book Value	
At 31 December 2003 and 31 December 2002	£1
	<hr/>

3. REMUNERATION OF COMMITTEE MEMBERS

None of the committee members, save for the Secretary as set out below, received any remuneration for their services as committee members or any reimbursement of expenses in connection therewith (2002 - £Nil).

The Association's Secretary, Mr. Farrell, received an honorarium of £2,500 for editing the journal and reimbursement of his travel expenses in the sum of £688 (2002 - £1,380).

4. TAXATION

This represents Corporation Tax on interest received.

5. POST BALANCE SHEET EVENTS

On 30 October 2003 British Association for Sport and Law Limited ("the Company") was incorporated, pursuant to a Resolution of members on the 22 October 2003. It was further resolved that the company would acquire and take over the whole of the assets and undertaking of the unincorporated Association with effect from 1 January 2004. Therefore, these Accounts are the final set in respect of the unincorporated Association.

Contributions, Subscription and Membership



**BRITISH
ASSOCIATION
FOR SPORT
AND LAW
LIMITED**

Contributions

Contributions for forthcoming editions of the Journal are invited. Contributions should be supplied on disk (Mac or PC) and saved in an ASCII format. Disks should be accompanied by a hard copy of the article. Contributors are asked to pay particular attention to the accuracy of references, citations, etc.

Articles should be forwarded to:

British Association for Sport and Law Limited
c/o Pridie Brewster,
1st Floor, 29-39 London Road,
Twickenham, Middlesex, TW1 3SZ
Telephone: 020 8892 3100
Facsimile: 020 8892 7604

Subscription

Anyone wishing to subscribe to the journal may do so at a cost of £95.00 per annum.

Further details are available from
Hammicks Bookshops Ltd
Hammicks Subscriptions Service
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3 Station Approach
Middlesex
TW15 2QN

Telephone: +44 (0)870 224 4900
Facsimile: +44 (0)1784 427 959
E-mail: subs@hammicks.co.uk

Membership

Membership is open to anyone with an interest in the legal aspects of sport and shall consist of the following categories:

Corporate Membership	£705.00
Individual Membership	£141.00
Full-time Academic Membership	£58.75
Student Membership	£29.38

All prices represent the current annual subscription rate and include VAT.

Corporate Membership

Corporate Membership shall be available to larger organisations which have a number of individuals who may wish to benefit from membership. Such organisations may nominate up to eight individuals thereby making a considerable saving.

Individual Membership

Individual Membership shall be available to groups or individuals, e.g. firms of solicitors, sports clubs but the organisation shall nominate one person as the Member.

Student Membership

Student Members shall have no power to vote at any Annual General Meeting or any other meeting.

Honorary Membership

Honorary Membership may be conferred at the discretion of the company.

Please make cheques payable to the British Association for Sport and Law Limited.

Application Form



BRITISH
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AND LAW
LIMITED

I/We wish to become a Member(s) of the British Association for Sport and Law Limited

Category of Membership

PLEASE TICK. ALL PRICES INCLUDE VAT.

- | | |
|---|----------------|
| <input type="checkbox"/> Corporate Membership
(Up to eight individuals) | £705.00 |
| <input type="checkbox"/> Individual Membership | £141.00 |
| <input type="checkbox"/> Academic Membership | £58.75 |
| <input type="checkbox"/> Student Membership | £29.38 |

ALL DETAILS BELOW MUST BE COMPLETED

NAME(S)

ORGANISATION

ADDRESS

POSTCODE

TELEPHONE

FACSIMILE

EMAIL

PLEASE MAKE CHEQUES PAYABLE TO THE BRITISH ASSOCIATION FOR SPORT AND LAW LIMITED

Please complete the membership form and return to:

Secretary – British Association for Sport and Law Limited

c/o Pridie Brewster, 1st Floor, 29-39 London Road, Twickenham, Middlesex, TW1 3SZ

Telephone: 020 8892 3100 · Facsimile: 020 8892 7604 · Website: www.basl.org

Postgraduate Certificate in Sports Law

The School of Law at King's College London offers a one-year, part-time postgraduate course in sports law, leading to a College Postgraduate Certificate in Sports Law.

The course is led by programme director Jonathan Taylor, partner and head of the Sports Law Group at Hammonds, who teaches the course along with other leading sports law practitioners including Adam Lewis, Nick Bitel, Alasdair Bell, Justin Walkey and Mel Stein, as well as sports law academics such as Simon Gardiner, Gary Roberts and Richard McLaren.

The course covers the range of key sports law issues:

- constitutional issues: self-regulation by sports governing bodies/the European Model of Sport; judicial control of sports bodies;
- commercial issues: broadcasting, sponsorship, IP rights, ambush marketing;

- issues for individual athletes: doping, discipline, player contracts, endorsement contracts, civil and criminal liability for sports injuries;

- EC law and sport: competition law, freedom of movement; and

- comparative sports law: the North American Model of Sport.

The course is taught in weekly evening classes from October to March and is open to both law graduates and non-law graduates.

For further details, visit the KCL sports law website at www.kclsportslaw.co.uk.

For a full prospectus and application form, contact: Annette Lee, School of Law, King's College London, Strand, London WC2R 2LS
Tel: 020 7848 2849 · Fax: 020 7848 2912
E-mail: sports.law@kcl.ac.uk



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